Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis

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INTRODUCTION

A. THE SENTENCING REFORM ACT, THE SENTENCING GUIDELINES, AND DEPARTURES

The result of nearly two decades of bipartisan efforts to reform federal criminal sentencing, the Sentencing Reform Act of 1984 (SRA) and the United States Sentencing Guidelines (Guidelines), represent the most extensive modification of federal sentencing practices in this century.¹ The sentencing reform movement was driven primarily by the widespread perception that courts give similarly situated offenders vastly disparate sentences.² These sentencing disparities were based,

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* The authors would like to thank Janeen M. Heaney, Attorney-Advisor to Commissioner Michael S. Gelacak, for her assistance in preparing this Article. The authors further acknowledge the assistance of Heather R. Epstein, Karen Kelly, Lori Fee, Rich McNeil, Gerry Kirk, and other Sentencing Commission staff for their work on this project.

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in part, on varied sentencing values and preconceptions among
individual district court judges, and on each judge’s virtually
unlimited discretion to fashion sentences according to her own
sense of what constitutes just and effective sentencing.\textsuperscript{3} To ad-
dress this problem, and related issues of discrimination and
lack of certainty, Congress created the United States Sentenc-
ing Commission (Commission),\textsuperscript{4} a permanent, seven-member
body comprised of judges and experts in the field of criminal
justice, aided by a professional research staff.\textsuperscript{5} Congress in-
structed the Commission to promulgate mandatory sentencing
guidelines, thereby limiting and structuring the discretion of
sentencing judges in order to reduce unwarranted sentencing
disparity.\textsuperscript{6}

The SRA requires judges to impose sentences within
guideline ranges specified by the Commission. The relevant
characteristics of the offender and his or her offense provide
the bases for these ranges. Congress contemplated that the
Commission’s Guidelines would be sufficiently broad and
flexible to provide just and effective individualized sentences in

\textsuperscript{3} See, e.g., Marvin E. Frankel, Lawlessness in Sentencing, 41 U. CIN. L.
REV. 1, 4-9 (1972) (describing the enormous discretion that judges exercise in
sentencing and the resulting predominance of judges’ personal beliefs in sen-
tencing decision making). As Judge Frankel explained:

The factual basis for the worry [about sentencing disparity] is clear
and huge; nobody doubts that essentially similar people in large
numbers receive widely divergent sentences for essentially similar or
different crimes. The causes of the problem are equally clear: judges
vary widely in their explicit views and “principles” affecting sentenc-
ing; they vary, too, in the accidents of birth and biography generating
the guilt, the fears, and the rages that affect almost all of us at
times and in ways we often cannot know. . . . It is disturbing enough
that a charged encounter like the sentencing proceeding, while it is
the gravest of legal matters, should turn so arbitrarily upon the
variegated passions and prejudices of individual judges.

\textit{Id.} at 7-8.

\textsuperscript{4} See S. REP. No. 98-225, at 65 (arguing that the SRA is intended to
“make criminal sentencing fairer and more certain”).

\textsuperscript{5} See 28 U.S.C. §§ 991(a), 995, 996 (1984) (establishing the seven-member
Commission); S. REP. No. 98-225, at 63-65 (outlining the Commission’s com-
position and authority); Nagel, supra note 1, at 883-84 (describing the Com-
mision’s purpose, authority, and composition).

detailed sentencing guidelines and specifying criteria to which the guidelines
should conform); S. REP. No. 98-225, at 51 (explaining that “[t]he purpose of
the sentencing guidelines is to provide a structure for evaluating the fairness
and appropriateness of the sentence for an individual offender”).
most cases.\textsuperscript{7} Congress also recognized, however, that because the range of criminal conduct is vast, individualized sentencing would sometimes require consideration of facts and circumstances that the Commission did not adequately address in the overall Guidelines scheme.\textsuperscript{8} Thus, the SRA provides sentencing judges with discretion to depart from the applicable Guidelines range if aggravating or mitigating circumstances exist which the Commission did not adequately consider, warranting imposition of a sentence outside the Guidelines range.\textsuperscript{9} The SRA further requires that judges state on the record the reasons for departure\textsuperscript{10} and that the appellate court review the departure sentence for reasonableness.\textsuperscript{11}

Congress's decision to remove a significant portion of judges' sentencing discretion and to place much of that discretion in the Commission was, and remains, highly controversial.\textsuperscript{12} Moreover, because the ability to depart from the Guidelines is a major source of the judicial discretion that remains under the Guidelines system,\textsuperscript{13} the departure provisions have

\begin{itemize}
\item \textsuperscript{7} See S. REP. NO. 98-225, at 52-53 (explaining that while the SRA is intended to reduce unwarranted sentencing disparities, the Guidelines should also "enhance the individualization of sentences by imposing on judges a structure for evaluating the fairness of particular sentences in light of individual case characteristics").
\item \textsuperscript{8} See S. REP. NO. 98-225, at 51-52 (explaining that under the Guidelines a judge "has an obligation to consider all the relevant factors in a case" and may impose a sentence outside the Guidelines if she finds "an aggravating or mitigating circumstance present in this case that was not adequately considered in the formulation of the guidelines").
\item \textsuperscript{9} 18 U.S.C. § 3553(b) (1994) (allowing departures from guideline sentences as circumstances warrant, if those circumstances were not adequately considered by the Commission in promulgating the Guidelines).
\item \textsuperscript{10} Id. § 3553(c)(2) (requiring a statement of specific reasons for any sentence imposed outside the Guidelines range).
\item \textsuperscript{11} Id. § 3742 (providing for appeal of sentences above or below the applicable Guidelines range by either the State or the defendant).
\item \textsuperscript{13} See Edward R. Becker, Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime, FED. PROBATION, Dec. 1991, at 10, 10 (noting that "[t]he most widely recognized avenue of flexibility under
been the subject of considerable debate. There is much disa-
greement among judges and commentators about how often and un-
der what circumstances judges should depart from the
Guidelines.14

Despite the acknowledged importance of departures in the
Guidelines scheme, there has been little empirical study of how
sentencing judges actually use the SRA’s departure provisions
or of how departure practices affect the goals of sentencing re-
form.15 Consequently, much of the existing analysis of depar-
ture issues is based on limited samplings of appellate caselaw.16
We believe that the policy debate surrounding departures could be
improved and better informed through a more comprehensive
analysis of departure practices. This belief prompted the re-
search described in this Article.

B. THE PURPOSE OF THIS ARTICLE

The research upon which this Article is based17 explores
how and when federal sentencing judges exercise their statu-
tory authority to depart from the Guidelines. This departure
power has important implications for the implementation of
the guidelines is the sentencing judge’s ability to depart from the prescribed
sentencing range”).

14. See, e.g., Judy Clarke & Gerald McPadden, Departures from the
Guideline Range: Have We Missed the Boat, or Has the Ship Sunk?, 29 AM.
CRIM. L. REV. 919, 921-31 (1992) (arguing that the SRA requires substantial
flexibility and discretion in sentencing); see also infra notes 82-126 and ac-
companying text (recounting competing views about the scope of the SRA’s
departure provisions).

15. This is not to say that there have not been some excellent analyses of
departure issues. See, e.g., Bruce M. Selya and Matthew R. Kipp, An Exami-
nation of Emerging Departure Jurisprudence Under the Federal Sentencing
and emerging issues in appellate departure caselaw). Possibly due to a lack of
available information about departure practices at the district court level,
however, commentators have tended to focus exclusively on appellate depar-
ture jurisprudence. Unfortunately, because most downward departures are
never appealed, analysis of appellate cases fails to tell the complete story. See
infra text accompanying notes 20-21 (discussing the limitations of research
based solely on appellate departure caselaw).

16. See, e.g., Kirk D. Houser, Downward Departures: The Lower Envelope
scribing appellate decisions dealing with downward departures as the
“principal focus” of an analysis of the lower limits of judicial discretion in sen-
tencing).

17. This Article arises from a broader departures research project involv-
ing data from all 12 United States circuit courts of appeals. The Commission
is in the process of analyzing data from the remaining circuits not covered in
this Article and is in the process of compiling a report detailing its findings.
the Guidelines system. If judges depart from the Guidelines too frequently or for inappropriate reasons, they may defeat the SRA's purpose of eliminating unwarranted sentencing disparity. Conversely, the failure to depart in appropriate cases may result in excessive rigidity in sentencing. Thus, proper use of the flexibility contained in the departure authority is crucial to the effective functioning of the Guidelines and the goals of uniformity, certainty, and reduction in sentencing disparity and discrimination.  

Because of the important role departures play in the overall Guidelines scheme, an understanding of departure practices—the types of cases in which sentencing judges depart, the extent of departures, and the reasons for departures—is essential to an evaluation of Guidelines sentencing and to efforts to improve the Guidelines. We designed our research to increase the understanding of the use of the Guidelines departure provisions. This Article analyzes, both qualitatively and quantitatively, the departure patterns of thirty United States district courts, drawn from six circuits, in fiscal years 1991 and 1992.  

Our focus on the departure behavior of district courts is meant to respond to the inherent limitations on research based solely on reviews of appellate caselaw. For several reasons, analyses of appellate departure caselaw alone presents an incomplete and skewed picture of the exercise of judicial discretion through departure. First, United States attorneys' offices do not appeal the vast majority of downward departures because of time and resource constraints. Because appellate courts seldom review departure decisions, analyses of patterns and trends in appellate caselaw alone would present a misleading account of actual departure activity. Second, review of departure practices at the district level permits assessment of the

18. See Nagel, supra note 1, at 938-39 (arguing that the SRA's departure provisions represent a compromise between sentencing uniformity and flexibility, the success of which depends on how the provisions are exercised).  

19. Comparable analyses for a sample of cases from the remaining federal circuits with jurisdiction over criminal cases will be conducted and presented in phase II of this two-part research program. Because we were interested in intercircuit comparisons, and because such comparisons would be cumbersome for 12 circuits at once, we divided the research into two phases.  

20. The time and resource constraint may be attributed to the requirement that the Department of Justice approve all government appeals of departure sentencing. See 18 U.S.C. § 3742(b) (1994) (requiring the Attorney General or Solicitor General to approve the government's appeals).
extent to which the district courts follow appellate caselaw. Because many departures are not appealed, it is possible that the district courts do not consistently follow appellate caselaw. Merely assessing appellate jurisprudence to determine the availability and use of certain kinds of departures may provide a distorted account of the actual role of departures in Guidelines sentencing. This is not to argue that the appellate caselaw should be ignored; rather, it is to assert that adequate assessment of departure practices must include an examination of district court departure decisions.

Through the intensive, qualitative analysis of district court departure activity, we seek to understand the real activity underlying the aggregate statistical data on departures. This Article primarily seeks to evaluate whether the "lore" surrounding variations in different courts' approaches to departures is true and whether there are any discernible patterns in the characteristics of cases thought to warrant departure.

The empirical data summarized here were drawn from a study of thirty districts. The results were analyzed in light of the appellate departure jurisprudence of the six United States circuit courts of appeals from which the thirty districts were selected, as well as the SRA's language and legislative history and the Guidelines' text.

Part I of this Article describes the background and legislative history of the departure provisions of the SRA and the Guidelines. It also notes, in particular, the divergent views of courts and commentators regarding the extent to which departures are an appropriate mechanism for individualizing sentencing, even when cases are not unusual or atypical. Part I seeks to determine, to the extent possible, how congressional proponents of the SRA viewed the role of departures in the Guidelines scheme. Finally, Part I provides a glimpse of the basic structure and application of the Guidelines and explains how the Commission attempted to provide for an important, yet limited, role for judicial departures.

Part II explains the study's methodology and research design. Part III presents a summary of the appellate departure jurisprudence of six of the twelve United States courts of ap-

21. For example, it is commonly believed that courts in some circuits are very open to downward departures but not to upward departures, while other courts take the opposite view. See, e.g., infra Part III (summarizing the study's findings regarding the six circuits' departure jurisprudence characteristics).
peals. This part highlights the relevant similarities and differences in departure caselaw among these six circuits. This serves not only to outline important jurisprudential issues, but also to provide background for our subsequent exploration of whether and how appellate decisions affect departure patterns at the district court level.

Part IV presents an analysis of over 1,400 departure sentences. The thirty district courts, selected from the six United States courts of appeals, imposed these sentences in fiscal years 1991 and 1992. The Article draws its data from the Commission’s extensive case monitoring files. Based on detailed review of the Commission’s files, we coded each for the following characteristics: the stated reason for departure; the extent of departure; the offense type; the race, gender, and socioeconomic status of the offender; and whether the conviction resulted from a guilty plea. We also noted any comments made by the sentencing judge that might tend to reveal the judge’s attitude toward departures, or toward the Guidelines in general. We then analyzed this data to determine if any discernible patterns emerged across districts or circuits, or if important variations existed between districts or circuits. Finally, Part IV analyzes the implications of our findings for the Guidelines’ effective functioning.

I. THE ROLE OF DEPARTURES IN THE GUIDELINES SCHEME

A. THE SENTENCING REFORM ACT

Prior to the SRA’s enactment, broad discretion characterized modern federal sentencing. Judges were free to impose any sentence below the statutory maximum applicable to the offense of conviction.22 Judges based their sentencing decisions on whatever information they deemed relevant.23 Their decisions reflected individual notions of justice and views on the purposes of sentencing.24

22. See, e.g., Gore v. United States, 357 U.S. 386, 393 (1958) (noting that a sentence within statutory limits is generally not subject to review).
23. See, e.g., Williams v. New York, 337 U.S. 241, 251 (1949) (holding that the Constitution does not prohibit a sentencing judge from considering inadmissible at trial).
24. See S. REP. No. 98-225, at 41-46 (1983), reprinted in 1984 U.S.C.C.A.N. 3183, 3224-39 (outlining disparities revealed by studies of various jurisdictions and concluding that these disparities could not be explained by differ-
As early as 1933, studies of the exercise of judicial sentencing discretion began to reveal significant disparities in the length and type of sentences imposed on similarly situated offenders. In the late 1960s and early 1970s, renewed interest in criminology and prison reform spurred a number of empirical studies of sentencing practices which demonstrated widespread, unwarranted sentencing disparity. As Judge Marvin Frankel, one of the key voices in urging sentencing reform, stated:

The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the differences are explainable only by variations among the judges, not by material differences in defendants or their crimes.

Moreover, some studies reached the damning conclusion that variables such as the race, gender, and socioeconomic status of the offender affected sentencing outcomes.


The evidence that unfettered judicial discretion resulted in unwarranted sentencing disparity and discrimination generated a consensus among scholars and other criminal justice experts that the country needed a system of mandatory sentencing guidelines to limit judicial discretion and increase uniformity. The work of these scholars and experts soon prompted a legislative response. In 1975, Senator Edward Kennedy introduced a comprehensive sentencing reform bill, proposing that uniform sentencing goals should guide federal judges and providing for the establishment of a sentencing guidelines system. Legislators introduced a number of similar bills in the 95th, 96th, and 97th Congresses. Finally, in 1983, a bipartisan coalition of twenty-three senators introduced S. 668—the bill which ultimately became the Sentencing Reform Act.

Congress sought to achieve the following directives in adopting the SRA: (1) honesty in sentencing through abolition of parole and adoption of “real time” sentencing; (2) increased uniformity in sentencing by reducing sentencing disparities

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Racial Discrimination in Sentencing, 59 JUDICATURE 121 (1975) (arguing that race serves as a determinative factor in sentencing).


32. The Senate Reports series contains the full text of the Comprehensive Crime Control Act of 1983, the broader reform bill into which Congress incorporated the SRA. See S. REP. NO. 225 (1983). This report constitutes the principal legislative history of the SRA.

33. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at A3 (1995) [hereinafter U.S.S.G. (1995)] (articulating both the underlying rationale and policy of the Guidelines); see also S. REP. NO. 225, at 56-57 (stating the Senate Committee’s belief that real time sentencing would increase public respect for the law, enhance prison rehabilitation efforts, and improve mechanisms for dealing with prison discipline problems); Edward M. Kennedy, Symposium on Sentencing, Part I, 7 HOFSTRA L. REV. 1, 4-5 (1978) (proposing the elimination of indeterminate sentences to increase fairness and certainty as one major goal of sentencing reform legislation).
among defendants with similar criminal records found guilty of similar criminal conduct, and (3) increased proportionality in sentencing by imposing appropriately different sentences for crimes representing different levels of culpability.

Congress's creation of the United States Sentencing Commission was a key element of the SRA. Congress authorized the Commission to promulgate sentencing guidelines and policy statements for use by federal courts when imposing criminal sentences. Although Congress assigned the ultimate responsibility for drafting the Guidelines to the Commission, Congress provided substantial guidance, with specific suggestions regarding both form and content. The SRA suggested that the Guidelines might take the form of a grid that determines sentencing ranges for particular offenses based on the characteristics of the offender and his offense. Congress intended narrow ranges for sentences involving imprisonment. By statute, the maximum of any sentencing range could not exceed the minimum of that range by more than the greater of six months or twenty-five percent.

Congress further required the Commission to examine a number of offense characteristics to determine the extent of

34. The Senate Committee characterized this reduction in disparity among similarly situated defendants as a "primary goal of sentencing reform." S. Rep. No. 225, at 52 (discussing the goals of federal sentencing reform); see U.S.S.G. (1995), supra note 33, ch. 1, pt. A, at A3 (articulating both the underlying rationale and policy of the Guidelines).

35. The Senate Committee Report states that "the use of sentencing guidelines and policy statements is intended to assure that each sentence is fair compared to all other sentences." S. Rep. No. 225, at 51 (discussing the goals of federal sentencing reform); see U.S.S.G. (1995), supra note 33, ch. 1, pt. A, at A3 (articulating both the underlying rationale and policy of the Guidelines).


37. See, e.g., Id. § 994(c)(1)-(7) (detailing seven offense characteristics relevant to the Commission for establishing categories of offenses); Id. § 994(d)(1)-(11) (detailing eleven offender characteristics relevant to the Commission for establishing categories of defendants).

38. Congress provided:

If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such term shall not exceed the minimum of that range by more than the greater of 25% or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

Id. § 994(b)(2).
their relevance to sentencing. The SRA listed a number of offender characteristics for the Commission to consider, but specifically provided that the Guidelines were to be "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."
In addition to these directives to the Commission, the SRA specified in § 3553(a) how sentencing judges were to use the Guidelines in fashioning sentences by setting out the factors a judge must consider. These factors were: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the purposes of sentencing; (3) the range of available sentencing alternatives; (4) the applicable Guidelines sentence; (5) any pertinent policy statements issued by the Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. 42

Section 3553(b) requires the sentencing judge to impose a sentence consistent with the Guidelines. It adds a proviso, however, that the judge may "depart" outside the applicable Guidelines range if there are aggravating or mitigating circumstances present that the Commission did not adequately consider when formulating the Guidelines, and when the presence of such aggravating or mitigating circumstances demands a sentence different from that specified in the Guidelines. 43 When a judge departs from the sentencing Guidelines, the SRA requires the judge to state on the record the reasons for the departure. 44 This statement of reasons provides the groundwork for appellate review of departures. 45

42. 18 U.S.C. § 3553(a) (1994).
43. Section 3553(b) states:
The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) [the guidelines sentencing range issued by the Commission] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

Id. § 3553(b).
44. See Id. § 3553(c)(2) (stating that judges must provide "specific reasons" for a sentence that falls outside of the scheme of the Guidelines).
45. See Id. § 3742(a)-(b) (articulating the requirements for an appeal of a departed sentence by either a defendant or the government). 18 U.S.C. § 3742(a) provides that a defendant may appeal "an otherwise final sentence" if the sentence "was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission . . . and the sentence is greater than the sentence specified in the applicable guideline." Similarly, under 18 U.S.C. § 3742(b), the government may appeal a sentence "imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission . . . and the sentence is less than the sentence specified in the applicable guideline."
B. THE SENTENCING GUIDELINES AND THE ROLE OF DEPARTURES

President Reagan signed the SRA into law on October 12, 1984. After a lengthy period of empirical research on federal sentencing practices, public hearings, drafting, and debate, the Commission promulgated its initial Guidelines, which went into effect on November 1, 1987. Particular provisions of the Guidelines have evolved substantially since the Guidelines' initial promulgation; the Commission has adopted over 500 amendments since 1987.\footnote{46. See U.S. SENTENCING GUIDELINES MANUAL App. C (1994) [hereinafter U.S.S.G. (1994)] (listing the text and effective date of each amendment promulgated since the issuance of the Guidelines in October of 1987). \footnote{47. See U.S.S.G. (1995), supra note 33, § 5A (presenting the November 1995 version of the Sentencing Table). \footnote{48. Id. As an example, a defendant convicted of bank robbery under 18 U.S.C. § 2113(a) has a base offense level of 20 under the applicable robbery guideline. Id. § 2B3.1. The robbery guideline contains a number of specific offense characteristics which affect the offense level. For example, it provides for a two-point enhancement if the robbery involves a financial institution. Id. § 2B3.1(b)(1). If, in the course of the offense, a firearm was brandished, displayed or possessed, the offense level is increased by five points. Id. § 2B3.1(b)(2). If any victim suffered bodily injury, the offense level is increased by two to six points, depending upon the extent of the injury. Id. § 2B3.1(b)(3)(A)-(E). If the loss to the bank is greater than $10,000 but less than $50,000, another point is added. Id. § 2B3.1(b)(6). Chapter Three contains a number of generally applicable adjustments. See, e.g., id. § 3A1.1-1.4 (outlining victim-related adjustments); id. § 3B1.1-1.4 (articulating adjustments related to the defendant's role in the offense); id. § 3C1.1-1.2 (detailing adjustments imposed for the obstruction of justice); id. § 3D1.1-1.5 (outlining adjustments for multiple counts); id. § 3E1.1 (discussing adjustments imposed for defendant's acceptance of responsibility). If our hypothetical bank robbery defendant brandished a firearm, punched a teller in the face causing minor injury, and fled with $40,000, and no Chapter Three adjustments applied, the total offense level would be 30.} The essential structure of the Guidelines has, however, remained constant.

The Guidelines employ a matrix (Sentencing Table), with the applicable sentencing range derived from an intersection of the defendant's "total offense level" and "criminal history category."\footnote{47.} The judge calculates the total offense level, represented by the vertical axis of the Sentencing Table, by determining the defendant's "base offense level," which is derived from the offense of conviction. The judge then makes adjustments to that base offense level in light of various indicators of the real offense conduct and other additional adjustments noted in Chapter Three of the Guidelines Manual.\footnote{48.} The criminal history category, represented by the horizontal axis of the
Sentencing Table, is based on the number and seriousness of the defendant's sentences for prior convictions.\footnote{49}

The intersection of the total offense level and criminal history category on the Sentencing Table matrix determines the applicable Guidelines sentencing range. This point on the Sentencing Table yields a range expressed in months of imprisonment.\footnote{50} Under § 3553(b), the sentencing judge must impose a sentence from within that range unless there are present aggravating or mitigating circumstances, not adequately taken into account by the Commission in formulating the Guidelines, and the presence of such circumstances warrants a sentence outside the Guidelines' range.\footnote{51} The following example demonstrates how the departure provision might work.

Assume a bank robbery defendant\footnote{52} was the girlfriend of a co-conspirator in the bank robbery. Assume further that at sentencing she is able to introduce credible evidence that her boyfriend coerced her into participating in the bank robbery, either through intimidation or threats of violence if she refused. This type of duress, although perhaps insufficient to constitute a complete defense on the merits, arguably could qualify as a mitigating factor for sentencing purposes.\footnote{53} The Guidelines do not contain an adjustment for duress in either Chapter Two or Chapter Three; however, Chapter Five contains a policy statement which suggests that duress or coercion

\footnote{49. Thus, if our hypothetical bank robber had one prior bank robbery conviction which had resulted in a prison sentence of two years, he would receive three criminal history points pursuant to section 4A1.1(a) of the Guidelines, placing him in Criminal History Category II. See id. § 4A1.1(a) (requiring the imposition of three additional points in the criminal history category for each prior sentence of imprisonment).

\footnote{50. In our bank robbery example in footnote 48, the defendant's total offense level of 30 and criminal history category of II results in a Guidelines sentence of 108 to 135 months.

\footnote{51. See 18 U.S.C. § 3553(b) (explaining how judges should apply the Guidelines when imposing a sentence). As we discuss below, there is some dispute about whether a court may depart from the Guidelines range if the requirements of § 3553(b) are not met. See infra notes 88-98 and accompanying text (noting various interpretations of interaction between § 3553(a) and § 3553(b)). Appellate courts, however, overwhelmingly have concluded that a departure must be premised on § 3553(b). See infra notes 88-89 and accompanying text (noting that 18 U.S.C. § 3553(b) requires the satisfaction of various elements for proper departure from the Guidelines).

\footnote{52. Refer to example supra notes 48-50.

\footnote{53. See United States v. Johnson, 956 F.2d 894, 897-98 (9th Cir. 1992) (permitting departure for duress where defendant failed to make a showing equivalent to that required for a complete defense).}
qualifies as a permissible basis for departure.\textsuperscript{54} Thus, duress constitutes a mitigating factor, not adequately taken into account in calculating the Guidelines sentencing range, which may warrant a sentence below the 108-month minimum Guidelines sentence. In this example, § 3553(b) authorizes the court to depart from the sentencing Guidelines.\textsuperscript{55}

The Commission's statements dealing with departures demonstrate that it recognizes both the need for departures and their potential for reintroducing disparity and discrimination if abused. On one hand, the Commission reasoned that no set of Guidelines could adequately account for all of the factors relevant to sentencing in every case.\textsuperscript{56} To avoid excessive uni-

\textsuperscript{54} See U.S.S.G. (1995), supra note 33, § 5K2.12 (recognizing duress as a grounds for departure from the Guidelines, but only such duress involving threat of physical injury, substantial damage to property, or similar injury resulting from the unlawful action of a third party or natural emergency).

\textsuperscript{55} It must be emphasized that a court is not required to depart, and a discretionary decision not to depart is not subject to appellate review. See United States v. Ocasio, 914 F.2d 330, 333 (1st Cir. 1990) (citing United States v. Ruiz, 905 F.2d 499 (1st Cir. 1990)), for the proposition that "absent extraordinary circumstances, a criminal defendant cannot ground appeal on the district court's discretionary decision not to undertake a downward departure from the sentencing range indicated by the guidelines"). Moreover, the extent of the departure is largely within the sentencing judge's discretion, and is reviewed only for "reasonableness." \textit{Id.}

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

18 U.S.C. § 3742. This standard is quite deferential. See United States v. Diaz-Villafane, 874 F.2d 43, 49-50 (1st Cir. 1989), \textit{cert. denied}, 110 S. Ct. 177 (1990) (noting that "appellate review must occur with full awareness of, and respect for, the trier's superior 'feel' for the case" and that "[courts] will not lightly disturb decisions to depart, or not, or related decisions implicating degrees of departure"). In our example, a court might plausibly depart to a sentence of 80 months, 24 months, or even probation. Appellate courts seem averse to reversing departures, especially downward departures, on the ground that the extent of departure was unreasonable. \textit{See infra} Part III (analyzing appellate departure jurisprudence).

\textsuperscript{56} See U.S.S.G. (1995), supra note 33, ch. 1, pt. A, at 1 (acknowledging that "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision"). Thus, the Commission designed the Guidelines to be modified over time, and the Commission contemplated that information gathered through departure analyses would be important in furthering the evolution of the Guidelines. As the Commission explained in its initial manual:

The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyze-
formity, a Guidelines system, where warranted by truly unusual fact situations, must leave the court some leeway to impose a sentence outside the Guidelines range. On the other hand, the availability of departures undermines, to some extent, the uniformity sought by adopting binding Guidelines. Judges are not required to depart when faced with apparently atypical fact situations, and different judges may respond in varying fashions to a request for departure. Moreover, since departures are by definition discretionary, the extent of departure may vary dramatically, depending on the judge. In short, departures permit individual judges to exercise discretion; if exercised appropriately, departures ensure proportionality, and they provide needed flexibility and balance to a mandatory Guidelines system. If, however, judges use departures to impose sentences according to their own ideals, the disparity which prompted Congress to enact the SRA will be reintroduced.

The Commission's challenge was to enact a set of provisions that would allow judges to exercise a limited amount of discretion within the framework of the Guidelines. The Commission characterized its view of the proper role of departures in the following manner:

The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

The Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Id. at 6.

57. This refers to the unwarranted treatment of unlike cases in a like manner. As Professor Stephen Schulhofer notes, excessive uniformity is still a problem under the Guidelines scheme due to a number of factors, including the prevalence of quantity-based mandatory minimum sentences in drug trafficking cases. See Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity, 29 AM. CRIM. L. REV. 833, 851-70 (1992) (noting excessive uniformity in drug cases and Guidelines sentences generally).

58. See, e.g., David N. Yellen, Two Cheers for a Tale of Three Cities, 66 S. CAL. L. REV. 567, 572 (1992) ("A factor that persuades one judge to depart from the guidelines may not convince another judge faced with an essentially identical defendant.").

Because the Commission felt it had accounted for most significant sentencing factors, it believed departures would rarely be needed.\(^6^0\)

The Commission recognized that departures could take different forms. Some departures are "guided"—that is, a guideline or related commentary suggests that a departure of a certain amount may be warranted under certain circumstances. The Guidelines Manual recommends,\(^6^1\) for example, a downward adjustment of eight levels when the offense was not committed for profit and did not involve physical force or coercion.\(^6^2\) Guided departures do not implicate the concerns associated with unguided departures because they are designed to apply in fairly specific fact situations, articulated by the Commission, and the Commission specifies the extent of departures. Although the sentencing judge must make the factual determination as to the applicability of these guided departures to any particular case, there is relatively little discretion and, consequently, little risk of introducing disparity.\(^6^3\) Such guided departures are more akin to adjustments, such as those in Chapters Two and Three, which judges use to calculate the applicable Guidelines range, rather than a departure from the Guidelines range.

Unguided departures—those for which the sentencing judge determines both applicability and magnitude—present more difficulty because they highlight the tension between the

\(^{60}\) *Id.* at 6 ("[T]he Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often . . . because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice.").

\(^{61}\) This reference is entitled, "Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct." U.S.S.G. (1995), *supra* note 33, § 2G1.1.


\(^{63}\) A similar analysis applies to a second type of departure that the Commission identified—interpolation between numerically oriented Guidelines. *Id.* ch. 1, pt. A, at 6. The example cited by the Commission is an offense characteristic providing for a four level increase in offense level for serious bodily injury, and a two level increase for bodily injury. *Id.* (referring to offenses such as assault or burglary as examples). The Commission's commentary suggests that in appropriate cases, a court might select an intermediate increase of three levels. *See id.* § 2A2.1(b)(1) (allowing for an increase of three levels if the bodily injuries should be categorized between life-threatening and serious). Like the guided departure, such interpolation does not risk serious disparity because judicial discretion is exercised within a narrow range, and in limited circumstances.
need for judicial discretion and sentencing flexibility, and the desire to limit discretion in order to reduce disparity. Judges may base unguided departures on grounds the Commission identified or on circumstances wholly unforeseen by the Commission. Such departures are generally the focus of the debate regarding the amount of judicial discretion preserved by departures and, consequently, are the focus of this Article.

The general departure provisions of the Guidelines appear in sections 5K2.0 through 5K2.16 of the Guidelines Manual. Section 5K2.0 provides a general description of the Commission's view on the appropriate use of departures. It tracks the general departure language Congress used in 18 U.S.C. § 3553(b), providing that a sentencing court may depart "if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described.'"64

Section 5K2.0 suggests that the Commission contemplated two distinct types of departures—"qualitative" and "quantitative."65 Qualitative departures involve aggravating or mitigating circumstances "of a kind" not taken into consideration by the Commission in formulating the Guidelines.66 As the Commission recognized, possible bases for such departures could not be determined in advance;67 therefore, the Commission set out in sections 5K2.1-2.16 a number of bases for departure which were not factored into the basic Guidelines calculations. These included such aggravating factors as death,68 physical injury,69 extreme psychological injury,70 and such miti-

64. Id. § 5K2.0. The language of the original § 5K2.0 was slightly different, permitting departure "if the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1987). Congress amended § 5K2.0, effective June 15, 1988, to reflect its 1987 revision of 18 U.S.C. § 3553(b). U.S. SENTENCING GUIDELINES MANUAL app. C. at 28-29 (1989); see infra notes 123-141 and accompanying text (discussing Congress's revision of § 3553(b)).

65. See Selya and Kipp, supra note 15, at 22 (using the terms "qualitative" and "quantitative" to describe two different types of departures).

66. See id. (describing qualitative departures).

67. See U.S.S.G. (1994), supra note 46, § 5K2.0 ("Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance.").

68. Id. § 5K2.1.

69. Id. § 5K2.2.
gating factors as victim conduct, coercion or duress, and diminished capacity. Generally, the Commission did not account for the presence of these factors in formulating the Guidelines ranges, and their presence would render a case sufficiently atypical to make it a candidate for departure.

Both Congress and the Commission also contemplated quantitative departures—those based on a factor that is present "to a degree" not adequately considered by the Commission in formulating the Guidelines ranges. These quantitative departures commonly involve certain offender characteristics that the Commission has taken into account to the extent they are deemed not ordinarily relevant. Examples of these include age, physical condition, mental and emotional condition, and family or community ties or responsibilities. When such characteristics are present to an unusual degree, departure may be warranted.

In short, departures come in a variety of forms, and may be based on a virtually unlimited variety of grounds. The treatment of these varied departures in the appellate caselaw and at the district court level has significant implications for federal sentencing policy and the effectiveness of the Guidelines in meeting the goals set out in the SRA. Whether departures are playing their intended role in furthering the policy goals of the Guidelines scheme is the subject of considerable controversy. Before approaching that question, we turn to a critical question of interpretation underlying the departure de-

70. Id. § 5K2.3.
71. Id. § 5K2.10.
72. Id. § 5K2.12.
73. Id. § 5K2.13.
74. This is true as a general matter, but not in every type of case. For instance, if one of the Chapter 2A homicide Guidelines is applied, the Commission obviously accounted for the death of the victim, and departure under § 5K2.1 would be inappropriate.
75. See Selya & Kipp, supra note 15, at 22 (describing quantitative departures).
76. See id. at 23 (acknowledging that normally irrelevant characteristics of defendant may warrant departure in certain circumstances).
78. Id. § 5H1.4.
79. Id. § 5H1.3.
80. Id. § 5H1.6.
81. See, e.g., United States v. Mogel, 956 F.2d 1555, 1561, 1564 (11th Cir. 1992) (holding that in extraordinary circumstances a court may rely on one of the factors in § 5H1 to depart from the Guidelines range).
bate: Precisely what role was departure intended to play in Guidelines sentencing?

C. DEPARTURES AND FLEXIBILITY IN SENTENCING: DIVERGENT VIEWS

In drafting the Guidelines, the Commission attempted to walk a fine line between excessive uniformity and excessive flexibility in sentencing. The availability of departures serves as a crucial safety valve, permitting flexibility in a scheme primarily designed to limit judges' discretion and impose some manner of uniformity in sentencing. Thus, the scope of the departure provision serves as the key battleground between those urging greater uniformity and those urging greater flexibility.82

It should come as no surprise that competing conceptions have arisen regarding the proper scope of the SRA's departure provisions. On one side of the debate, commentators urge extensive use of departure to individualize sentences, particularly to permit sentences less severe than those the Guidelines impose. One of the proponents of a more extensive use of departure, Judge Vincent Broderick, has used a sports analogy to exhort his colleagues to assert their departure authority. "Spectators at New York Knicks games in the late 1960s used to chant: 'Defense! Defense! Defense!' Today's message for sentencing judges is: 'Depart! Depart! Depart!' Departures are the lifeblood of the Guidelines process."83 Others, though in somewhat less colorful language, have also urged more aggressive use of departures.84

On the opposite side of the debate, there are others, including a number of appellate judges, who have a less expansive view of the departure authority of sentencing judges.85 As one

82. See supra note 12 (citing articles that criticize the Guidelines as too inflexible).


appellate court stated, departure "must be restricted to those few instances where some substantial atypicality can be demonstrated."\textsuperscript{86}

Courts traditionally have focused on legislative intent as the key to statutory interpretation.\textsuperscript{87} In keeping with this view, in this section we seek to discern how Congress intended departures to function. Our review of the structure, text, and legislative history of the SRA persuades us that departures were not intended as an all-purpose escape hatch from the Guidelines as some proponents of a liberal departure standard have suggested. Rather, Congress intended departures to be used relatively rarely, reserved for cases in which either the offense, behavior, or relevant circumstances of the defendant are meaningfully atypical.

1. Departure Language in the SRA

The most specific provision in the SRA governing a sentencing judge's decision to depart from the Guidelines range is § 3553(b), which provides:

The court shall impose a sentence of the kind, and within the range, [specified by the Commission in its guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.\textsuperscript{88}

This language appears to create a straightforward requirement. In the absence of specific, atypical circumstances, the sentencing judge must impose a sentence from within the range that the Commission authorized. While some may dispute what the Commission considered in formulating the Guidelines and whether its consideration was "adequate," it is apparent that this provision assumes the presumptive nature of the Guidelines sentence. It also assumes that, absent some unusual circumstance, the twenty-five percent spread in the Guidelines sentencing range provides courts with enough

\textsuperscript{86} United States v. Williams, 891 F.2d 962, 967 (1st Cir. 1989).

\textsuperscript{87} See, e.g., Commissioner v. Engle, 464 U.S. 206, 214 (1984) (stating that the "sole task" of statutory interpretation is to determine legislative intent); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.05 (4th ed. 1984) (stating that the intent of the legislature is the criterion most often cited as the basis for interpreting statutes). But see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13-47 (1994) (criticizing the focus on legislative intent as the principal basis for statutory interpretation).

\textsuperscript{88} 18 U.S.C. § 3553(b) (1994).
flexibility to individualize sentences for offenders whose criminal conduct and criminal history are similar.\textsuperscript{89}

Some commentators have argued that 18 U.S.C. § 3553(b) is inconsistent with other provisions of the SRA, specifically §§ 3553(a) and 3551, and that the latter sections provide an alternative basis for departure.\textsuperscript{90} These commentators cite two key elements for departure authority under § 3553(a): the parsimony language of the first sentence of § 3553(a)\textsuperscript{91} and the sequencing of issues that the sentencing judge should consider in imposing sentences.\textsuperscript{92} First, the parsimony language suggests that a sentencing judge who concludes that any sentence within the range is greater than necessary to satisfy the purposes of sentencing may depart on that basis.\textsuperscript{93} Second, the se-

\textsuperscript{89} Thus, for example, the Guidelines system created by Congress presumes that two first-time offenders convicted of bank robbery, each of whom displayed but did not use a weapon, should not receive sentences that differ by more than 25%, even if they have different family ties, educational backgrounds, or employment histories. See 28 U.S.C. § 994(b)(2) (1994) (requiring a 25% range between the minimum and maximum sentence under the Guidelines); Id. § 994(e) (indicating the "general inappropriateness" of education, employment record, and family ties in sentencing).

\textsuperscript{90} See, e.g., United States v. Davern, 937 F.2d 1041, 1043-46 (6th Cir. 1991); United States v. Concepcion, 795 F. Supp. 1262, 1275-82 (E.D.N.Y. 1992) (noting that courts tend to ignore §§ 3551 and 3553(a) and discussing the importance of those sections); Clarke & McFadden, supra note 14, at 929-31 (suggesting § 3553(a) provides independent departure authority); Freed, supra note 84, at 1709 (explaining how a court could base a departure on the purposes outlined in § 3553(a) or the failure of the Commission to adequately consider a factor, as allowed in § 3553(b)).

\textsuperscript{91} "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the [four basic purposes of sentencing] set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a); Sentencing Alternatives and Procedures, in ABA STANDARDS FOR CRIMINAL JUSTICE 18-3.2(iii) (1993) ("Parsimony in the use of punishment is favored. The sentence imposed should therefore be the least severe sanction necessary to achieve the purposes for which it is imposed.").

We will refer to the § 3553(a) language quoted above as the "parsimony" language, as have others. See, e.g., Richard S. Frase, The Uncertain Future of Sentencing Guidelines, 12 LAW & INEQ. J. 1, 20 (1993) (using "parsimony" as short-hand reference for notion that penal sanctions should be the least severe necessary to achieve the purposes of sentencing).

\textsuperscript{92} See 18 U.S.C. § 3553(a)(1)-(7) (1994) (instructing the sentencing court to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the four purposes of sentencing; (3) the kinds of sentences available; (4) the Guidelines range established by the Commission; (5) the Commission's policy statements; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to the victim(s) of the offense).

\textsuperscript{93} See, e.g., Davern, 937 F.2d at 1043-44 ("18 U.S.C. § 3553(a) . . . provides in mandatory language in the first sentence that the District Court
quencing of factors the sentencing judge should consider is of particular importance. The Commission's Guidelines and policy statements are but two of seven factors for the sentencing judge's consideration. Further, they are listed only after consideration of relevant offense and offender characteristics, sentencing purposes, and kinds of sentences available. As Clarke and McFadden argue, "Given the legal principle that a statute must be read to give meaning to each of its parts, subsection (a) must have some meaning. . . . Had Congress meant for subsection (b) to be the only guide for sentencing courts, it would not have adopted subsection (a)."94 Further, courts cite the language of § 3551, which instructs courts to impose sentences to achieve the four basic purposes of sentencing articulated in § 3553(a)(2),95 to bolster the argument that the judge should impose a sentence the judge individually decides is consistent with the purposes of sentencing, rather than reflexively looking to the Guidelines range.96

Requiring a judge to determine a sentence initially by reference only to the Guidelines range and policy statements appears inconsistent with the structure and sequence of § 3553(a). Some commentators, however, have noted that the sequence of the factors to be considered does not necessarily establish the priority of those factors.97 Moreover, permitting judges to depart on the basis of §§ 3551 and 3553(a) effectively negates § 3553(b), which instructs judges to impose a Guidelines sentence, absent the presence of aggravating or mitigating circumstances not considered by the Commission. This evisceration of § 3553(b) violates the same interpretive canon upon which Clarke and McFadden rely.

should consider the facts and fix a sentence 'not greater than necessary to comply' with [the stated purposes"].

94. Clarke & McFadden, supra note 14, at 929 (citations omitted).
95. See 18 U.S.C. § 3551(a) (1994) ("[A] defendant who has been found guilty . . . shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) . . . ."); id. § 3553(a)(2)(A)-(D) (outlining the purposes of sentencing to include just punishment, deterrence, public protection, and rehabilitation).
97. See, e.g., Leonard J. Long, Miller's Algebra of Purposes at Sentencing, 66 S. Cal. L. Rev. 483, 490 (1992) ("But, the fact that the purposes are listed prior to the guidelines and presumptive sentence in the sequential order of judicial consideration does not establish that purposes have priority in either importance or weight . . . .").
Appellate courts interpreting the departure provisions have noted the apparent tension between subsections (a) and (b), but have harmonized these provisions by reading § 3553(a) to permit the sentencing judge to consider the non-Guidelines factors specified in that provision when imposing a sentence within the Guidelines range. This interpretation, adopted by the vast majority of courts addressing the issue, appears to be the most natural reading of these provisions, given the clear directive in § 3553(b) to impose a sentence from within the Guidelines range, absent special aggravating or mitigating circumstances. As this Article's next section shows, this reading is also most consistent with the SRA's legislative history and the central policies underlying its adoption.

2. Legislative History of the SRA's Departure Language

One can trace the SRA's origins back to S. 2699, a sentencing reform measure introduced by Senator Kennedy in 1975. The next nine years produced several sentencing reform bills, extensive hearings, committee reports, and floor debates, as both houses of Congress considered various sentencing reform bills and aspects of federal sentencing and criminal code reform.

The Senate Judiciary Committee reported, and the Senate passed, sentencing reform bills in 1977, 1980, 1981, and 1983. From the beginning, however, the House's vision of sentencing reform differed significantly from the Senate's. Throughout this period, the House, critical of the Senate's

98. See, e.g., United States v. Boshell, 952 F.2d 1101, 1106-07 (9th Cir. 1991) (allowing for consideration of offender characteristics in adjusting sentences within the Guidelines, but only allowing departures outside the range in extraordinary circumstances). But see Concepcion, 795 F. Supp. at 1278 (arguing that selection of a point within the Guidelines range does not permit the sentencing judge to engage in full consideration of the factors specified in § 3553(a)).


103. S. 668, 98th Cong. (1983); S. 1762, 98th Cong. (1983). The latter bill included the Sentencing Reform Act, which the House ultimately adopted as part of an appropriations measure, and which President Reagan signed in 1984.

This different vision was reflected in the House's refusal to act on the Senate-sponsored reform legislation before the SRA's adoption, and in the bills debated and adopted by the House during that time. For example, a bill reported to the House floor in 1980 provided for flexible, non-binding guidelines, promulgated under the aegis of the Judicial Conference of the United States and a body wholly comprised of judges. These aspects of the House's approach contrast sharply with the approach the Senate ultimately adopted, which emphasized comprehensive, binding guidelines promulgated by an independent body of experts, including both judges and non-judges. The vast difference in approaches adopted by the House and the Senate may have stifled the debate on the role of departures and contributed to the lack of clarity on the role of departures in the SRA's final version.

The lengthy history of the SRA and its numerous predecessor bills produced surprisingly little debate on the role of departures. Senator Hart introduced the provision eventually adopted as § 3553(b) on January 23, 1978. The Senate,


108. See H.R. 6915, 96th Cong. § 3103(d) (1980) (stating that a court can depart from Guidelines upon finding any aggravating or mitigating circumstances); H.R. Rep. No. 96-1396 (1980) (discussing the role and composition of the Judicial Conference).

109. See 18 U.S.C. § 3553(b) (1994) (authorizing departure only when the court finds an aggravating or mitigating circumstance that the Commission did not adequately consider).

110. The proper scope of § 3553(b) received more extensive consideration in 1987 when that section was amended. See infra notes 127-141 and accompanying text (explaining how the 1987 debate sheds light on the intent of the SRA's drafters).

viewing the provision as relatively uncontroversial, only briefly debated this language, as the following Congressional Record excerpt indicates.

Mr. HART: This is a very simple and straightforward amendment that accomplishes exactly what the bill set out to do. That is, it says that a judge shall sentence a convicted offender within the guidelines established by the sentencing commission unless there are aggravating or mitigating circumstances of an extraordinary nature; then, that he must report what those circumstances are in deviating from the guidelines laid down by the sentencing commission. That is exactly what the purpose of this measure that we are presently debating is. Yet nowhere in the language of the pending legislation does it specifically state the fact.

Mr. KENNEDY: [This is, again, completely consistent with the thrust of the legislation . . . We want to make sure these guidelines are followed in the great majority of cases. I think this amendment . . . makes that more specific . . . .]

Mr. STEVENS: It is my interpretation, as a country lawyer, giving [sic] the trial judge back some of his authority. Is that right or wrong?

Mr. HART: No more and no less than the intent of the committee in offering this bill . . . .

Mr. STEVENS: If the trial judge finds that the guidelines, or the sentencing commission in formulating the guidelines, did not take into account circumstances that would either aggravate or mitigate the situation before him, he can deviate from the range provided in subsection 84?

Mr. HART: I would state it the other way around. That is to say, the presumption is that the judge will sentence within the guidelines unless there are aggravating or mitigating circumstances, which is the purpose of this bill.112

The language added by Senator Hart in 1978 survived, essentially unchanged, through the SRA's passage in 1984.113

As the statements of Senator Hart and Senator Kennedy indicate, the principal proponents of sentencing reform legislation believed that § 3553(b), with its emphasis on the presumptive nature of the Guidelines, was consistent with the central policies and purposes of sentencing reform. The Senate's express rejection in 1983 of an amendment offered by

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112. Id. at 383 (emphasis added).
113. It was amended in 1987 to add the "of a kind or to a degree" language discussed infra text accompanying note 138. This amendment occasioned a vigorous debate between members of the House and members of the Senate about the original meaning of § 3553(a) and (b). See infra notes 127-141 and accompanying text (outlining the 1987 debate).
Senator Mathias, which was intended to facilitate departures, supports this view:

The Committee rejected an amendment by Senator Mathias which would have expanded significantly the circumstances under which judges could depart from the sentencing guidelines in a particular case. The Mathias amendment would have permitted deviations from the guidelines whenever a judge determined that the characteristics of the offender or the circumstances of the offense warranted deviation, whether or not the Sentencing Commission had considered such offense and offender characteristics in the development of the sentencing guidelines. The Committee resisted this attempt to make the sentencing guidelines more voluntary than mandatory, because of the poor record of States . . . which have experimented with "voluntary" guidelines.\(^{114}\)

In other words, the Committee viewed expansion of departure as a threat to the uniformity sought by charging a single body, the Commission, with the task of determining the role of key offense and offender characteristics in sentencing and determining the appropriate sentence for each offense/offender combination.

Still other portions of the 1983 Senate Report, the SRA's principal legislative history, further emphasize the relatively narrow intended scope of § 3553(b). Noting that "a primary goal of sentencing reform is the elimination of unwarranted sentencing disparity," the Report states that "the bill seeks to assure that most cases will result in sentences within the Guidelines range and that sentences outside the Guidelines will be imposed only in appropriate cases."\(^{115}\) How many cases is "most" cases? The Committee believed that, based on the United States Parole Commission's experience with its guidelines, that departure would be appropriate in as many as twenty percent of cases, possibly less, depending upon the level of detail of the Guidelines.\(^{116}\)

The United States Parole Commission currently sets prison release dates outside its guidelines in about 20 percent of the cases in its jurisdiction. . . . It is anticipated that judges will impose sentences outside the sentencing guidelines at about the same rate or possibly at a somewhat lower rate since the sentencing guidelines should contain recommendations of appropriate sentences for more detailed combinations of offense and offender characteristics than do the parole guidelines.\(^{117}\)

\(^{115}\) Id. at 52 (emphasis added).
\(^{116}\) Id. at 52 n.71.
\(^{117}\) Id.
Regardless of the precise departure frequency anticipated by the Committee, the Senate bill contemplated presumptive guidelines, with judicial departures reserved only for exceptional or atypical cases.

As stated, the House pursued a different type of sentencing reform. In 1984, the House Judiciary Committee reported H.R. 6012, which authorized merely advisory guidelines and contained the parsimony language of current § 3553(a). House Republicans opposed H.R. 6012, and urged adoption of the Senate bill. The text of the Senate's bill was passed and forwarded as part of a continuing appropriations resolution.

On October 4, 1984, the Senate passed the continuing resolution with a handful of amendments, which in turn were adopted in conference by the House. One of these amendments is the source of much of the current debate over the meaning of § 3553(a) and (b). The amendment involved the incorporation into subsection (a) of the parsimony language from the House’s bill, H.R. 6012. It is not entirely clear why the Senate adopted this language. In any event, the Senate apparently did not realize that this language could be viewed as inconsistent with the language of § 3553(b). There is no discussion in the record of the meaning of the new § 3553(a) or of how subsections (a) and (b) might be harmonized.

118. See H.R. 6012, 98th Cong. (1984) (proposed 18 U.S.C. § 3523(b)(2) requiring the court to impose the “least severe appropriate measure” when sentencing). This bill’s emphasis on advisory guidelines and preservation of broad judicial discretion was consistent with most of the previous bills reported out of the House Judiciary Committee and debated in the House. See Stith and Koh, supra, note 107, at 236 (describing the vast differences between the House and Senate bills stemming from the House’s strong support of greater judicial discretion in sentencing).


121. See 130 CONG. REC. 29,870 (1984) (proposing an amendment to the joint resolution that included the “sufficient but not greater than necessary” language).

122. Hutchinson and Yellen suggest that the House language was added “as a gesture to the House Judiciary Committee.” THOMAS W. HUTCHINSON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 427 (1989). This explanation seems plausible, and if true, bolsters the view that the Senate did not perceive this language as particularly substantive. At this stage, there was no need for major policy concessions to obtain House support because the original Senate bill had already been approved.
Noting the Senate's eleventh-hour incorporation of the parsimony language, Clarke and McFadden argue that "Senator Mathias and the House won: the 'sufficient, but not greater than necessary' language exists and should be acknowledged as a legitimate basis for departure." We believe this is a misreading of the statute and the legislative history.

First, this reading of the legislative history ignores the fact that the bill adopted by Congress incorporated the approach associated with the Senate's bills in every essential way. It called for a full-time, presidentially-appointed Commission empowered to make broad decisions regarding sentencing policy and to draft complex guidelines; it eliminated parole; it contained language strongly suggesting the illegitimacy of the use of many offender characteristics traditionally relied upon by judges; and, most important, it contained the specific directive to sentencing judges in § 3553(b) to follow the Guidelines. It was virtually identical to S. 1762, reported by the Senate Judiciary Committee in 1983, the legislative history of which establishes the intent to rein in judicial discretion.

In the context of the SRA as a whole, it would be anomalous to read the parsimony language added in October 1984 as an independent basis for departure. Such an interpretation would, in effect, permit a sentencing judge to reject the Guidelines range established by the Commission merely because that judge felt that the range was higher than necessary to serve the purposes of sentencing. This would eviscerate the Commission's role and the presumptive nature of the Guidelines. Further, this reading of § 3553(a) would have represented too great a shift in the Senate's approach to sentencing reform. There is nothing in the legislative history to suggest that at the last minute the Senate repudiated its consistently stated view that presumptive guidelines were needed. Even Representative Conyers, a long-time foe of the Senate reform proposals and advocate of unfettered judicial sentencing discretion, decried the last-minute Senate amendment as "purely cos-

123. Clarke & McFadden, supra note 14, at 931.
124. It is important to bear in mind that the Senate report cited the lack of consensus among judges as to sentencing purposes as a major source of the sentencing disparity the bill was designed to alleviate. See S. REP. No. 98-225, at 41 n.18 & 41-46 (1983) (discussing empirical evidence suggesting variation among federal judges about purpose of sentencing and impact of this variation on sentence disparity).
metic.” The record demonstrates that the result of the Senate and House conflict “was not compromise but clear and complete victory for the Senate approach.”

3. The 1987 Amendment and Accompanying Legislative History

One footnote to the legislative history is that the debate over the interaction of §§ 3553(a) and (b), which did not take place before the SRA’s passage, occurred in 1987 when Congress amended subsection (b). The Sentencing Act of 1987 contained several amendments to the SRA, designated as technical and clarifying, including a modest amendment to the language of § 3553(b). The principal change in that section was the insertion of the phrase “of a kind, or to a degree” after the phrase “there exists an aggravating or mitigating circumstance.” The House initially proposed the “of a kind, to a degree” language. This amendment to the SRA was fairly straightforward and was designed, according to Senator Kennedy,

_to make clear what is already implicit in current law, that a factor can be found not to have been adequately considered either first, because it is not reflected in the applicable guidelines at all, or second, because it is not reflected to the unusual extent that it is present in a particular case._

The House, however, included in the legislative record a section-by-section analysis of the amendments that went far

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126. Stith & Koh, _supra_ note 107, at 236.
127. Thus, the new provision read:

_The court shall impose a sentence of the kind, and within the range, referred to within subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described._

_18 U.S.C. § 3553(b) (1994). To protect the Commissioners and their work product from subpoena relating to the “adequately considered” issue, § 3553 also was amended to provide that in determining whether a circumstance was adequately taken into consideration, the court shall consider only the Guidelines, policy statements, and official commentary of the Sentencing Commission. Id. § 3553(a)._

beyond explaining the purpose of those amendments, and attempted to reinterpret the meaning of § 3553(a) and (b), suggesting that § 3553(a) could provide an independent basis for departure.\textsuperscript{130} The Senate sponsors of the SRA immediately objected to this effort as unapproved, not voted upon, and not agreed to; in effect, they considered it revisionist legislative history.\textsuperscript{131} The issue sparked such great controversy that the Senate sponsors took the unusual step of issuing a bipartisan "joint explanation" repudiating the analysis placed in the record by the House staff, and setting out their views of the principles and purposes embodied in the SRA's departure provisions.\textsuperscript{132}

The joint explanation by Senators Biden, Thurmond, Kennedy, and Hatch makes clear that the Senate unanimously passed S. 1822 on October 28, 1987, to make technical and clarifying changes to the Sentencing Reform Act of 1984, but allowed only days before the changes were to take effect.\textsuperscript{133} The House Judiciary Committee, however, decided to oppose expedited review until the Senate sponsors agreed to "drop or limit the scope of several sections" and add clarifying language to the standard for departures.\textsuperscript{134} In return, the Committee agreed to support immediate passage of S. 1822.\textsuperscript{135} The joint explanation further established that while the Senate sponsors accepted the compromise, they neither reviewed nor approved the section-by-section analysis of S. 1822, which the House staff placed in the record.\textsuperscript{136} The joint explanation expressed disagreement with several parts of the House's analysis, including the analysis of § 3553(a) and (b):

\begin{enumerate}
\item The Senate wanted the changes effective on November 1, 1987; therefore, it was important to get the bill passed as quickly as possible. \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at S16,646.}
\end{enumerate}
The first assertion [made by the House in its section-by-section analysis] is that 18 U.S.C. Sec. 3553(a) provides authority for sentencing courts to depart from the guidelines. The Senate sponsors think it is clear that while many statutory provisions bear on the sentencing decision, 18 U.S.C. Sec. 3553(b) exclusively governs the sentencing judge's authority to depart from the guidelines. An alternative view, such as that proposed by the House, would permit courts to circumvent the central purposes of guideline sentencing, a result Congress clearly never intended.137

The use of the term "exclusively governs" leaves little doubt that the Senate intended no substantive change in the departure provision. The Senate rejected the House interpretation.

Moreover, according to Senator Hatch, the House assertion that the language in § 3553(a) provided an alternative standard of departure was contrary to the legislative intent behind the measure. On the floor of the Senate, Senator Hatch observed that § 3553(a) added nothing more than clarifying language to the extent that excessively lenient or excessively harsh sentences were inappropriate.

In short, the phrase merely clarified the purposes of sentencing and did not provide an additional basis for departure. Frankly, I would not have agreed to this amendment offered in 1984, and I do not believe the managers of the bill or the Senate would have accepted this amendment, had it been interpreted in the manner now being urged by the House. The suggestion promoted by the House in this statement would be a radical change in the Sentencing Reform Act and does not have the concurrence of the Senate.

In fact, it is section 3553(b), not section 3553(a), that provides the basis for departure. Section 3 of S. 1822 amends section 3553(b) and clarifies the standard for departure, but it does not broaden the departure standard in any way. Section 3 adds the words "of a kind or to a degree" to the existing standard for departure. The standard for departure is vital to the proper functioning of the guidelines system. It tells judges when, under the law, they are permitted to impose a sentence outside the guidelines promulgated by the Sentencing Commission. If the standard is relaxed, there is a danger that trial judges will be able to depart from the guidelines too freely, and such unwarranted departures would undermine the core function of the guidelines and the underlying statute, which is to reduce disparity in sentencing and restore fairness and predictability to the sentencing process. Adherence to the guidelines is therefore properly required under the law except in those rare and particularly unusual instances in which the court concludes that there is present in the case an aggravating or mitigating circumstance of a kind or to a degree not in-

cluded in the guidelines, and that the presence of this circumstance should result in a sentence different from that described.\textsuperscript{138}

Senator Biden, a co-author and manager of the 1984 Comprehensive Crime Control bill, agreed with Senator Hatch's assessment of the relative effects of § 3553(a) and (b):

The House interpretation of this 1984 Senate amendment allegedly would permit courts to circumvent a sentence called for by the guidelines based on the argument that some lesser sentence would be sufficient to meet the purposes of sentencing or, alternatively, that a greater sentence is necessary to meet those purposes.\textsuperscript{139}

The joint explanation is reminiscent of the earlier debate in the Senate over the amendment to S. 1762 proposed by Senator Mathias to make the Guidelines voluntary.\textsuperscript{140} The joint explanation also highlights the fundamental problem with the view of § 3553(a) espoused by the 1987 House analysis and by Clarke and McFadden: that interpretation would, in effect, render the Guidelines merely advisory because the sentencing judge would be able to depart whenever he or she felt the sentence was too high or too low.\textsuperscript{141} As explained above, there is nothing in the contemporaneous legislative history to suggest that the Senate intended this approach, and the 1987 legislative "history" reinforces that view.

The entire 1987 exchange between the House and the Senate regarding the meaning of the SRA's departure provisions of 1984 should be viewed with some caution as it is merely legislative history. This exchange nevertheless supports the view that the Senate did not intend to work a major substantive change in the implementation of the Guidelines when it incorporated the parsimony language of § 3553(a), and that language thus cannot be viewed as an independent basis for departure.

D. CONCLUSION

While there has been considerable dispute over the proper scope of departure in the Guidelines sentencing scheme, the language, legislative history, structure, and purpose of the SRA and the Guidelines establish that Congress did not design departure provisions to be used whenever the sentencing judge

\textsuperscript{138} Id. (statement of Sen. Hatch).
\textsuperscript{139} Id. (statement of Sen. Biden).
\textsuperscript{140} See supra text accompanying note 114 (discussing the Committee's rejection of the Mathias amendment).
viewed the applicable Guidelines sentence as too harsh or too lenient. Rather, Congress designed departures to provide some flexibility to judges facing extraordinary or atypical cases. This background informs the analyses of appellate departure jurisprudence and district court departure practice undertaken below.

II. METHODOLOGY AND RESEARCH DESIGN

A. DATA

The data for this study came from the Commission's case monitoring database, a comprehensive computerized database containing information on cases in which judges sentenced under the Guidelines. The principal source of information used here is the individual case monitoring files, provided to the Commission by the United States Probation Offices of the various United States district courts.

Each case monitoring file typically contains: (a) the Judgment of Conviction, which sets forth the defendant's sentence; (b) the Statement of Reasons, which reflects the court's determination of the applicable Guidelines sentencing range, and an indication of whether, and why, the court departed from that range; (c) the Presentence Report (PSR), a document prepared by the probation officer assigned to the individual case, which contains information about pertinent offense and offender characteristics; \(^\text{142}\) and (d) the probation officer's guideline calculation worksheets, which indicate how the probation officer calculated the recommended Guidelines sentencing range. The written plea agreement is sometimes included in the case monitoring files as well as the court's written explanation of the departure or pertinent excerpts of the sentencing proceeding's transcript.

While the case monitoring data files contained a wealth of valuable information, the data were not perfect. Several problems limited its utility. For example, the PSR occasionally did not contain pertinent offender data, such as race or educational

\(^{142}\) The PSR contains a relatively detailed account of the offense behavior, derived from the investigative files and supplemented by written submissions and interviews with the prosecuting attorney and the defendant. The PSR also contains fairly detailed biographical information about the defendant, including demographic characteristics, background and family ties, education and employment histories, and analyses of the defendant's physical, emotional, and financial conditions.
background; some relevant documentation such as the plea agreement or a sentencing transcript may not have been forwarded to the Commission; or the sentencing judge may have inadequately documented the basis for departure in the Statement of Reasons. Where such missing data could be derived from other sources, the absence of this data and its effect on the analysis is noted in the jurisdictional analyses presented below in Part IV. While we note this limitation, we emphasize that missing data in the case monitoring files were uncommon. In our judgment, the available data were sufficient to conduct meaningful analyses of departure practices in the districts selected for our study.

B. PARAMETERS OF RESEARCH

Before examining the study's methodology, it is important to understand the study's scope. First, this study excludes departures for substantial assistance under section 5K1.1 of the United States Sentencing Guidelines Manual. The principal reason for this is that the study is primarily interested in departure as an exercise of judicial discretion. Substantial assistance departures, because they require a motion from the government, raise a host of other legal and policy issues beyond the scope of the study. As the First Circuit has noted, section 5K2.0 departures for atypical aggravating or mitigating circumstances are totally different from section 5K1.1 departures.

Moreover, because of the extensive prosecutorial involvement in substantial assistance departures, the type of study necessary to explore such departures differs substantially from the methods we sought to employ here. A substantial assistance departure study requires intensive interviews of judges, defense counsel, and particularly, prosecutors, a procedure at odds with the broad overview of departure practices we sought to complete here.

143. That section provides, "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." U.S.S.G. (1994), supra note 46, § 5K1.1.

144. See United States v. Mariano, 983 F.2d 1150, 1154-55 (1st Cir. 1993) (explaining that section 5K1.1 is a distinct provision with a "different raison d'etre" from section 5K2.0 and that the "methodological contrast between the two departure modalities is glaring").
Finally, at the time of the research, there was a separate working group within the Commission formed to study substantial assistance departure practices. Because the working group wished to examine the major components of substantial assistance policies, practices, and outcomes in the federal system, the group collected data from a variety of sources: caselaw review, United States attorney surveys, site visits, individual case studies, co-defendant conspiracy studies, and aggregate statistical analysis. The Substantial Assistance Working Group has analyzed the information collected and plans on releasing a report of their findings in the spring of 1997.

The study's research is also limited to cases in which the court specifically stated that it was departing from the Guidelines range, or when such a departure was readily apparent from the statement of reasons filed by the court. There have been cases in which fact-bargaining, charge-bargaining, Guidelines-factor-bargaining, calculation error, or some other factor resulted in a sentence different from that prescribed by the Guidelines. Such cases, however, are not formal, overt departures under 18 U.S.C. § 3553(b), and, therefore are not within this study's scope.

Finally, the study did not attempt to identify cases in which there may have been grounds for departure, but the court declined to depart. While this type of analysis would surely be interesting, we deemed it not practicable for the study's purposes because it would require a missing data collection effort.

145. A departure might be readily apparent, for example, when the court's statement of reasons specifies a particular total offense level, criminal history score, and resulting Guidelines range, yet imposes a sentence below that range. Unless there is a reference to a substantial assistance motion in the statement of reasons, the presentence report, or the plea agreement, such a case would be coded as a departure, with no reason for departure provided. Such cases are rare. In the vast majority of cases, the statement of reasons specifies that the court has departed and provides a reason for departure.

C. SAMPLING AND METHODOLOGICAL PROCEDURES

The study's analysis was two-pronged. First, it analyzed relevant appellate jurisprudence at the time the research was conducted from six selected courts of appeal. These circuits were selected on a non-random basis in order to maximize geographic and demographic diversity among the districts selected for inclusion in the study. We analyzed the departure caselaw in each circuit to identify specific similarities and differences in the appellate departure jurisprudence, and to compare and contrast the general approaches to departure exhibited by the various courts of appeals. The principal purpose of the jurisprudential analysis was to provide a background contextual picture to facilitate analysis of sentencing practices within each of the districts we studied.

The second prong of our analysis was a review of departure practices at the district court level. This analysis was qualitative in nature and was intended to supplement the extensive aggregate statistical data on departures already compiled by the Commission. The study selected, in a non-random fashion, five districts from each of the six circuits—thirty districts in all. As before, we selected the districts to maximize geographic and demographic diversity. For each district, the study reviewed the case monitoring file for every non-section 5K1.1 departure in fiscal years 1991 and 1992. For those districts with an extremely large number of departures, we reviewed a sample of one hundred departures drawn from the relevant time period. In all, we analyzed case file data for approximately 1,400 departures drawn from the thirty judicial districts.

Based on our detailed review of the case files, we coded each case with the reason and extent of departure, the type of offense, the individual trial court judge and date of appointment to the bench, the race, gender, and socioeconomic status of the offender, and whether the conviction resulted from a trial or guilty plea. We also recorded comments made by the judge which might reveal the judge's attitude toward departures or the Guidelines in general. We analyzed the data to determine whether any important patterns or variations across districts or circuits emerged.

147. These were the First, Second, Seventh, Eighth, Ninth, and Eleventh Circuits.
III. ANALYSIS OF THE APPELLATE DEPARTURE JURISPRUDENCE

A. INTRODUCTION

Our study's principal focus was the departure activity of sentencing judges at the district court level. The appellate caselaw of each circuit, however, informs and influences district court judges in their sentencing decisions. In this section, we undertake a brief analysis of the departure jurisprudence of the six circuits from which our departure cases have been selected. The similarities and differences among the circuits that emerge from this analysis will inform the analysis of district court departure practice that we report below.

B. CIRCUIT COURT ANALYSIS

1. Standards of Review

During fiscal years 1991 and 1992, the three-part test announced in United States v. Diaz-Villafane,148 governed appellate review of departure decisions in each of the six circuits from which our departure cases were drawn.149 The First Circuit summarized the test as follows:

First, we consider whether the circumstances relied on by the sentencing court warranted a departure. . . . Second, we determine whether the circumstances relied on by the sentencing court are present in appellant's case; findings of fact are reviewed for clear error. . . . Third, we evaluate the reasonableness of the direction and degree of the challenged departure. The reasonableness determination is "quintessentially a judgment call," primarily entrusted to the district court.150

The first step of the Diaz-Villafane standard is the critical barrier to affirmance of the departure; the appellate court re-

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148. 874 F.2d 43, 49 (1st Cir. 1989).
149. Although many cases do not explicitly cite it as direct authority, the majority of cases follow an analysis utilizing the test announced in Diaz-Villafane. See, e.g., United States v. Feekes, 929 F.2d 334, 338 (7th Cir. 1991); United States v. Lira-Barraza, 941 F.2d 745, 746-47 (9th Cir. 1991) (en banc); United States v. Lara, 905 F.2d 599, 602-03 (2d Cir. 1990); United States v. Lang, 898 F.2d 1378, 1379-81 (8th Cir. 1990); United States v. Shuman, 902 F.2d 873, 875-76 (11th Cir. 1990).
views *de novo* whether the district court's grounds for departure are permissible. Under the First Circuit's approach, however, the district court enjoys considerable deference through the remainder of the test. This is particularly true during step three, the reasonableness determination. The higher level of deference is necessary because "appellate review must occur with full awareness of, and respect for, the [district court's] superior 'feel' for the case. [The appellate court] will not lightly disturb decisions...implicating degrees of departure."\(^{151}\) In short, under *Diaz-Villafane* and its progeny, review of the decision to depart is rigorous, but the extent of departure is almost entirely left to the discretion of the district court.\(^{152}\)

Although each appellate court applied the same formal standard of review, there were some notable differences in emphasis. For example, the Seventh Circuit's departure review tended to be somewhat more aggressive than that of the other courts. In making the reasonableness determination, the degree of deference was tempered by the requirement that the degree of departure "must be linked to the structure of the Guidelines."\(^{153}\) The Seventh Circuit appeared to be more willing than most to reverse departures, both upward and downward, based on its assessment of the reasonableness of the degree of departure. In *United States v. Schmude*, for example, the court reversed a departure effectively doubling the Guidelines range based on the "repeat nature" of the offense.\(^{154}\) Similarly, in *United States v. Boula*, the court concluded that a ten-level departure based on the number of fraud victims was not reasonable.\(^{155}\)

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151. *Diaz-Villafane*, 874 F.2d at 49-50; see also *United States v. Ocasio*, 914 F.2d 330, 336 (1st Cir. 1990) (indicating that although some courts have suggested formulaic approaches to assessing the reasonableness of departures, the First Circuit views this method with some skepticism).

152. See *United States v. Perkins*, 929 F.2d 436, 438 (8th Cir. 1991) (agreeing that a district court's departure from the Guidelines must be given deference because of the district court's "superior 'feel'"); *United States v. Snover*, 900 F.2d 1207, 1209 (8th Cir. 1990) (holding that upward departure from 14 to 21-month range to 46 months was "reasonable" in light of sentencing judge's "feel" for the case and opportunity to judge defendants' credibility); *United States v. Correa-Vargas*, 860 F.2d 35, 40 (2d Cir. 1988) (affirming as not "unreasonable" departure from range of 6 to 12 months to statutory maximum of 48 months).


The Ninth Circuit was also notable in its departure review standards, as the court imposed rather stringent procedural requirements on district courts' decisions to depart. The Ninth Circuit required district courts to state the reasons for departure on the record and to explain the extent of departure. The Ninth Circuit strictly applied these requirements and vacated numerous departures, especially upward departures, for the sentencing court's failure to provide an adequate explanation.

Four circuits imposed a structuring requirement on their district courts for some departures based on criminal history. Under this approach, the sentencing judge sequentially examined each criminal history category and explained the appropriateness of the category selected, as well as the extent of departure.

156. See United States v. Hoyungowa, 930 F.2d 744, 748 n.1 (9th Cir. 1991) (holding the appellate court could not affirm the decision of the sentencing court merely because some unusual, but uncited, circumstances could have warranted the upward departure, and requiring the sentencing court to adequately articulate its grounds for the upward departure). In addition, the Ninth Circuit has held that a sentencing departure based on a defendant's criminal history which does not adequately describe the criminal history, and is conclusory in nature, is not sufficient to sustain a departure from the Guidelines. United States v. Wells, 878 F.2d 1232, 1233 (9th Cir. 1989); see also United States v. Michel, 876 F.2d 784, 786 (9th Cir. 1989) (holding that the district court's failure to clearly identify the specific aggravating circumstances invalidated its departure from the Guidelines). The purpose of this requirement is to enable the appellate court to engage in a meaningful review of the reasonableness of the departure. Wells, 878 F.2d at 1233.

157. See United States v. Hernandez-Rodriguez, 975 F.2d 622, 628 (9th Cir. 1992) (reversing a departure from 4 to 10-month range to 30 months because the court "neither explained the amount of its departure nor analogized to other portions of the Guidelines"); see also United States v. Streit, 962 F.2d 894, 903 (9th Cir. 1992) (stating that the appellate court considers only "the reasons actually articulated by the district court both for the departure and for the extent of the departure") (emphasis added).

158. The Seventh Circuit was also fairly strict in requiring that the sentencing court explicitly state, with adequate justification, its reasons for both the decision to depart and the extent of departure. For example, in United States v. Gentry, the court reversed a substantial downward departure that had been based on the offender's mental condition. 925 F.2d 186, 189 (7th Cir. 1990). The Gentry court vacated the sentence departure, reasoning that the district court did not provide an adequate explanation for the extent of the departure. Id.

159. See Gentry, 925 F.2d at 189 (requiring a district court that reduced a sentence by 50% to explicitly justify the reasons behind the departure); United States v. Shuman, 902 F.2d 873, 876 (11th Cir. 1990) (noting that the district court's specific findings that a defendant voluntarily brought her son into a drug business environment, in addition to her previous criminal his-
2. Upward Departures

Analysis of the upward departure caselaw of the six selected circuits revealed broad similarities in their approaches. These courts tended to be fairly sympathetic to upward departures, especially where the sentencing judge identified offense conduct that was unusually serious in some respect.\textsuperscript{160}

The six circuits did diverge somewhat in their treatment of upward departures based on criminal history, however.\textsuperscript{161} The tory, provided sufficient documentation to justify departure from the Guidelines; United States v. Cervantes, 878 F.2d 50, 54 (2d Cir. 1989) (finding the district court's mere statement that the defendant had a "pretty bad record" rendered the departure improper due to a lack of specific findings with respect to the defendant's criminal history); United States v. Miller, 874 F.2d 466, 470 (7th Cir. 1989) (observing that a departure from the Guidelines should set forth a specific explanation referring to the criminal history categories and their intended applicability).

160. See United States v. Ellis, 935 F.2d 385, 396 (1st Cir. 1991) (affirming upward departure based on extreme psychological harm to a child subjected to extensive sexual abuse); United States v. Reyes, 927 F.2d 48, 51-52 (1st Cir. 1991) (approving an upward departure based upon the reckless endangerment of the lives of smuggled aliens); United States v. Hernandez, 941 F.2d 133, 141 (2d Cir. 1991) (upholding a district court's upward departure for a defendant who used a weapon during drug trafficking); United States v. Pergola, 930 F.2d 216, 219 (2d Cir. 1991) (holding that defendant's harassing communications to his girlfriend that resulted in severe emotional and behavioral impairment warranted departure); United States v. Feekes, 929 F.2d 334, 337 (7th Cir. 1991) (observing that upward departure was appropriate because the defendant distributed heroine in prison); United States v. Morin, 935 F.2d 143, 145 (8th Cir. 1991) (finding that the extraordinarily young age of a sexual assault victim and the resulting serious psychological harm justified upward departure); United States v. Perkins, 929 F.2d 436, 438 (8th Cir. 1991) (validating the district court's upward departure because of the unusual financial and psychological injury caused by the defendant's credit card fraud); United States v. Loveday, 922 F.2d 1411, 1417-18 (9th Cir. 1991) (endorsing the district court's upward departure since the defendant's manufacturing and storage of pipe bombs in a home constituted a public danger); United States v. Perez-Magana, 929 F.2d 518, 520-21 (9th Cir. 1991) (stating that reckless driving that endangers public safety and subjects passengers to "dangerous treatment" can be sufficient to justify upward departure); United States v. Sweeting, 933 F.2d 962, 966-67 (11th Cir. 1991) (noting that defendant's membership in a gang that engaged in drive-by shootings and his possession of dangerous firearms for use in drug trafficking sufficiently justified the district court's upward departure); United States v. Correas-Vargas, 860 F.2d 35, 38 (2d Cir. 1988) (finding that the district court appropriately considered the large amount of cocaine possessed by the defendant in granting upward departure).

161. The Guidelines specifically provide, "If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence depart-
Eighth Circuit, for example, invited such departures by approving them on a wide variety of grounds, including: convictions too old\textsuperscript{162} or too minor\textsuperscript{163} to be included in calculating the offender’s criminal history category (CHC); unduly lenient past sentences;\textsuperscript{164} evidence of prior similar adult conduct not resulting in a criminal conviction;\textsuperscript{165} similarity of the current offense conduct to prior offense conduct;\textsuperscript{166} commission of the offense while on probation or pending trial in another case;\textsuperscript{167} and post-arrest conduct suggesting likelihood of recidivism.\textsuperscript{168} The Eleventh Circuit was similarly hospitable to CHC-based upward departures.\textsuperscript{169}
The Eighth and Eleventh Circuits were deferential to sentencing courts in that they imposed no specific structuring requirement. This is in sharp contrast to the Ninth Circuit, for example, which vacated numerous CHC-based upward departures on the ground that the district court failed to provide an adequate explanation by way of analogy to higher categories. The Second Circuit also reviewed upward departures relatively aggressively, expressly discouraging upward departures beyond Category VI. The Ninth Circuit’s upward departure jurisprudence was also notable in that the court rejected upward departures based both on facts that were rejected by a jury’s acquittal and on charges dismissed pursuant to a plea agreement.

criminal, despite the fact that defendant did not have the requisite two felony convictions, because he was a “habitual criminal” with a high likelihood of recidivism). The Eleventh Circuit often permitted substantial departures from the Guidelines. Specifically, in both Briggman, 931 F.2d at 708-10, and Campbell, 888 F.2d at 79, the court affirmed sentences nearly double those prescribed by the Guidelines.

170. See United States v. Rodriguez-Castro, 908 F.2d 438, 442-43 (9th Cir. 1990) (finding that the district court was “obligated to justify the extent of its departure by analogy to the guideline sentences of defendants in a higher criminal category”); see also United States v. Gayou, 901 F.2d 746, 750 n.4 (9th Cir. 1990) (vacating an upward departure and stating that, “the district court can [not] simply throw the Guidelines to the wind once it decides to depart, and we intend to make it clear that the district court cannot do so”); United States v. Cervantes Lucatero, 889 F.2d 916, 917-19 (9th Cir. 1989) (vacating an upward departure from 12 to 24 months because the district court did not provide sufficiently specific reasons for the departure).

171. See United States v. Cervantes, 878 F.2d 50, 55 (2d Cir. 1989) (finding that upward departures are appropriate in “only the most compelling circumstances”).

172. In United States v. Brady, the court declined to follow other circuits on this issue and held that a sentencing court may not depart upward based on a factor that was necessarily rejected by the jury. 928 F.2d 844, 851 (9th Cir. 1991), overruled on other grounds by Nichols v. United States, 114 S. Ct. 1921, 1928 (1994). As the court explained:

We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted. The Guidelines recognize that voluntary manslaughter is to be punished less severely than murder by setting a lower base offense level for voluntary manslaughter than for murder. A sentencing court should not be allowed to circumvent this statutory directive by making a finding of fact—under any standard of proof—that the jury necessarily rejected by its judgment of acquittal.

Id.

173. See United States v. Castro-Cervantes, 927 F.2d 1079, 1082 (9th Cir. 1991) (vacating a departure from a range of 30 to 37 months to 60 months which was based on robbery charges dismissed by plea agreement). The court held that under section 6B1.2(a) of the Guidelines, “the sentencing court
3. Downward Departures

The extensive downward departure jurisprudence of the six circuits in our study varied sufficiently to warrant a brief discussion on each circuit’s approach. A consistent rejection of departures based on individual offender characteristics characterized the First Circuit’s downward departure jurisprudence in 1991 and 1992. Reversals of downward departures based on the defendant’s pregnancy, family responsibility and impact of the defendant’s incarceration on children, the defendant’s alcohol and drug dependency, the defendant’s employment record, and the defendant’s passivity in committing the crime and desire for rehabilitation are illustrative. The First Circuit also has rejected as a departure basis the defendant’s should reject a plea bargain that does not reflect the seriousness of the defendant’s behavior and should not accept a plea bargain and then later count dismissed charges in calculating the defendant’s sentence.” Id; see also United States v. Faulkner, 952 F.2d 1066, 1070 (9th Cir. 1991) (vacating an upward departure from a range of 63 to 78 months to 144 months based on robbery charges dismissed by a plea agreement, noting that the court’s use in sentencing of charges dropped pursuant to the plea agreement was “patently unfair” and would “undermine the integrity of the plea bargaining system” by “severely undermin[ing] the incentive of defendants to enter into plea bargains”).


176. See United States v. Rushby, 936 F.2d 41, 43 (1st Cir. 1991) (holding that a history of drug and alcohol abuse coupled with recent sobriety does not justify a downward departure); United States v. Citro, 938 F.2d 1431, 1440 (1st Cir. 1991) (rejecting a downward departure based on the offender’s drug dependency), cert. denied, 502 U.S. 1044 (1992).

177. See Rushby, 936 F.2d at 43 (holding that the defendant’s steady and successful employment in his own business did not justify a downward departure).

178. See United States v. Deane, 914 F.2d 11, 14 (1st Cir. 1990) (reversing a downward departure in a child pornography case that had been based on the passive nature of the defendant’s conduct and his “otherwise exemplary life”); United States v. Studley, 907 F.2d 254, 257-59 (1st Cir. 1990) (rejecting a downward departure in a child pornography case that had been based on the fact that the defendant was a “useful person,” the defendant’s “posture of rehabilitation,” and the lack of an appropriate treatment program in prison). Together, Deane and Studley indicate that the First Circuit strongly discourages downward departures in child pornography cases.
post-offense efforts at rehabilitation.\textsuperscript{179} As these cases demonstrate, the court adhered fairly rigidly to the goal of uniformity in guideline application, particularly when considering what factors place an offender outside the "heartland" of typical cases.

In striking contrast, the Second Circuit often affirmed departures based on the offender's individual characteristics. Examples included the defendant's family ties and circumstances,\textsuperscript{180} employment history,\textsuperscript{181} and physical characteristics as they related to likelihood of abuse in prison.\textsuperscript{182} Also notable from the Second Circuit was \textit{United States v. Garcia},\textsuperscript{183} which affirmed a downward departure based on the defendant's cooperation with the government.\textsuperscript{184} The defendant's actions re-

\textsuperscript{179} See \textit{United States v. Sklar}, 920 F.2d 107, 115-16 (1st Cir. 1990) (quoting \textit{Studley}, 907 F.2d at 259) (rejecting a downward departure for pre-sentence rehabilitation that is not "so extraordinary as to suggest it's present to a degree not adequately taken into consideration by the acceptance of responsibility reduction"). Some have criticized the court for this decision. See, e.g., Aaron Rappaport, \textit{Guideline Developments in the First Circuit: The Two Faces of Appellate Review}, 5 FED. SENT. REP. 267, 268 (1993) (quoting an attorney characterizing \textit{Sklar} as "the worst case yet under the guidelines").

\textsuperscript{180} See \textit{United States v. Johnson}, 964 F.2d 124, 128-30 (2d Cir. 1992) (affirming a downward departure for a defendant who was the sole custodial parent of three minor children, including one who was disabled); \textit{United States v. Alba}, 933 F.2d 1117, 1122 (2d Cir. 1991) (affirming a downward departure on the basis of the defendant's responsibility for the care of two minor children and disabled parents, as well as the defendant's employment history); \textit{see also} \textit{United States v. Sharpsteen}, 913 F.2d 59, 63-64 (2d Cir. 1990) (remanding for determination of whether the defendant's family circumstances were sufficiently extraordinary to warrant departure).

\textsuperscript{181} See \textit{United States v. Jagmohan}, 909 F.2d 61, 65 (2d Cir. 1990) (affirming a downward departure in a bribery case, based in part on the defendant's stable employment history). The court in \textit{Jagmohan} acknowledged that employment history is not ordinarily relevant to the decision to depart, but concluded that the district court's determination that this case was extraordinary deserved great deference. "We do not view this appeal as presenting an instance in which we should reject the assessment of an experienced district judge that the case presents exceptional circumstances." \textit{Id.}

\textsuperscript{182} See \textit{United States v. Gonzalez}, 945 F.2d 525, 526 (2d Cir. 1991) (affirming a downward departure on the basis of defendant's extreme vulnerability to physical assault); \textit{United States v. Lara}, 906 F.2d 599, 603 (2d Cir. 1990) (upholding a downward departure based on the defendant's "vulnerability due to his immature appearance, sexual orientation, and fragility"). The \textit{Lara} court expressed a very expansive view of the sentencing judge's departure authority, explaining that "it was not Congress' aim to straightjacket a sentencing court, compelling it to impose sentences like a robot inside a Guidelines' glass bubble." \textit{Id.} at 604.

\textsuperscript{183} 926 F.2d 125 (2d Cir. 1991).

\textsuperscript{184} \textit{Id.} at 128.
sulted in prompt disposition of related cases.\footnote{Garcia is unusual because it permits docket control considerations to affect sentencing disposition, a basis for downward departure that other circuits do not typically employ.}

The Seventh Circuit consistently rejected downward departures, particularly those based on offender characteristics. The court's approach to offender-based downward departures is best exemplified by its decision in United States v. Thomas,\footnote{in which the court rejected as a basis for departure the defendant's status as sole caretaker of three children, one of whom was mentally disabled.} The court read section 5H1.6 of the United States Sentencing Guidelines Manual as prohibiting departure based on family circumstances where probation is not a sentencing option, even in extraordinary cases.\footnote{The restrictive view of departure articulated in Thomas was representative of the tone of Seventh Circuit caselaw; the court denied downward departures based on such factors as the defendant's mental condition,\footnote{age, physical condition, and conclusions that an offense constituted a single act of aberrant behavior.} It also rejected downward departures based on culpability considerations such as the low purity of the defendant's illicit drugs and victim misconduct.}

\footnotetext[185]{Id.}
\footnotetext[186]{930 F.2d 526 (7th Cir.), cert. denied, 502 U.S. 857 (1991), partially superseded by regulation as stated in United States v. Canoy, 38 F.3d 893, 905-07 (7th Cir. 1994).}
\footnotetext[187]{Id. at 526. Subsequently, the Seventh Circuit noted that a recent amendment to section 5H1.6 of the U.S. Sentencing Guidelines Manual affected one basis of its decision in Thomas. Therefore, the court corrected Thomas by holding in Canoy that "a district court may depart from an applicable guidelines range once it finds that a defendant's family ties and responsibilities or community ties are so unusual that they may be characterized as extraordinary." Canoy, 38 F.3d at 905-07.}
\footnotetext[188]{Thomas, 930 F.2d at 530.}
\footnotetext[189]{See United States v. Poff, 926 F.2d 588, 593 (7th Cir.) (holding that a downward departure is not justified for a defendant with a reduced mental capacity and a history of violent crime), cert. denied, 502 U.S. 827 (1991).}
\footnotetext[190]{See United States v. Carey, 895 F.2d 318, 324 (7th Cir. 1990) (declaring improper a downward departure for a 62-year-old defendant absent additional findings).}
\footnotetext[191]{Id. at 324.}
\footnotetext[192]{Id. at 325 (holding that a first time offense which involved extensive planning over a 15-month period did not justify downward departure for a single act of aberrant behavior).}
\footnotetext[193]{See United States v. Upthegrove, 974 F.2d 55, 56 (7th Cir. 1992) (holding that a downward departure was not justified for possessing, with the intent to distribute, only low-grade "filler" marijuana).}
The Eighth Circuit demonstrated a relatively balanced approach to review of downward departures. The court typically affirmed downward departures based on offense seriousness or offender culpability. In contrast, the court's record in evaluating downward departures that were based on individual offender characteristics was mixed, although the court rejected such factors in most cases. For example, the court generally rejected family and community ties as insufficiently atypical to warrant departure. The court also rejected factors such as the offender's cultural background, first offender status, and physical blocking the doorway of the defendant's home are not victim misconduct justifying a downward departure, 

194. See United States v. Bigelow, 914 F.2d 966, 975 (7th Cir. 1990) (holding that refusing to pay debts, possessing an unpleasant voice and demeanor, and physically blocking the doorway of the defendant's home are not victim misconduct justifying a downward departure), cert. denied, 498 U.S. 1121 (1991).

195. See, e.g., United States v. Crumb, 902 F.2d 1337, 1340 (8th Cir. 1990) (affirming a downward departure in a failure to surrender for service of sentence case where the defendant surrendered voluntarily after a short delay); United States v. Yellow Earrings, 891 F.2d 650, 654 (8th Cir. 1989) (affirming a downward departure in an assault case based on victim misconduct which "substantially contributed to provoking the offense behavior"). But see United States v. Desormeaux, 952 F.2d 182, 185 (8th Cir. 1991) (holding that the defendant's physical and psychological abuse was "too attenuated" to warrant departure); United States v. Shortt, 919 F.2d 1325, 1328 (8th Cir. 1990) (reversing a downward departure for an offender who manufactured a pipe bomb to blow up his spouse's lover, noting that "[t]hough certainly wrongful and provocative, adultery does not justify blowing up the adulterers, or building a bomb capable of doing so").

The court also upheld a downward departure when the negligence of government officials was partly responsible for the offense. See United States v. Whitehorse, 909 F.2d 318, 319 (8th Cir. 1990) (affirming a downward departure in a case involving an "escape" from a federal institution, where prison officials were responsible for the failure to properly supervise the offender's prison furlough).

196. In United States v. Neil, 903 F.2d 564, 565 (8th Cir. 1990), the court held that the defendant's supportive family relationships and his community ties (specifically the fact that he coached young athletes in his community) were not sufficiently unusual to constitute mitigating circumstances not adequately considered in the Guidelines. See also United States v. Sutherland, 890 F.2d 1042, 1043 (8th Cir. 1989) (per curiam) (affirming the district court's refusal to depart downward for family and community ties).

Similarly, in Shortt, the court vacated a family circumstances departure based on the defendant's wife's history of drug and alcohol abuse and on his father's disability. In its conclusion, the appellate court noted the wife's testimony at trial that she had overcome her problems and that the defendant had two brothers who were capable of assisting the father. 919 F.2d at 1328.

197. In United States v. Natal-Rivera, 879 F.2d 391, 393 (8th Cir. 1989), the court rejected the defendant's claim that a downward departure was justified because her cultural background socialized her to follow her husband's commands to engage in illegal conduct.
military record,\textsuperscript{199} status as a bi-racial adopted child,\textsuperscript{200} and post-offense rehabilitation.\textsuperscript{201} In \textit{United States v. Big Crow},\textsuperscript{202} however, the court upheld a substantial downward departure in an assault case, based on the defendant's employment record and community ties.\textsuperscript{203} While acknowledging that employment and community ties are not ordinarily relevant in sentencing, the court emphasized that the defendant's ability to maintain employment despite the extreme adversity of the social and economic environment on the Pine Ridge Indian Reservation made the defendant's case extraordinary enough to warrant departure.\textsuperscript{204} The Eighth Circuit also agreed with the Second Circuit in permitting a departure based on the of-

\textsuperscript{198} See, e.g., Neil, 903 F.2d at 566 (finding that the criminal history score adequately accounted for first offender status).

\textsuperscript{199} In \textit{Neil}, the court rejected as a basis for a downward departure the defendant's \textsuperscript{11} years of military duty within the continental United States, explaining that such a career is not meaningfully distinguishable from the work history of steadily employed individuals holding responsible positions in the civilian work force." \textit{Id.} The court left open the possibility, however, that a downward departure may be possible for a defendant with a particular exemplary military record, one who has "displayed the attributes of courage, loyalty, and personal sacrifice that others in society have not." \textit{Id.}

\textsuperscript{200} The court rejected this as a basis for departure in \textit{United States v. Prestemon}, 929 F.2d 1275, 1277-78 (8th Cir.) ("We do not think an offender's status as an adopted child is so unusual or atypical that the Sentencing Commission did not adequately take such circumstances into consideration in formulating the guidelines."). cert. denied, 502 U.S. 877 (1991).

\textsuperscript{201} In \textit{United States v. Desormeaux}, the court rejected the defendant's post-arrest rehabilitation efforts (specifically, attainment of her GED) and her potential contribution to society as bases for departure. 952 F.2d 182, 185-87 (8th Cir. 1991). The \textit{Desormeaux} court adopted the analysis of the Fourth and Seventh Circuits, holding that post-offense rehabilitation is equivalent to acceptance of responsibility under section 3E1.1 of the Guidelines, and is not a basis for departure. \textit{Id.} at 185-86 (citing United States v. Bruder, 945 F.2d 167, 173 (7th Cir. 1991) (en banc) and United States v. Van Dyke, 895 F.2d 984, 987 (4th Cir.), cert. denied, 498 U.S. 838 (1990)).

\textsuperscript{202} 898 F.2d 1326 (8th Cir. 1990).

\textsuperscript{203} \textit{Id.} at 1332.

\textsuperscript{204} \textit{Id.} ("Big Crow's excellent employment history, solid community ties, and consistent efforts to lead a decent life in a difficult environment are sufficiently unusual to constitute grounds for . . . departure . . ."). The court emphasized the reservation's 72\% unemployment rate and average annual income of $1,042 in support of its conclusion that this was an unusual case. \textit{Id.} at 1331. Although the court acknowledged that consideration of these factors was tantamount to departure on the basis of national origin and socioeconomic status, factors inappropriate under section 5H1.10 of the Guidelines, it ignored those limitations, implying (but not holding) that section 5H1.10 is inconsistent with the SRA's legislative history. \textit{Id.} at 1332 n.3.
fender's extraordinary physical impairment and consequent vulnerability to attack in prison.\textsuperscript{205}

The Ninth Circuit exhibited a mixed response to departures based on individual offender characteristics. Generally, the court rejected as bases for departure such individual offender characteristics as the defendant's substance abuse,\textsuperscript{206} drug rehabilitation,\textsuperscript{207} age,\textsuperscript{208} need for psychiatric help,\textsuperscript{209} family circumstances,\textsuperscript{210} and employment history.\textsuperscript{211} In contrast, however, this circuit was responsible for several interesting and controversial cases permitting downward departure based on offender characteristics such as lack of youthful guidance,\textsuperscript{212} prior benevolent acts,\textsuperscript{213} and a history of childhood abuse.\textsuperscript{214}

\begin{itemize}
  \item \textsuperscript{205} United States v. Long, 977 F.2d 1264, 1277 (8th Cir. 1992).
  \item \textsuperscript{206} See United States v. Martin, 938 F.2d 162, 163 (9th Cir. 1991) (rejecting drug dependence as a basis for departure), cert. denied, 503 U.S. 988 (1992); United States v. Page, 922 F.2d 584, 585 (9th Cir. 1991) (finding the defendant's extreme alcoholism was not an appropriate departure factor); United States v. Sanchez, 933 F.2d 742, 746-47 (9th Cir. 1991) (finding that the defendant's addiction to legal prescription drugs was not a basis for departure).
  \item \textsuperscript{207} See Martin, 938 F.2d at 163 (holding defendant's post-arrest drug rehabilitation efforts do not constitute a valid basis for departure because the Commission's policy statement accompanying section 5H1.4 of the Guidelines indicates that the Commission adequately addressed this factor in formulating the Guidelines); see also United States v. Anders, 956 F.2d 907, 911 (9th Cir. 1992) (rejecting downward departure based on drug rehabilitation efforts), cert. denied, 507 U.S. 989 (1993).
  \item \textsuperscript{208} In Anders, 956 F.2d at 912, the court rejected as clearly erroneous the district court's finding that the defendant's age (46) was extraordinary because it represented a "critical time in [the defendant's] life."
  \item \textsuperscript{209} See United States v. Deering, 909 F.2d 392, 395 (9th Cir. 1990) (stating that "the need for psychiatric treatment is not a circumstance which justifies departure").
  \item \textsuperscript{210} See United States v. Berlier, 948 F.2d 1093, 1096 (9th Cir. 1991) (vacating departure from 15 months to probation in embezzlement case and quoting United States v. Daly, 883 F.2d 313, 319 (4th Cir. 1989), cert. denied, 496 U.S. 927 (1990), in noting that imposition of a prison sentence "normally disrupts spousal and parental relationships," and that this is an insufficient reason for departure).
  \item \textsuperscript{211} See Anders, 956 F.2d at 913 (finding no extraordinary or unusual aspect in an employment record when the defendant held a steady job until his drug use made it impossible to continue working).
  \item \textsuperscript{212} See United States v. Floyd, 945 F.2d 1096, 1099 (9th Cir. 1991) (upholding a departure from a range of 360 months to life to 204 months because of the defendant's "[l]ack of guidance and education, abandonment by parents, and imprisonment at age 17"), overruled by United States v. Atkinson, 990 F.2d 501, 503 (9th Cir. 1993).
  \item \textsuperscript{213} In United States v. Takai, 941 F.2d 738, 744 (9th Cir. 1991), the court stated:...
\end{itemize}
The court was also more willing than other appellate courts to recognize aberrant behavior as a legitimate basis for downward departure. *United States v. Takai*\(^{215}\) established that even a series of acts over a period of time can constitute a "single act" of aberrant behavior under the Guidelines.\(^{216}\) In *United States v. Morales*,\(^{217}\) the court actually vacated a sentence because the district court failed to consider whether to depart on the basis of aberrant behavior.\(^{218}\) Thus, *Morales* extends tremendously the potential scope of the aberrant behavior departure, even suggesting that the absence of proof of other criminal activity is sufficient to support a finding of aberrancy.\(^{219}\) Another sig-

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The government conceded at oral argument that if Mother Teresa were accused of illegally attempting to buy a green card for one of her sisters, it would be proper for a court to consider her saintly deeds in mitigation of her sentence. A gangster, on the other hand, should not be able to get credit for his or her calculated charities. Where a defendant has a blameless record, his or her outstanding generosity should be able to be taken into account. With the principle established, it is only a matter of degree, and it seems entirely appropriate for outstanding good deeds by Takai to be considered . . . .

214. In *United States v. Roe*, the court reversed, as clearly erroneous, the district court's conclusion that the circumstances of Roe's abusive childhood were not "extraordinary" for departure purposes and remanded the case for the district court to determine whether a departure from the defendant's 145-month bank robbery sentence was warranted. 976 F.2d 1216, 1218-19 (9th Cir. 1992). The court's unusual determination in this case was not only based on the details of Roe's horrific childhood abuse, but on the uncontradicted testimony of three medical experts who characterized her abuse as exceptional. *Id.* at 1218.

215. 941 F.2d 738 (9th Cir. 1991).

216. *Id.* at 743 ("It is fair to read 'single act' to refer to the particular action that is criminal, even though a whole series of acts lead up to the commission of the crime."). This ruling contrasts sharply with the Seventh Circuit's approach in *United States v. Carey*. 895 F.2d 318, 324-25 (7th Cir. 1990) (ruling multiple acts in check-kiting scheme were not a single act of aberrant behavior).

217. 961 F.2d 1428 (9th Cir. 1992).

218. *Id.* at 1432. The court held that the district court committed clear error in holding that no facts justified a finding of aberrant behavior:

> Morales had no criminal history and was convicted of one isolated criminal act. There is no evidence whatsoever in the record that Morales was a regular participant in an ongoing criminal enterprise or that he has been convicted of several unrelated illegal acts. Because the absence of evidence of continued criminality constitutes a finding of aberrancy, the district court erred in thinking that additional findings were necessary to give it the authority to depart down.

*Id.*

219. *Id.; see also United States v. Fairless*, 975 F.2d 664, 667-69 (9th Cir. 1992) (affirming a departure based on aberrant behavior in a bank robbery case because of first time offender status, emotional distress arising from job loss, and character testimony).
significant Ninth Circuit decision permitted a district court to depart based on the defendant drug courier's "marginal culpability." This decision was significant not only because it could influence district courts' departure behavior in a large number of drug cases, but also because it permits district courts to take into account social and economic conditions in assessing departure factors.

In contrast, the Ninth Circuit rejected factors relating only indirectly to the offense and the defendant's culpability. In United States v. Berlier, the court rejected restitution as a basis for downward departure because downward departure for acceptance of responsibility already takes restitution into account. The court has held that imperfect entrapment, alleged governmental misconduct falling short of the legal standards for an entrapment defense on the merits, is not a basis for departure. The court also held in United States v. Williams that a government agent's perjury before a grand jury did not warrant departure. The court suggested in Williams that departures on the basis of factors other than the circumstances of the offense or the character of the offender are not permitted. It concluded that "the only purpose of a depa-

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220. See United States v. Valdez-Gonzalez, 957 F.2d 643, 650 (9th Cir. 1992) (upholding a downward departure from a range of 33 to 41 months to 8 months based on the defendant drug courier's relative lack of culpability). While citing United States v. Bierley, 922 F.2d 1061, 1069 (3d Cir. 1990), the Valdez-Gonzalez court held that a "mule's" role is a mitigating circumstance which the Commission did not adequately consider, despite the existence of a section 3B1.2 role adjustment. 957 F.2d at 648-49.

221. The court also upheld the district court's reliance on the socio-economic conditions along the Mexican border in assessing the defendant's relative culpability. United States v. Valdez-Gonzalez, 957 F.2d 643, 649 n.3 (9th Cir. 1992) (citing United States v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990)). The district court stated that "one of the reasons that I am departing in this case is...the [Sentencing] commission had no way of considering the conditions along the Mexican border where these people [drug mules] are starving to death..." Id. at 645.

222. 948 F.2d 1093 (9th Cir. 1991).

223. Id. at 1096.


226. Id. at 1136.

227. Id.
ture would be to deter government misconduct, a purpose having no relation to goals of the Sentencing Reform Act.\textsuperscript{228}

The Eleventh Circuit rejected downward departure factors almost as consistently as it affirmed upward departures. Although in principle the court recognized the permissibility of departures based on individual offender characteristics,\textsuperscript{229} it held a particularly dim view of such departures and typically concluded that individual circumstances were insufficiently extraordinary to permit sentence mitigation.\textsuperscript{230}

The court denied downward departures based on other considerations as well. For example, in *United States v. Gonzalez-Lopez*,\textsuperscript{231} the court rejected the district court's conclusion that departure from the career offender category was warranted where the defendant's predicate offenses did not involve force.\textsuperscript{232} The Eleventh Circuit determined that the Commission adequately considered this factor, as the Guidelines distinguish between offenses in which the use of force causes injury and offenses that merely involve the threat of force.\textsuperscript{233} Finally, the court rejected a prisoner's voluntary return to custody\textsuperscript{234}

\begin{footnotes}
\item[228] Id. The court decided this case after the district court sentencing decisions that our study analyzes.
\item[229] See *United States v. Mogel*, 956 F.2d 1555, 1562 (11th Cir. 1992) ("We do not interpret this instruction [sections 5H1.1-6 of the Guidelines] as categorically prohibiting departures from the guidelines sentence range based on the listed offender characteristics ... [h]ad the [Congress] wanted to do that, it knew how.") (quoting *United States v. Thomas*, 930 F.2d 526, 529-30 (7th Cir. 1991)).
\item[230] See id. at 1565 (finding the family responsibilities and dependence of the defendant's two minor children and her mother did not warrant a downward departure, and the defendant's ownership of her own business was not sufficiently extraordinary to warrant departure); *United States v. Cacho*, 951 F.2d 308, 311 (11th Cir. 1992) ("[The defendant] has shown nothing more than that which innumerable defendants could no doubt establish: namely, that the imposition of prison sentences normally disrupts ... parental relationships.") *United States v. Daly*, 883 F.2d 313, 319 (4th Cir. 1989)); *United States v. Russell*, 917 F.2d 512, 516-17 (11th Cir. 1990) (explaining that psychologist's testimony that the defendant suffered from "dependent personality disorder" was insufficient to warrant a downward departure), \textit{cert. denied}, 499 U.S. 953 (1991). \textit{But see} *United States v. Williams*, 948 F.2d 706, 710-11 (11th Cir. 1991) (recognizing the possibility of departure for extraordinary acceptance of responsibility based on drug rehabilitation, but declining to award it under facts of this case); *United States v. Philibert*, 947 F.2d 1467, 1472 (11th Cir. 1990) (recognizing possibility of downward departure for mental condition and remanding to sentencing judge to consider applicability of such a departure).
\item[231] 911 F.2d 542 (11th Cir. 1990).
\item[232] Id. at 549-50.
\item[233] Id. at 550-51.
\item[234] See *United States v. Weaver*, 920 F.2d 1570, 1574 (11th Cir. 1991).
\end{footnotes}
and another defendant's minimal role in transporting cocaine as reasonable bases for departure.

C. CONCLUSION

As the appellate court analysis indicates, there are common threads in the departure jurisprudence of the circuits in this study. All six circuits applied the Diaz-Villafane standard of review, and each of the appellate courts tended to affirm upward departures, particularly those based on case-specific offense circumstances. The circuits differed significantly, however, with respect to downward departures. The circuits split over discrete issues such as the permissibility of reliance on individual offender characteristics, family ties and circumstances, employment history, and prior good works. The Second Circuit tended to accommodate such downward departures, particularly those based on individual offender characteristics, while the Seventh Circuit prohibited such departures almost entirely. The appellate courts also differed as to whether a sentencing judge could depart upward from a career offender sentence because the offender's criminal history category understated the nature and extent of prior criminal conduct.

Beyond these discrete issues, the most noticeable difference among the circuits was the degree of deference with which they reviewed the extent of departures. While the First and Eighth Circuits were highly deferential in this regard, especially regarding upward departures, the Second and Seventh Circuits reviewed the reasonableness of departures more rigorously. The Ninth Circuit eschewed substantive reversals based on the extent of upward departures, but employed stringent procedural requirements to control those departures. When analyzing the departure practices in the district courts, it is important to bear in mind these differences in jurisprudence among the circuit courts.

236. See supra text accompanying notes 148-152 (explaining the Diaz-Villafane standard of review).
237. See supra notes 160-173 and accompanying text (discussing divergence among the circuits in their treatment of upward departures based on criminal history).
IV. DISTRICT COURT DEPARTURE ANALYSIS: GENERAL CONCLUSIONS

The Commission report on which this Article is based, contains a detailed, district-by-district analysis of our findings regarding district court departure practices which is far too lengthy to reproduce in this Article. This section will, however, broadly summarize some of the major observations derived from our extensive review of case files. First, however, a caveat: broad generalizations about district court departure practices are extremely difficult, due to the enormous range of fact patterns, departure rationales, and the inherent methodological limitations of the kind of exploratory research this Article represents. A detailed review of 1,400 departure decisions produced a mountain of impressions and data that tend to defy easy categorization. As the Commission stated in its introduction to the initial set of Guidelines, the factors that warrant departure cannot be delineated in advance because of the "vast range of human conduct potentially relevant to a sentencing decision." This caveat notwithstanding, some patterns emerged which deserve attention and an informed attempt at interpretation.

A. RESISTANCE TO IMPRISONMENT OF WHITE-COLLAR OFFENDERS

Our research suggests a distinct pattern of judicial resistance to imprisonment for white-collar offenders. The Commission made a policy choice, in part because of past disparity and in part at the urging of Congress, to increase sentence severity for white-collar economic offenders. Specifically, Congress designed the Guidelines to provide for a brief period of incarceration for such offenders, most of whom received non-imprisonment sentences of probation in the pre-Guidelines era.


239. For pre-Guidelines attempts to explain perceived disparities in white-collar sentencing, see Kenneth Mann et al., Sentencing the White-Collar Offender, 17 AM. CRIM. L. REV. 479 (1980) (examining judicial perceptions to explain how judges arrive at particular white-collar sanctions); Ilene H. Nagel & John L. Hagan, The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity, 80 MICH. L. REV. 1427 (1982) (testing the hypothesis that sanctions are differentially applied to the benefit of the white-collar class); Stanton Wheeler et al., Sentencing the White-Collar Offender: Rhetoric and Reality, 47 AM. SOC. REV. 641 (1982) (testing and
Our research reveals that downward departures tend, to some extent, to thwart the Commission’s intent to increase the use of imprisonment for serious white-collar offenders and to make sentences for such offenders more comparable to those meted out to non-white-collar offenders found guilty of economic crimes. In the cases we reviewed, white-collar offenders seemed to benefit disproportionately from downward departures. Typically, these departures involve reduction from a modest sentence of imprisonment to probation, or to an intermediate sanction such as home confinement. This pattern seems especially prevalent for female offenders, particularly those involved in embezzlement or social security fraud. Of particular interest is that sentencing judges justified these departures on the basis of individual offender characteristics such as family circumstances, diminished capacity, or the defendant’s expression of remorse, despite the Guidelines’ exhortation to reserve these bases for departure in only extraordinary, unusual, atypical cases.

A careful reading of the case files suggests not only that these departures are not reserved for extraordinary cases, but also that a significant number of these departures are somewhat contrived; that is, these cases reflect offense or offender circumstances that lack the atypicality required by § 3553(b) and the Guidelines departure provisions. This apparent judicial resistance to imprisoning white-collar offenders may reflect the sympathetic character of these defendants, judicial rejection of the Commission’s views regarding the seriousness of white-collar offenses, a judgment by the court that prison is an inappropriate sentence for non-violent offenses, or a combination of these and other factors. Whatever the reason, the pattern may have important implications for the Commission’s future deliberations.

B. RARITY OF UPWARD DEPARTURES

The aggregate statistical data published each year by the Commission indicate that upward departures from the Guidelines are quite rare. Our analysis suggests that “true” up-
ward departures, that is, those where the defendant receives a sentence higher than required by the applicable, properly applied Guidelines sentencing range, are even more rare than the published figures suggest. We found a significant number of cases where a sentence reported as an upward departure was actually lower than the sentence which the court should have applied under the Guidelines as the Commission designed them. We characterized these cases as "down-ups"—upward departures designed to partially offset the impact of prosecutorial charging decisions favorable to the defendant.

Down-ups typically occurred in drug trafficking cases or in cases involving weapons enhancements. In the former, a typical pattern involved a defendant who would be permitted to plead to a telephone count or to misprision, rather than to a substantive drug trafficking count under 21 U.S.C. § 841. The sentencing judge, determining the plea to be appropriate, but the resulting sentence too low in view of the actual offense conduct, would accept the plea but depart upward from the lower Guidelines range. Although correctly coded as a departure from the "applicable" Guidelines sentencing range, the net result was a lower sentence for the defendant than called for in light of the real offense behavior—hardly a "true" upward departure.

Similar practices were common in departures that involved exposure to a lengthy sentence as a result of the prescribed guideline enhancement for possession of a dangerous weapon. Typically, the defendant would stipulate in a binding plea agreement to an upward departure from the applicable range for a felon-in-possession offense. In exchange, the prosecutor would agree not to pursue an armed career criminal enhancement, which carries a fifteen-year mandatory sentencing enhancement. The result was a departure from the Guidelines range, but a sentence considerably lower than the defen-

241. In many of these cases, the upward departure would be stipulated in a binding plea agreement. For example, a defendant involved in a trafficking offense, potentially subject to a sentence of 63 to 78 months, would plead guilty to a telephone count which carries a statutory maximum of 48 months. The plea agreement would provide for a sentence at or near the maximum, yet still less than the Guidelines range (or applicable mandatory minimum sentence) for trafficking.

242. See 18 U.S.C.A. § 924(e)(1) (West 1990) (stating sentence of "not less than fifteen years" for felon-in-possession with three previous convictions for a violent felony or serious drug offense).
dant would have received had there not been a plea agreement to a below-guideline sentence.

In some districts, these down-ups accounted for as many as half of the reported upward departures. This suggests that true upward departures occur even less frequently than the published aggregate statistical data indicate. Additionally, this pattern may also suggest evidence that some judges accept plea agreements that do not adequately reflect the defendant's offense.243

C. MALLEABILITY OF CRIMINAL HISTORY CATEGORIES

Our analysis indicates that departures under section 4A1.3, on the basis of the offender's criminal history scores, are relatively common and that the extensive use of this ground for departure is perhaps explained by the malleability of this factor.

When the Commission elected to use an offender's prior sentencing history as the basis for coding the criminal history score, it discussed at length the potential for this approach to under- or over-characterize the prior record. For example, this approach provides no distinction between an offender previously sentenced to five ten-year terms, versus an offender sentenced to five eighteen-month terms. Moreover, no account is taken of the fact that an offender may have been sentenced to probation for a prior rape, or to ten years for a petty theft. For these reasons, among others, the Commission provided in section 4A1.3 that a departure may be appropriate when, in a specific case, a review of the defendant's prior record indicates to the court that the criminal history category under- or over-represents the offender's prior sentencing record. As with all departures, the working hypothesis was that this departure provision would be used sparingly, reserving it for the truly atypical extraordinary cases. It was included, however, to offset a potentially inappropriate sentence in recognition of the limitations of the measure of criminal sentencing history used.

243. See also Nagel & Schulhofer, A Tale of Three Cities, supra note 146, at 527-36 (discussing judicial approval of charging and bargaining practices that circumvent the Guidelines). The policy statement governing acceptance of plea agreements urges judges to reject those plea agreements that do not "adequately reflect the seriousness of the actual offense behavior." U.S.S.G. (1995), supra note 33, § 6B1.2(a). Thus, the sentencing judge who determines that a plea agreement does not capture the seriousness of the offender's conduct should reject the plea, rather than depart upwardly to offset the impact of the plea on the Guidelines sentence.
The Commission was cognizant of this limitation; however, other measures of prior criminal record such as felonies and misdemeanors were similarly imperfect.

An examination of the data reveals that criminal history served as the basis for a significant number of departures, both upward and downward. In many districts, inadequacy of the defendant's CHC in capturing the true extent of prior offenses accounted for virtually all upward departures; overall, it accounted for more than half of such sentences. In part, these cases arose because the criminal history calculation did not differentiate adequately among more and less serious criminal records. It is also possible that the ready acceptance of CHC-based upward departures by most courts of appeals permitted sentencing judges to use inadequate CHCs as a rationale for avoiding imposition of a Guidelines sentence the judge believed too low in light of the perceived seriousness of the offense.

There also were a significant number of cases in which courts departed downward because the court found that the offender's criminal history score overstated the nature and seriousness of the offender's past criminal conduct. Among these cases, two patterns emerged. First, judges seemed to depart downward to offset the impact of the criminal history score of the prior offense involved, such as drunk or reckless driving, petty thefts, or passing bad checks. This was especially common when the instant offense conduct was fairly serious, such as bank robbery, and when the impact of prior convictions was significant in absolute terms. The extensive use of such departures is interesting because it represents a judgment by individual judges to reject the Commission's explicit decision to include such prior offenses in the calculation of the criminal history score.

The second pattern, and an even more interesting phenomenon in CHC-based downward departure cases, was the extensive use of departures from sentences generated by the career offender provisions. Our study revealed a number of

244. See supra text accompanying notes 161-169 (describing the Eighth and Eleventh Circuits' willingness to depart upwardly for a variety of CHC-based grounds).

245. For example, sentencing judges in several cases reduced the CHC for bank robbery offenders, resulting in sentences near 30 months, rather than the 51 to 63 month range applicable absent the CHC-based departure.

246. The Guidelines sentences for career offenders, defined as those con-
cases in which a sentencing judge declined to sentence the defendant under the career offender guideline,\(^{247}\) despite the offender's rightful classification under statutory criteria as a career offender. These departures sometimes occurred because the court deemed one or more of the predicate convictions, although technically a predicate felony, to be minor or too remote in time to warrant consideration.\(^{248}\) In such cases, the judge typically would impose the sentence that would have been applicable in the absence of the career offender provisions. Such departures were often accompanied by disparaging comments about the career offender provisions or about the Commission itself. Because the career offender statutory prescription requires a sentence at or near the maximum term authorized,\(^{249}\) the resulting departures were generally quite substantial.

D. DEPARTURE AND JUDICIAL EXPERIENCE/IDEOLOGY

Judge Jack Weinstein, a well-known jurist and frequent commentator on the Guidelines, hypothesized that the frequency of departures and judicial resistance to the Guidelines would gradually diminish as newer judges, with no pre-Guidelines sentencing experience, were appointed and fewer sentences were imposed by those accustomed to the unconstrained authority of the pre-Guidelines era.\(^{250}\)

One might also expect that the political and judicial philosophy of individual judges could affect departure practices. That is, one might predict that judges appointed by the more conservative presidents, such as Reagan and Bush, would be less likely to depart downward from Guidelines sentences and

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248. Similarly, sentencing judges sometimes concluded that two predicate offenses occurred so close in time to one another, or were otherwise so closely related, that they should effectively be treated as one offense.
250. See Jack B. Weinstein, A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines, 5 FED. SENTENCING REP. 1, 13 (July/Aug. 1992) (stating "Judges appointed after 1987, never having experienced the responsibility for full independent judgment and having been trained by the [Federal] Judicial Center in the mechanics of guideline sentencing, will, I hypothesize, tend to be less free about departing").
perhaps more likely to depart upward than judges appointed by Carter, or even by Nixon or Ford. Although we undertook no definitive analysis of this hypothesis, our exploratory examination of these possible relationships suggests that neither hypothesis is correct. While the tendencies of individual judges to depart did vary dramatically, we found no clear ideological or temporal pattern. Reagan and Bush appointees, who were appointed to the bench after promulgation of the Guidelines, appeared to be just as willing as their peers to depart, both up and down. Indeed, some of the most prolific users of departure were post-1987 appointees.

E. LINK BETWEEN APPELLATE JURISPRUDENCE AND DISTRICT PRACTICE

Our research revealed a general pattern of significant, albeit limited, relationships between a circuit court's appellate jurisprudence and the actual departure behavior of district judges.

Our analysis of appellate departure jurisprudence reveals that different circuits vary substantially in their general approaches to departure. The caselaw of some circuits seems to encourage or facilitate departure; in others, it is chilling, or non-facilitative; still others are neutral. For example, the Second Circuit clearly seemed to encourage departures by consistently upholding departures for reasons that other circuits often rejected. Often it based its departures on factors which the Guidelines designate as "not ordinarily relevant." In contrast, the Seventh Circuit discouraged departures by its many reversals of departures and by its rigid reading of the Guidelines provisions governing the use of individual offender characteristics in departure. The Eighth Circuit is an example of an appellate court that might be classified as neutral, taking a

251. Although the existence of a connection between ideology and departure practices was an issue within the scope of our district court analysis, Part IV does not report the particular departure rates or dates of appointment of judges who sit in the districts included in our study. The omission of such information is based on the lack of any meaningful nexus and on our decision to retain judicial anonymity.

252. See supra Part III (discussing and summarizing departure jurisprudence in the appellate circuits).

253. See supra notes 180-185 and accompanying text (describing the Second Circuit's downward departure jurisprudence).

254. See supra notes 186-194 and accompanying text (describing the Seventh Circuit's downward departure jurisprudence).
balanced approach to reviewing district court departure decisions.\textsuperscript{255}

Beyond this rough typology of the general approaches of circuit courts, circuit conflicts exist over particular departure issues, such as whether the defendant's employment record\textsuperscript{256} or the defendant's parenting responsibilities\textsuperscript{257} are permissible departure factors. This said, the question for our research became: To what extent do district court departure patterns reflect appellate court jurisprudence?

1. Departure Practices as Reflections of Circuit Caselaw

We found that departure practices did, to some extent, mirror applicable appellate jurisprudence. An appellate court's general approach to departure review was reflected in the frequency and distribution of departures at the district court level. For example, the five judicial districts we studied in the Seventh Circuit all had downward departure rates below the national average of approximately six percent. Moreover, the incidence of departures based on individual offender characteristics such as family ties was low in all districts in this circuit. These findings likely reflect Seventh Circuit caselaw, which tended to discourage downward departures, particularly those based on offender characteristics.

In contrast, the five districts from the Second Circuit exhibited much higher rates of downward departure; in fact, the District of Connecticut had the highest rate of downward departure of any district in our study. This is consistent with the caselaw of this circuit, which facilitates downward departure. Moreover, district court judges in the Second Circuit frequently justified their decisions to depart downward from the applicable Guidelines sentence on the basis of family ties, a factor almost never cited in the Seventh Circuit, but encouraged by Second Circuit caselaw.

\textsuperscript{255} See supra notes 195-205 and accompanying text (describing the Eighth Circuit's downward departure jurisprudence).

\textsuperscript{256} Compare United States v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990) (affirming downward departure based on employment history and community ties) \textit{with} United States v. Anders, 956 F.2d 907, 913 (9th Cir. 1992) (rejecting employment history as a basis for departure).

The impact of particular decisions or lines of appellate analysis on the approach and reasoning of sentencing judges also is apparent. For example, district court judges in districts in the Ninth Circuit were much more likely than other judges to justify downward departures on the bases of such factors as the defendant's lack of youthful guidance, co-defendant disparity, and aberrant behavior. Each of these grounds for departure reflects a particular appellate decision or series of decisions that placed a stamp of appellate approval on these grounds for departure. Sentencing judges outside the Ninth Circuit tended to cite these grounds with much less frequency, if at all.

2. Intracircuit Variations

The conclusion that appellate caselaw influences district court decision making is not surprising. A somewhat more interesting pattern emerging from our analysis, however, is that there were large variations in departure practice among district courts within circuits. These variations, which cannot be explained by applicable caselaw, apparently are based on differences in the exercise of judicial discretion. A review of the district-by-district data is replete with examples; however, the

258. Use of co-defendant sentence disparity as a ground for departure was encouraged by cases such as United States v. Ray, in which the court upheld a departure from approximately 27 years to 12 years on the ground that the Guidelines sentence was disproportionate to the sentences received by co-defendants subject to non-Guidelines sentencing. 930 F.2d 1368, 1372-73 (9th Cir. 1990). The Ninth Circuit extended the Ray holding in United States v. Boshell to cases where a defendant, whose offenses involve both pre- and post-Guidelines conduct, would receive a stiffer sentence under the Guidelines than would co-defendants who plead guilty only to pre-Guidelines offenses. 952 F.2d 1101, 1107-09 (9th Cir. 1991).

The Ninth Circuit's liberal standards for assessing "aberrance," which were developed in such cases as United States v. Morales, 972 F.2d 1007, 1010-11 (9th Cir. 1992); United States v. Dickey, 924 F.2d 836, 838-39 (9th Cir. 1991); and United States v. Takai, 941 F.2d 738, 742-44 (9th Cir. 1991), encouraged departure based on aberrant behavior.

Finally, in United States v. Floyd, the court upheld a departure from a range of 360 months to life to 204 months on the basis of the defendant's "lack of guidance and education, abandonment by parents and imprisonment at age 17." 945 F.2d 1096, 1099 (9th Cir. 1991), amended by 956 F.2d 203 (9th Cir. 1992), superseded by guideline as stated in United States v. Johns, 5 F.3d 1267 (9th Cir. 1993). Although the Commission later rejected Floyd's "youthful lack of guidance" rationale by amending section 5H1.12, several sentencing judges in the Ninth Circuit adopted this rationale during the 1991 and 1992 fiscal years.
following cases from the First and Second Circuits illustrate this variation.

In the First Circuit's District of Maine, upward departures outnumbered downward departures by a ratio of 4.5 to 1. Individual offender characteristics accounted for only one departure—a case in which the judge ordered home confinement due to the defendant's need for medical treatment for cancer. Upward departures, which judges tended to base primarily on the defendant's criminal history, were typically rather large—some more than doubled the defendant's Guidelines sentence. In contrast, the District of New Hampshire, governed by the same First Circuit caselaw, had a 10 to 1 ratio of downward departures to upward departures. Judges cited reliance on offender characteristics, including the defendant's lack of guidance as a youth and the defendant's prior good works and community service, to explain half of the downward departures. There were only two upward departures in the district, both based on the use of a firearm in the offense, and neither was based on the defendant's criminal history.

In the Second Circuit, the District of Connecticut demonstrated unusually high departure rates. The downward departure rate was over 16%, more than two and one-half times the national average, and the upward departure rate was 3.9%, more than twice the national average. Downward departure rates were driven largely by reliance on individual offender characteristics, such as family responsibilities, the defendant's mental and emotional condition, and the defendant's past military service. White-collar offenses, especially embezzlement, were heavily overrepresented in the downward departure group in this district. Judges were simply unwilling to imprison these defendants.

In contrast, the Northern District of New York, governed by the same Second Circuit caselaw, had below average rates of both upward and downward departures. Downward departures, on the basis of offender characteristics, were virtually non-existent. The district primarily based downward departures on stipulated plea agreements. These typically occurred in drug trafficking cases and were based largely on perceived difficulties in proof.

Contrasting with both of these districts was the Eastern District of New York. There the downward departure rate exceeded the national average, but upward departures were virtually non-existent. The high downward departure rate in this
district was driven, not by white-collar offenses, but by the large number of departures granted to drug couriers convicted of importing heroin or cocaine from abroad.

Other examples in other circuits could be cited as well. The point is, however, that there are large variations in departure practice within circuits that cannot be explained by variations in the appellate caselaw. Moreover, there is an interesting pattern to these intracircuit variations: our analysis suggests that there is a tendency of certain districts to gravitate toward pre-Guidelines severity levels through departure activity. That is, those districts in which sentence severity was below the national average in the pre-Guidelines era tended to exhibit higher-than-average rates of downward departure and higher-than-average ratios of downward departure to upward departure.

We evaluated relative pre-Guidelines sentence severity by comparing mean sentences imposed within each district for drug offenses, robbery, fraud, and embezzlement with the national mean for each of those offenses. A district with below-average mean sentences for more than one-half of the offenses analyzed was considered a "lenient" district; one with above-average sentences for more than one-half of the four offenses was considered a "tough" district.\textsuperscript{259} Other districts were "neutral." Of the thirty districts in our study, we classified fourteen as lenient, ten as tough, and six as neutral in their pre-Guidelines sentencing practices.

We then evaluated our thirty districts to determine whether departures in each district tended to make sentencing tougher or more lenient, by comparing the ratio of downward to upward departures with the national averages for fiscal years 1991 and 1992. By this measure, we classified thirteen as lenient and fourteen as tough.\textsuperscript{260} Next, we compared this analysis with the analysis of pre-Guidelines leniency/toughness to

\textsuperscript{259} We chose this method because a simple comparison of mean overall sentences fails to account for differences in caseload composition. For example, it would be misleading to compare mean sentences of a district with a heavy load of drug trafficking offenses and robberies (which tend to be punished fairly severely) with a district that had an unusually high percentage of embezzlement cases. The latter might treat like offenders more harshly than the former (imposing higher sentences within each offense category) but have a lower total mean sentence because of its caseload distribution.

\textsuperscript{260} These typologies, however, were not necessarily the same districts so characterized in the pre-Guidelines period. There were 22 districts that were non-neutral in both the pre-Guidelines and post-Guidelines periods.
determine whether there was a correlation between pre-Guidelines sentencing patterns and departure tendencies. On this crude numerical measure of the non-neutral districts, twelve were consistent with pre-Guidelines practice, whereas ten were inconsistent with pre-Guidelines practice. However, the departure practices of two of the ten inconsistent districts are attributable to special factors.\textsuperscript{261} Moreover, our more detailed, qualitative district-by-district analysis indicates even more strongly than does this simple district head-count the continuity between pre-Guidelines practice and departure activity in many districts. This continuity suggests the existence of a sentencing "ethos" within some districts that is resistant to efforts to impose national uniformity. Departure tends in some districts to provide a mechanism for gravitation toward pre-Guidelines sentencing patterns.

F. DEPARTURES ARE NOT LIMITED TO MEANINGFULLY ATYPICAL CASES

One critical question which this research sought to address was whether departures are limited, as Congress intended, to extraordinary or atypical cases. This is not only the most important question but also the most difficult question to answer. It goes to the very heart of the impact of departure on the SRA's success in minimizing unwarranted disparity. A clear answer requires the ability to identify and distinguish legitimate departures from illegitimate ones. This, however, is difficult because the Commission has never articulated a consistent penologically grounded theory or theories of departure, and there is no consensus about the appropriate frequency of departure or what constitutes legitimate grounds for departure. This difficulty is compounded by a lack of complete factual information in the monitoring data. Nevertheless, departure

\textsuperscript{261} The Western District of Washington had a slightly lower than average ratio of downward to upward departure, which appeared inconsistent with its somewhat lenient pre-Guidelines sentencing pattern. Nearly one-third of that district's upward departures were "down-ups," however. See supra notes 240-243 and accompanying text (comparing upward departures to what are termed, "down-ups"). Adjusting to the "true" upward departure rate renders that district's post-Guidelines practices consistent with pre-Guidelines severity data.

Similarly, the apparent inconsistency between pre- and post-Guidelines practice in the District of South Dakota is misleading. That district's slightly lenient post-Guidelines departure activity is explained by an unusually large group of downward departures in firearms cases, a factor which is actually consistent with that district's pre-Guidelines sentencing data in such cases.
decisions may be evaluated in light of applicable appellate caselaw, stated Commission policy, and the factual information presented in the Probation Officer’s presentence report. In addition, analysis of district-wide trends can suggest whether factors other than the atypicality of the case explains departure activity.

Our analysis suggests that in a significant minority of cases, departure is driven by the sentencing judge’s desire to reach a result different from that specified in the Guidelines, rather than by the presence of meaningfully atypical facts. We reach this conclusion for several reasons:

1. In a few cases, the sentencing judge expressly stated that he or she disagreed with the severity of the Guidelines sentence and had departed for that reason. These cases are relatively rare, but they exist. Similarly, there were a number of cases in which the sentencing judge failed to articulate a reason for departure, or offered a very general explanation, such as that the departure was “in the interests of justice.” While there may well have been appropriate grounds for departure in some, or even all, of these cases, the absence of an adequate explanation suggests that there was no articulable ground for departure.

2. Our review revealed a number of departures based on grounds generally rejected in the appellate caselaw or by the Commission as appropriate grounds for departure. Many of these cases reflect a lack of understanding by sentencing judges about the policies and purposes underlying particular Guidelines provisions. Others may reflect a more conscious disregard of Guidelines policies.

3. The clear patterns of departure in some districts are inconsistent with the Guidelines “heartland” approach, which contemplates federal sentencing policy as nationally uniform rather than locally determined. For example, the tendency of judges in the Eastern District of New York to depart downward for drug couriers, the high departure rate for female white-collar criminals in the District of Connecticut, and the high departure rate for firearms offenders in the District of South Dakota, among other trends, all suggest that some departures are based on judges’ sympathies and policy views, rather than on the presence of atypical factors in particular cases.

Judicial predisposition to influence departure practices is not particularly surprising. Congress determined that binding Guidelines were necessary precisely because judges’ policy
views and sympathies played a central role in the sentencing of individual offenders too often. Our findings do, however, highlight the inherent difficulty in eliminating unwarranted sentencing disparity, while at the same time, preserving discretion to deal with individual cases. This should give pause to those who would advocate broad expansion of sentencing judges' authority to depart from the Guidelines.

CONCLUSION

What lessons can be drawn from our analysis of departure practices? First, the apparent incursion of judges' preferences into departure decisions and the tendency of departure patterns to mirror pre-Guidelines severity levels highlight the inherent limitations of legislative control over judicial decision-making. As long as some discretion is left in the system, some disparity in the application of general rules to specific cases will occur.

In our judgment, further reductions in disparity cannot, however, be imposed by legislative fiat. The Commission must improve its efforts to articulate clear and sensible policies underlying Guidelines provisions; these efforts are necessary to build consensus and provide clearer guidance to both district and appellate judges regarding the situations in which departure is appropriate. These efforts will help ensure that judges exercise their discretion to depart for sound reasons and in a more consistent manner.

Furthermore, we come away from this research with a heightened sensitivity to the vast range of federal criminal conduct, and the enormous variability in fact situations presented for sentencing. Congress and the Commission must recognize the crucial role departures play in maintaining sufficient flexibility to address unusual cases. Above all, Congress should permit the Guidelines to work, rather than impose inflexible mandatory minimum sentences as it has increasingly shown a tendency to do.

Our research suggests that the Commission may wish to reevaluate its policies in light of the experiences of the courts. Our findings on white-collar departure suggest that the Commission should reexamine its approach to white-collar sentencing. If policy changes to encourage alternatives to incarceration are in order, the Commission should enact them. If not, the Commission must articulate more clearly why not, and aid judges in identifying cases in which departures are appropri-
ate. Sentencing judges also have an obligation to recognize that personal policy preferences might influence their decisions about whether a case is sufficiently atypical to warrant departure from the applicable Guidelines range.

Sentencing reform is an evolving process. Its success will require the good faith and sound input of all key institutions—Congress, the Commission, and the courts. Each institution must participate in the dialogue over sentencing policy, listen to the considered views of the others, and modify its positions based on collective experience.