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THE DISCONTINUOUS TRADITION OF SENTENCING DISCRETION: *KOON'S* FAILURE TO RECOGNIZE THE RESHAPING OF JUDICIAL DISCRETION UNDER THE GUIDELINES

IAN WEINSTEIN*

> *Looked at from a general science of law, the effective individualizing agency in the administration of justice is discretion. . . .*
>
> *Discretion is an authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgment and conscience.*[1]

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[1] Roscoe Pound, Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case, 35 N.Y.U. L. REV. 925, 925-26 (1960).

INTRODUCTION

Can a judge exercise discretion and follow the law? Some think it impossible, seeing discretion as the opposite of law.[2] Others have harmonized the two ideas, viewing discretion as the exercise of judgment according to and within the bounds of the law.[3] Those who decry judicial discretion urge legislatures to enact more specific laws and leave less room for the vice of inconsistent results. Those who defend discretion would channel it to achieve the virtue of individualized justice.

The tension between individualization and uniformity in the law is often unnecessarily heightened by an inadequate analysis of judicial discretion.[4] The exercise of judicial discretion in federal criminal sentencing exemplifies the problems arising from those inadequate analyses. The Sentencing Reform Act of 1984[5] ("SRA") dramatically altered federal criminal sentencing for the express purpose of controlling judicial discretion.[6] Judges were once free to impose any sentence from probation to the statutory maximum and were not subject to appellate review regarding the length of that sentence. However, they are now bound by the Sentencing Guidelines[7] and subject to appellate review of the sentences they impose. Despite this dramatic change, or perhaps because of it, the Supreme Court has used the breadth and uncertainty of the concept of discretion to paper over the fundamental reallocation of sentencing power in an effort to buttress the limited authority judges retain to individualize sentences.

The Sentencing Guidelines include provisions which permit judges to ignore, or depart from, their requirements in some circumstances,[8] leaving an island of individualized punishment in a sea of rule determined sentences. In

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[2] *See id.* ("'The Discretion Of A Judge Is The Law of Tyrants . . . .'") (quoting Lord Camden). Kenneth Davis offered a more recent version of the same sentiment when he wrote: "Where law ends, discretion begins." KENNETH DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 3 (1969). *See generally* Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169 n.3 (tracing the view that opposes law and discretion, citing Packer, Dicey, Weber, Hayek, Dickinson, and Mashaw).

[3] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977) (calling discretion the "hole in the doughnut," arguing that it must always be understood in relation to rules or standards that define its limits).

[4] *See generally* George Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747 (arguing that we will always be ambivalent about discretion because it reflects the underlying tensions of regulating the exercise of power in a web of political relationships).

[5] Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586, & 28 U.S.C. §§ 991-998 (1994)).

[6] *See* S. REP. NO. 98-225, at 37-39 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220-22 (noting disparities in sentencing "can be traced directly to the unfettered discretion the law confers on . . . judges").

[7] U.S. SENTENCING GUIDELINES MANUAL (1998) [hereinafter GUIDELINES MANUAL].

[8] *See id.* ch. 1, pt. A, cmt. 4(b).

Koon v. United States,[9] the Supreme Court tried to map that island, adopting an abuse of discretion standard for reviewing district court decisions to impose criminal sentences outside the range established by the Sentencing Guidelines.[10] Attempting to bolster the remnants of the once formidable judicial sentencing power, the Court looked to an assertedly "uniform and constant" tradition of judicial discretion to justify the abuse of discretion standard and protect the trial court's sentencing discretion under the Guidelines.[11] The Court relied on an attractive linguistic symmetry to preserve the long tradition of sentencing discretion. Unfortunately, the linguistic symmetry masks deep doctrinal difficulties and a fundamentally flawed effort to reinvigorate judicial sentencing power.

Although both the old and current systems have features properly called "discretionary," they are very different systems of discretion. The old law involved unreviewable and largely standardless judicial discretion, founded on the model of individualized, rehabilitative sentencing. The current law requires the exercise of judgment within a system of detailed rules, subject to appellate review and founded on a compromise model of sentencing that sometimes establishes several inconsistent goals.[12] The Court did not acknowledge the qualitative difference between old law discretion and Guidelines discretion in *Koon*, and cloaked its substantive choice of the individualized sentencing model in procedural dress. These twin flaws have only deepened the rift between those who favor the application of the Guidelines without exception in every case and those who favor individualized sentences.

Without tradition or agreement on initial principles to guide lower courts, the *Koon* Court's adoption of the abuse of discretion standard without explanation of how to apply it has also deepened decisional inconsistency. While one circuit uses *Koon* to affirm every district court decision to depart downward, another uses it to reverse every similar district court decision.[13] The immediate difficulties with *Koon* reflect the inherent inability of a procedural ruling—the decision on the appropriate standard of review—to bring uni-

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[9] 518 U.S. 81 (1996).

[10] *See id.* at 95 (holding that abuse of discretion is the proper standard of review of district court decisions to depart downward from the Sentencing Guidelines and applying that standard to reverse some departure grounds and affirm others in the case of the two police officers convicted in the beating of Los Angeles motorist Rodney King).

[11] *See id.* at 109-12.

[12] *See* GUIDELINES MANUAL ch. 1, pt. A, cmt. 3 (asserting the Commission's goals of honesty, uniformity and proportionality in sentencing).

[13] The Second Circuit affirmed all the post-*Koon* downward departures they reviewed between *Koon* and January 1998. The Fifth, Ninth, Tenth, and Eleventh affirmed some and reversed others while the First, Third, Fourth, Sixth, Seventh, Eighth and District of Columbia Circuits reversed every downward departure case they reviewed in that period. See *infra* Part IV for a discussion of the circuit court cases.

formity to this area of law.[14] The procedural rule cannot resolve the continuing policy debate over the proper goals of criminal sentencing that led to the significant political[15] and doctrinal[16] compromises upon which the SRA and the Sentencing Guidelines are founded. Criticism of the evolving SRA regime must be tempered by an acknowledgment of the enormity of the task.[17] However, ten years of experience with the current system suggests that it is time for the appellate courts to look past the policy debate between uniformity and individualization. Appellate courts must develop doctrines to guide the practical resolution of those tensions, a task district courts undertake every time they consider a sentence under the Guidelines.

Koon was a step in the wrong direction. Although it may suit the Court's purpose to use the common analytically blunt concept of discretion to achieve a particular result, it does not advance doctrinal clarity or promote uniform application of the law. Perhaps broad, theoretical statements about the judicial power to exercise individual judgment may best be left to jurisprudence, but much remains to be said about the actual differences among the kinds of discretion found in federal sentencing and what the differences actually mean for sentencing courts.

This Article begins, in Part I, with an analysis of the facets of judicial discretion. Part II pays particular attention to the power to individualize sentences under the old sentencing regime and the changes wrought by the Sentencing Guidelines. Part III then shows that the abuse of discretion standard of review in *Koon* was dictated neither by a tradition of sentencing discretion nor the factual nature of the issue. Rather, the choice reflects the Court's own adherence to a much more individualized model of sentencing than the Sentencing Commission chose. In Part IV, the Article analyzes how the circuit courts have applied *Koon*, and argues that they too have continued the

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[14] Others have argued that *Koon* cannot bring consistency to this area because it does nothing to remedy the Commission's excessive control to define the legally permissible bases for downward departure. *See* Kate Stith & Jose Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1278-79 (1997).

[15] *See, e.g.*, Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 261-73 (1993) (detailing the political debates involved in sentencing reform); David Yellen, *What Juvenile Court Abolitionists Can Learn from the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577, 585-90 (using the development of the federal guidelines to illustrate how sentencing reform politics inevitably lead to harsher punishments).

[16] *See, e.g.*, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-31 (1988) (discussing six compromises and arguing that only one involved interests trading, while the others were rooted in practical needs and unresolved theoretical issues).

[17] Any sentencing reform must consider the number of criminal sentences imposed. The Sentencing Commission reports that 42,436 federal criminal sentences were imposed from October 1, 1995 through September 30, 1996. *See* U.S. SENTENCING COMM'N, 1996 ANN. REP. 32.

debate over sentencing models, and have not developed a doctrine about how and when district courts should use their limited discretion. This Article concludes that the unexplicated abuse of discretion standard of review cannot unify the law of district court sentencing departure. That approach has only encouraged appellate courts to continue to debate policy, rather than focus their attention on the more mundane task of adjudicating individual cases and developing legal standards over time.

I. DESCRIBING JUDICIAL DISCRETION: VARIETIES OF DISCRETION

There is an element of discretion in every exercise of judicial power that does not flow from the obvious and mechanical application of a clear rule. In addition, every exercise of appellate court power that gives any weight to a lower court's ruling, whether pursuant to a clear rule or not, presents an issue of judicial discretion in choosing what deference, if any, will be accorded to the lower court's decision. These two broad categories encompass two very different kinds of judicial power. Examples from both the old and current federal sentencing regimes illustrate these varieties of judicial discretion.

Before the SRA, federal criminal sentencing discretion was characterized by almost completely individualized and unreviewable decision making. The length of a federal criminal defendant's sentence was almost entirely in the control of the district judge,[18] although a negotiated plea agreement[19] could cap the possible sentence with a chosen statutory maximum. Further, prose-

[18] *See* Mistretta v. United States, 488 U.S. 361, 363 (1989) (commenting on the extent of pre-guidelines discretion in the introduction to the decision affirming the constitutionality of the Guidelines). Of course, judicial sentencing discretion was restrained by statutory maximums, but as they were generally quite high relative to the expected range of punishment and subject to manipulation by charging multiple counts, they rarely imposed any consequential limits on sentences. Judicial power was also supposed to be moderated by the parole board's power to release prisoners, but judges knew and accounted for the parole board's practices particularly after the promulgation of the parole guidelines. *See* Stith & Cabranes, *supra* note 14, at 1248 (calling the impact of parole more apparent than real after the promulgation of the parole guidelines). Judicial sentencing decisions also faced procedural restrictions and the restraints of the very weak doctrine of proportionality review (but these were very weak boundaries). *See* Solem v. Helm, 463 U.S. 277 (1983).

[19] The Guidelines have changed, but not eliminated, sentence manipulation through plea agreements. *See* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamic in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284 (1997) (arguing that the Guidelines have made charging decisions more consistent, but prosecutors retain a considerable degree of sentencing discretion). For discussions of pre-guidelines plea bargaining, see Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981) (criticizing plea bargaining); PAMELA J. UTZ, SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT (1978) (defending plea bargaining).

cutors and defense lawyers developed local customs to influence judges.[20] In most cases, however, judges could impose any combination of fines and restrictions on liberty—from suspending the imposition of sentence[21] with or without supervision by the probation department, to a sentence of imprisonment at the statutory maximum and the maximum authorized fine. Judges were not required to state reasons for their sentences and "sentence[s] within statutory limits [were], for all practical purposes, not reviewable on appeal."[22]

Although the SRA changed everything, there is still much within the new system that is properly called discretionary. Today federal criminal sentencing discretion is characterized by a complex combination of reviewable and non-reviewable exercises of judgment in applying rules and determining when the rules may not apply. Sentences are determined by applying a complex body of rules that define a mandatory sentencing range for each offender, based upon the substantive conduct, the offender's criminal history and other factors.[23] A judge must apply standards to choose a sentence within that range, unless the case presents "circumstance[s] . . . not adequately taken into consideration by the Sentencing Commission."[24] If the

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[20] The author practiced criminal law in two jurisdictions that did not have sentencing guidelines. In both the Superior Court of the District of Columbia and the United States District Court for the Southern District of New York, before the Guidelines were in force, it was common for the prosecutor to agree not to reveal certain information to the judge (and the judges never directly sought that information) and to agree to take "no position" on defense requests at sentence.

[21] Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best. *See* 18 U.S.C. § 3651 (1987), *repealed by* the SRA (applicable to offenses committed prior to Nov. 1, 1987).

[22] Koon v. United States, 518 U.S. 81, 96 (1996) (citing Dorszynski v. United States, 418 U.S. 424, 431 (1974) and United States v. Tucker, 404 U.S. 443, 447 (1972)). For a discussion of the development of the doctrine of non-reviewability and its weakening through increasing procedural scrutiny of federal sentencing by courts of appeals, see Robert J. Kutak & J. Michael Gottschalk, *In Search of a Rational Sentence: A Return to the Concept of Appellate Review*, 53 NEB. L. REV. 463 (1974) (demonstrating convincingly that courts of appeal occasionally used procedural dress to remand egregious sentences, but arguing for substantive appellate review of sentencing because the doctrine of non-reviewability generally held firm and prevented the development of sentencing standards).

[23] For a general discussion of the Sentencing Guidelines, see THOMAS W. HUTCHINSON & DAVID YELLIN, FEDERAL SENTENCING LAW AND PRACTICE (1989); HARRY I. SUBIN, CHESTER L. MIRSKY AND IAN S. WEINSTEIN, FEDERAL CRIMINAL PRACTICE: PROSECUTION AND DEFENSE ch. 10 (1992).

[24] 18 U.S.C. §3553(b); *see also* GUIDELINES MANUAL § 5K2.0.

judge finds such circumstances, the court may depart from the Guidelines. A sentence within the guideline range is not reviewable,[25] but any decision to depart is reviewable.[26] Thus, the system combines discretion requiring rule application to both non-reviewable and reviewable determinations.

In *Koon*, the Supreme Court followed longstanding practice in using "discretion" to describe (1) the unreviewable, and essentially standardless, pre-SRA exercise of sentencing power; (2) the unreviewable decision not to depart, which is governed by both statute and guidelines;[27] and (3) the reviewable power, limited and defined by statute and guidelines, to depart from the otherwise mandatory sentencing range.[28] Each of these three exercises of judicial power looks very different to a defendant and the defendant's lawyer thinking about the power of the particular judge to choose the defendant's sentence.

Under the old sentencing law, lawyers were well advised to tell their clients that the actual sentence was "up to the judge," and whatever the judge said would almost certainly be the final word on the matter. Today, however, a lawyer may explain that the judge has to decide whether the case fits within any of the available legal categories for departure, and if it does, whether the judge will choose to depart. The lawyer can also explain that the law identifies the particular factors relevant to that decision, enabling the lawyer to evaluate and advance arguments tailored to the law. A judge's decision will be final, assuming the judge recognized a legal basis for the decision. If the judge decides that there is no authority to depart, or chooses to depart, the judge's decision is subject to review by a higher court, if the losing party seeks review. The judge's power is channeled by standards and rules and sometimes subject to review, although much is still "up to the judge."

Provisionally, we might say that the problem of judicial discretion is measured by how much the result in the case turns upon who is making the decision. If we are confident that the outcome will not be significantly different, regardless of the judge, then there is no problematic judicial discretion involved.[29] If, on the other hand, we are not confident that the outcome would be substantially the same if the decision were made by a different judge or judges, then there is a significant element of problematic judicial discretion involved.

Judicial discretion in this formulation is a problem if results should not turn on the identity of the particular decision maker but on the application of

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[25] *See* 18 U.S.C. §§ 3742(a)(3) & (b)(3).

[26] *See id.* §§ 3742(a)(3), (b)(3) & (f)(2).

[27] 18 U.S.C. § 3553(b) and GUIDELINES MANUAL § 5K2.0 set out the standards judges must apply when they evaluate a request for departure.

[28] *See* Koon v. United States, 518 U.S. 81, 92 (1996).

[29] This formulation accounts for decisions that are not simply yes or no, but those that require a judge to settle within a range, such as sentencing or awarding fees or damages.

a rule. Indeed, it is only an issue if a decision maker is bound by some rules. As Ronald Dworkin put it, "The concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority."[30] Judges only have discretion within a framework of rules that imposes limits on their authority. The problem of discretion is the lack of certainty about those limits. To put it another way, absolute rulers deciding cases would not meaningfully be said to have judicial discretion. They simply have power to do as they please and we do not think it inconsistent that their decisions would vary from absolute ruler to absolute ruler.[31] But the law, not the identity of the judge, ought to decide legal cases.

What happens when the judge must decide a question for which there is no rule, or there is a rule but no clear answer, or there is no review to ensure that the judge did, in fact, follow the rule? These are all cases in which the result may turn on the judge rather than the law. The problem is controlling decision making to ensure that the law—the constant from case to case—is the decisive factor in the outcome. Maurice Rosenberg, the leading non-jurisprudential commentator on discretion,[32] captures this idea in stating that a decision maker with discretion is "not bound to decide the question one way" because "there is no *officially* wrong answer."[33] Others have gone further in opposing law and discretion by suggesting that discretion only arises in cases where there is no law.[34] That view is too sharply dismissive of what judges do and much of what we call law. Judges exercise discretion within the constraining web of the law; the question is how tightly the web binds and whether the spider has any means for chasing down the fly who occasionally wriggles free.

Commentators point to two distinct classes of cases in which judges have discretion and where there is no authoritative way to officially pronounce

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[30] DWORKIN, *supra* note 3, at 31. Dworkin's interest in discretion is part of his refutation of the positivist claim that when judges are not enforcing rules, they are using discretion (as opposed to law) to decide cases. He argues that positivists have missed the importance of principles and standards as enforceable sources of legitimate law. *See id.* at 34-39.

[31] *See* George Fletcher, *Unwise Reflections About Discretion*, 47 LAW & CONTEMP. PROBS. 269, 281-83 (1984) (calling this the difference between discretion and prerogative).

[32] *See* Christie, *supra* note 4, at 747 (describing Rosenberg and Dworkin as the most important and useful commentators on discretion).

[33] Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971).

[34] *But see* DWORKIN, *supra* note 3, at 31-32 (refuting this claim in the jurisprudential sense); Post, *supra* note 2, at 208-11 (discussing the long perceived discomfort over how to understand judicial decisions that are not clearly determined by application of a rule). For another approach to the question of judicial judgment, see JEROME FRANK, COURTS ON TRIAL (1949) (arguing, among other things, that judicial decisions must be understood as the product of the judge's particular psychological makeup).

their decision wrong.[35] In one group there are no official, legally correct answers; in the other group, the judge's choice will usually not be disturbed on appeal. The cases in which there are no official answers permit judges to decide the cases as they see fit. This is "primary" or "decision-liberating" discretion.[36] Judges have the greatest primary discretion when applicable legal standards do not exist and the least when specific rules to the kinds of cases for which the rules were intended do exist.[37]

In the other class of cases, there may be official answers, but the judge's choice will, rarely, if ever, be disturbed on appeal, because the decision is unreviewable or the judge's choice is given deference by the reviewing court. This is "secondary" or "review-limiting" discretion.[38] This form presents the appellate procedural issues of reviewability and standards of review familiar to all appellate judges and lawyers. Secondary discretion ranges from completely unreviewable decisions to de novo review of lower court decisions and various levels in between.[39]

Much confusion has come from the failure to recognize the independence of, and the differences between, decision-liberating and review-limiting discretion. Any court subject to review[40] may have any combination of each kind of discretion. For example, the trial court and appellate court would both have primary (i.e., decision-liberating) discretion in deciding and reviewing, respectively, a decision to award counsel fees governed solely by a statute that states the decision is "in the discretion of the court." Absent any other law, each court would have no official standards to apply. If the trial court's decision were also reviewable "in the discretion of the court," the trial court would have no secondary (i.e., review-limiting) discretion because the reviewing court would not give any deference to the trial court's deci-

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[35] *See* DWORKIN, *supra* note 3, at 33 (cautioning us not to confuse a judge's power regarding discretion with being beyond criticism). For example, even if a judge may not be reversed, or even reviewed, the judge may still be subject to criticism.

[36] Rosenberg, *supra* note 33, at 637; *see also* DWORKIN, *supra* note 3, at 31-32; Post, *supra* note 2, at 210-11.

[37] *See* DWORKIN, *supra* note 3, at 31-32; Post, *supra* note 2, at 210-211; Rosenberg, *supra* note 33, at 637.

[38] *See* Rosenberg, *supra* note 33, at 638; DWORKIN, *supra* note 3, at 32.

[39] *See generally* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW (1986) (two volume treatise on standards of review in the federal courts). See *infra* notes 180-82 for discussion of the abuse of discretion standard.

[40] Courts of last resort—the United States Supreme Court or State Supreme Courts—ruling on questions of state law cannot properly be said to have judicial discretion in Dworkin's view, because there is no higher controlling authority. Their decisions may be changed by legislative action or constitutional amendment, which illustrates how those courts also exercise an essentially political authority, checked by non-judicial mechanisms.

sion. In this example, both courts would have primary discretion and the appellate court would have complete secondary discretion.[41]

A lower court may also have complete secondary discretion in an area governed by well-established standards. For instance, a trial court's decision to grant a criminal defendant's motion for judgment of acquittal at the close of the prosecution's case is controlled by a clear standard,[42] but is unreviewable.[43]

The Supreme Court has addressed review-limiting, or secondary discretion, in cases like *Koon* that require the Court to choose among the three existing standards of appellate review.[44] The Court has developed a largely functional jurisprudence of review-limiting discretion, using general considerations to arrive at case by case judgments about the proper allocation of authority in each case.[45]

The general rules for the proper exercise of primary, or decision-liberating discretion, are never at issue for decision by the Court. The law does not

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[41] The doctrine of independent review of certain facts in First Amendment cases provides an example of this rather atypical situation. The lower court must, in the end, make an individualized judgment even about constitutional facts, which judgment is then reviewable *de novo* on appeal. *See* Henry Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) (discussing the lack of deference to lower court fact application to the legal issue of malice).

[42] The judge may grant a motion for a judgment of acquittal prior to submission of the case to the jury, pursuant to FED. R. CRIM. P. 29(a), if, viewing the evidence in the light most favorable to the government, no jury could reasonably find the defendant guilty beyond a reasonable doubt. *See, e.g.*, United States v. Hazeem, 679 F.2d 770, 772 (9th Cir. 1982).

[43] *See* 18 U.S.C. § 3731 (1994) ("[N]o appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."). In contrast, a motion for judgment of acquittal pursuant to FED. R. CRIM. P. 29(b) or (c), after a guilty verdict, is reviewable because the jury verdict may simply be reinstated and no second trial is required. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 569-70 (1977) (holding that double jeopardy does not bar government appeal of a grant of motion for judgment of acquittal where reversal would only require reinstatement of a jury verdict and not a new trial).

[44] "All appellate Gaul . . . is divided into three parts: review of facts, review of law, and review of discretion." Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 173 (1978). Questions of law are subject to *de novo* review, questions of facts are subject to review under the clearly erroneous standard and questions denominated matters of discretion are subject to review for abuse of discretion. *See generally* CHILDRESS & DAVIS, *supra* note 39, §§ 101-04 (providing an introductory discussion of standards of review, emphasizing the malleability of the abuse of discretion standard).

[45] *See, e.g.*, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 399-403 (1990) (discussing the choice of standards and emphasizing the difficulty of distinguishing law from fact); Pierce v. Underwood, 487 U.S. 552, 558-63 (1988) (citing Rosenberg in the Court's discussion of choosing the applicable standard of review).

govern judges' cognitive processes, only the results they reach. Many cases offer models of how the Supreme Court exercises judicial judgment in the absence of clear rules, however, the general rules for the exercise of decision-liberating discretion are left to jurisprudence. Although reasoning by analogy is at the heart of the common law method for applying the results of one case governed by standards to another case involving the same standards,[46] no rules specify when or how this method should be applied.

Commentators agree on the important distinction between decision-liberating and review-limiting discretion, but they continue to seek some unifying idea undergirding judicial discretion. Rosenberg's view that discretion signifies choice[47] is probably the leading candidate, but it suggests too simple a view of discretion. Although situations of completely unreviewable secondary discretion and completely standardless primary discretion are centrally about choice, discretion also involves choices that are neither completely free nor wholly beyond the judge's control. Post has made this point in criticizing both Rosenberg and the Supreme Court for identifying discretion with choice and opposing those two notions with the idea of law and rules. He writes:

> [Rosenberg] invites us to conceptualize choice as a single, unitary act that is either free or constrained, rather than as a complex process. Our judicial system contains numerous examples of decision making that is both discretionary and guided by legal standards. But since we have no disciplined method to bring these examples easily to mind, we do not use them in analysis of unfamiliar circumstances . . . .[48]

Post goes on to offer an analysis of how discretion, as choice, interacts with rules in several dimensions of decision making and review.[49] He is right in observing that many situations combine some range of choices with standards or processes that shape the choice in the particular case. Discretion is often more about how choice is constrained, not simply whether the judge has choice. Post's "viewpoint discretion,"[50] which analyzes the interrelationship of choice and constraint from the viewpoint of trial (as opposed to appellate) judging, captures the task judges face when they have discretion limited by standards and review, but does not address instances of complete non-reviewability,[51] or cases in which there is simply no officially wrong answer.[52]

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[46] *See* Cass Sunstein, *Commentary on Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (calling analogy the "most familiar form of legal reasoning" and analyzing its use in appellate opinions).

[47] *See* Rosenberg, *supra* note 33, at 636.

[48] Post, *supra* note 2, at 207.

[49] *See id.* at 209-10.

[50] *Id.* at 209-13.

[51] Post shares Dworkin's lack of interest in nonreviewable decisions, arguing that trial judges, even when their decisions are not reviewable, cannot make decisions by flipping a

In cases of complete non-review, the trial judge's choice will decide the case. When judges must evaluate substantive standards according to procedural rules, their decision making is much more complex than the simple idea that choice captures. But where there are no standards or review, the judge may simply choose what to do. That choice may be informed by law, or it may not,[53] but it will decide the case. For a litigant in a case where there is no standard or review (or review so weak that it makes a change in result a practical impossibility), the trial judge has significant power. There is no official way to say that the law, not the judge, decided the case.

Thus choice, as a unitary act of deciding between one result or another, is at the heart of complete review-limiting discretion, but it does not capture much of the complexity of review or decision-liberating discretion.[54] Rosenberg's discussion of choice better explains the absence of review, while Post highlights how we can analyze the actual review undertaken in a particular kind of case. Neither can account for both, nor does Rosenberg's choice model explain why choice may be given to the judge.

The functional view of discretion, first offered in the administrative law setting by Davis, suggests that review-limiting discretion reflects decisions

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coin. *See id.* at 210. "He might instead feel himself bound to choose the appropriate legal policies . . . and to do his best to implement them." *Id.* Thus, for Post, the trial judge has unalterable choice from the viewpoint of the appellate court, but from the trial court's own perspective, its choice is (assumedly) guided by standards.

[52] Because Post is interested in the situation in which there are standards that leave some room for judgment, he does not discuss the complete absence of standards. Discretion as the absence of standards, however, is most important to Dworkin's refutation of the positivist. Thinking about the discretion of a decision maker who is subject to standards set by authority, Dworkin identifies three "gross distinctions." DWORKIN, *supra* note 3, at 31. He identifies two kinds of "weak discretion," *id.* at 32, one in which the application of standards requires exercise of judgment and the other in which the decision is unreviewable. For Dworkin's arguments, the two forms of weak discretion are trivial, because neither exercise of judgment nor institutional arrangements speak to the place of principle as law.

The third category is "strong discretion," when the decision maker is simply not bound by standards set by the authority in question. *See id.* Dworkin questions whether in hard cases where the rules do not provide a clear decision, if judges must fall back upon strong discretion, or if they are bound by principle to reach a particular conclusion. *See id.* at 33. He denies the positivist claim that such decisions are discretionary in the strong sense, and famously constructs his richer legal toolkit. *See id.* at 34-39.

[53] *But see* Kutak & Gottschalk, *supra* note 22, at 486-87 (discussing exceptions to the non-review doctrine under which cases viewed as unjust still receive review).

[54] Childress & Davis capture this distinction in the context of review of administrative agency decisions by labeling situations of non-review or no standards "true discretion" and cases involving reviewable judgments about the application of standards as involving "guided discretion." *See* CHILDRESS & DAVIS, *supra* note 39, § 15.08.

about allocation of authority.[55] Davis analyzes the discretion held by non-judicial actors, whose authority is limited by rules and the degree of review of the application of those rules.[56] In that context it seems quite natural to ask functional questions about the allocation of authority.

Pound's view of discretion as the individualizing agent in the law also focuses on the outcome.[57] He questions who has the final say and what criteria that authority may use, by offering a historical gloss that traces the emergence of discretion from growing dissatisfaction with the harsh results of imposing the letter of the law.[58] His view considers the value individualized justice can have in discretionary decision making.[59]

Davis and Pound remind us that judicial discretion is both necessary and desirable. It is necessary because we cannot have a rule directly on point for every situation, nor can every decision reasonably be reviewed by a higher authority. It is desirable because it permits rules to be modified to fit individual cases. In a new, undeveloped area, the wisdom of the common law may emerge if enough individual decisions coalesce around a principle to permit the development of more precise rules.[60]

With that justification in mind, we might return to the provisional view that the problem of judicial discretion is measured by how much the result in the case turns upon who is making the decision. Many minor, procedural decisions that constitute the day to day exercise of generic judicial discretion are unreviewable and standardless, but there is little variation from judge to judge. These decisions do not often turn upon who is making the decision and they are efficiently left to discretion.

The class of potentially problematic cases is that in which judges have discretion on a dispositive issue and, hence, arguably similar cases are not decided alike. Pound's view of discretion as the individualizing agent in the law reminds us that there are two possible explanations for the variations. One is the problematic answer that the results turn on the identity of the judge. The other possibility is that the difference is in the cases. The prob-

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[55] *See* DAVIS, *supra* note 2, at 215-16 (suggesting that the entire legal system "find ways to minimize discretionary injustice").

[56] *See id.* at 219.

[57] *See* Pound, *supra* note 1, at 937.

[58] *See id.* at 926-30 (tracing the history of the powers of discretion, dispensation and mitigation).

[59] *See id.*

[60] Rosenberg suggests that this happens when a novel situation arises and appellate courts bide their time to see what factors emerge. *See* Rosenberg, *supra* note 33, at 662-63 He sees that as a more easily remedied subclass of the more general problem of cases for which rules are difficult to frame. *See id.* Rules are more difficult to frame when the issue presents "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Id.* at 662. Sentencing under the Guidelines presents both types of questions—some novel but amenable to rules, and some too detailed for the development of unified appellate doctrine.

lem is not that judges sometimes have choices. Choice is a necessary result of the imperfect fit between our world and the inadequate rules we can create for it. The problem is controlling the choices so cases meriting individualized consideration can receive it. These cases should receive consistent standards so the outcomes do not turn on which judge hears the cases.

Viewed under this test, the new sentencing law replaced a system that was fairly criticized for failing to exert any control. The system had a large element of problematic discretion in sentencing. However, the Supreme Court has continued the legacy of problematic discretion by relying on those years of non-review, when no consistent standards existed, to inform the new regime of guided discretion. The Supreme Court's current rule on discretionary sentencing still fails the second part of the discretion test. Although the first part is met by providing consistent standards courts can apply, outcomes continue to turn on who does the judging.

II. FROM UNFETTERED CHOICE TO LIMITED DISCRETION

Under the old sentencing law, federal judges had a great deal of primary discretion and virtually complete secondary discretion to determine sentences. Beyond the statutory maximums, no promulgated standards guided the exercise of sentencing discretion and no appellate review existed to opine on the length of the sentences imposed.[61] So long as the sentence was under the maximum limit and was procedurally proper, the judge was not subject to review and could not be reversed. For example, in the case of a bank robber, the judge could suspend sentence or send the defendant to prison for twenty-five years. Few other decisions of such moment were left to the trial court without the possibility of review.

Non-reviewability[62] is the strongest form of secondary discretion.[63] Because there was no review of sentencing, the Supreme Court had no choice but to defer to the trial court.[64] It had little opportunity to express its view

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[61] *See supra* notes 18, 21 & 22 and accompanying text. These decisions were not completely standardless, only standardless in an important practical sense. The statutory maximums provided no real limits in the vast majority of cases where the sentence did not approach the maximum.

[62] The non-review doctrine may well have been founded on a mistake, but became well entrenched by the 1930s. *See* Kutak & Gottschalk, *supra* note 22, at 468-72 (tracing the history of the doctrine of non-review of sentences and suggesting it was founded on a misreading of the law); Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1444 (1997) (discussing the doctrine of non-review).

[63] *See supra* note 51 (identifying non-reviewability as Dworkin's second type of weak discretion).

[64] *See* Gore v. United States, 357 U.S. 386, 393 (1958) (noting that, unlike the English and Scottish courts of appeals, the Supreme Court does not have the power to increase or reduce sentences).

on sentencing and could only caution against invading the legislative prerogative and entering the field of penology.[65] The Court also suggested that the sentencing court is in the best position to make a sentence determination because of its familiarity with the case.[66] Of course, the failure to develop principled justifications is a key feature of non-review.[67]

How much primary (i.e., decision-liberating) discretion did judges have under the old law? Statutory maximums imposed some limits on sentences. A judge could only enjoy complete, unbounded choice in sentencing in the case of a life maximum, without any mandatory minimum. Generally, however, within the statutory maximums, the relevant authority promulgated no governing rules or standards. Statutes provided no guidance beyond the vaguest nostrums,[68] and appellate courts had virtually no opportunity to guide sentencing courts because they never reviewed sentences.[69] This system developed to advance the goal of rehabilitation,[70] which required sentences tailored to each individual's particular background and needs.[71] Old law sentencing also offered an example of a strong form of primary, or decision-liberating discretion. Any sentence under the maximum was legally

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[65] *See id.* (commenting that decisions about severity of punishment are "peculiarly questions of legislative policy").

[66] *See* Blockburger v. United States, 284 U.S. 299, 305 (1932) (noting that although the sentence "seems unduly severe," the trial court may have facts before it justifying its sentencing decision and the Supreme Court cannot disturb the sentence).

[67] Norval Morris, a principal voice for sentencing reform, advocated appellate review of sentences to develop a "common law of sentencing." Reitz, *supra* note 64, at 1448 (quoting Norval Morris, *Toward Principled Sentencing*, 37 MD. L. REV. 267, 284 (1977)).

[68] *See* Reitz, *supra* note 62, at 1445.

[69] *See* Stith & Cabranes, *supra* note 14, at 1252.

[70] The development of the parole system, introduced in 1910, provided some check on judicial sentencing and offered another avenue for the rehabilitation theory to guide criminal sentencing. Parole gave executive branch officials the authority to evaluate each prisoner's progress toward rehabilitation. *See* Stith & Koh, *supra* note 15, at 227. Individualized release determinations were supposed to reflect the inmate's progress. *See id.* Parole decisions were non-judicial determinations guided by standards and subject to limited review. *See id.* Sentences actually served were not completely at the discretion of judges, but judges learned to account for parole in sentencing, *see supra* note 20, and there was no systematic mechanism for feedback to judges. Sentencing decisions remained uninformed by experience beyond the particular lessons each individual judge might believe he or she had learned over time.

[71] *See id.* at 227 (discussing the rise and fall of the rehabilitative model); *see also* Robert J. Cottrol, *Hard Choices and Shifted Burdens: American Crime and American Justice at the End of the Century*, 65 GEO. WASH. L. REV. 506, 506 nn.7-10 (1997) (reviewing MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA (1995), and citing authors on each side of the rehabilitation and retribution debate).

correct because there were no rules, standards or guidelines governing the particular sentence to be imposed.[72]

Dworkin's reminder—that judicial discretion asks whether the judge was accountable according to a standard furnished by a particular authority and still admits of the possibility of criticism based on sense, fairness or other criteria,[73]—highlights the problem with judicial discretion under the old law. Judges were subject to "unofficial criticism" from all angles,[74] but not to an official check on their exercise of judicial power. Interest groups espoused varying views about the proper goals and methods of punishment, subjecting every sentencing decision to potential criticism. Each judge was on his or her own when sentencing,[75] because the lack of standards and non-review left the judge without a supporting body of sentencing case law.

Old law discretionary sentencing gave federal judges unreviewable and, within the statutory maximum, standardless power to choose the punishment in a given case. All that has changed with the SRA. The movement for sentencing reform began in the 1970s.[76] That movement criticized the standardless, unreviewable sentencing regime as lawless and subject to the prejudices and whims of individual judges.[77] Critics focused on extremely harsh sentences for relatively minor offenses,[78] urged increasing use of alternatives to incarceration,[79] and sought appellate review to prevent judges from favoring white and middle class defendants at the expense of people of color.[80]

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[72] Further dissection of this exercise of judicial authority under Dworkin's scheme of strong versus weak discretion depends on the characterization of the question. The overall sentencing decision was bounded by a standard—the maximum sentence and fine set out in the statute. Thus, the judge exercised weak discretion. But the real decision, given that in many cases the maximum is far in excess of the probable sentence and defendants are more concerned with how short the sentence may be, was not governed by any standards directing the choice of the particular sentence under the maximum. In an important sense, and from the perspective of the parties and the judge, the old law decision about the actual length of the sentence is an example of Dworkin's strong discretion. *See* DWORKIN, *supra* note 3, at 31-34.

[73] *See id.* at 31.

[74] *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES 5-25 (1973) (criticizing discretionary sentencing and the way his colleagues on the federal bench exercised their power); *see also* Stith & Koh, *supra* note 15, at 227-30 (analyzing the growing debate over rehabilitative sentencing during the early 1970s).

[75] *See* FRANKEL, *supra* note 74, at 61-85 (discussing the occasional use of sentencing institutes to educate judges and sentencing counsels to control sentencing).

[76] Stith & Koh, *supra* note 15, at 230-33 (recounting the early history of sentencing reform); *see also* Reitz, *supra* note 62, at 1447-48 (noting the "reformist vision" of the early movement to change sentencing).

[77] *See* Stith & Koh, *supra* note 15, at 231.

[78] *See* FRANKEL, supra note 74, at 17-23.

[79] *See* Stith & Koh, *supra* note 15, at 231.

[80] *See id.*

Stith & Koh and Yellen tell different versions of the political tale of how that liberal 1970s movement yielded a 1980s legislative alliance with conservative law and order interests. Riding the "crime wave" and controlling the legislative process, conservative interests met the demands of their liberal allies for rules and reviewability, while achieving their goals of lengthening criminal sentences and eliminating the rehabilitative model of criminal sentencing.[81] The SRA and the introduction of mandatory minimum narcotics sentences brought about a complete restructuring of federal criminal sentencing made possible by, and reflecting, a classic political compromise. Although its diverse supporters agreed that the discretion of sentencing judges should be reined in, they did not agree on why or what goal the new system should pursue. As a compromise, they simply listed several general goals and "remained agnostic" on choosing an underlying philosophy of sentencing.[82]

Although the failure to decide on an underlying philosophy is problematic, more immediately troublesome is the contradiction inherent in the stance on individualization of sentencing in 18 U.S.C. § 3553.[83] The statute directs sentencing courts to consider "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; . . . [and] (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . ."[84] Judges have a statutory mandate to continue to individualize sentences as they did under the old law. However, that mandate is now balanced against a directive that those individualized sentences should not vary too much from those of similarly situated defendants. One way to view that tension is to ask what

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[81] *See id.* at 232-48 (tracing the results of the political compromise between Senators Kennedy and McClellan); *see also* Yellen, *supra* note 15, at 585-90 (drawing a cautionary lesson from the history of the sentencing reform movement and warning advocates of systemic reform of the juvenile justice system that political pressure to be tough on crime can overwhelm any other reform agenda).

[82] *See* Kevin Cole, *Ten Years Later: The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997) (arguing that the Commission's failure to make fundamental theoretical choices makes the goal of reducing disparity incoherent).

[83] The Guidelines send a "mixed message," with some elements highlighting judicial individualization and other elements encouraging uniformity through uniform application of the Commission's rules. *See* Reitz, *supra* note 62, at 1462; *see also* Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991) (analyzing the conflicting provisions and arguing for more individualization); Daniel Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1744-45, 1749-52 (1992) (analyzing the conflicting provisions and arguing for greater judicial power to individualize); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 870 (1992) (calling for more individualization within the Guidelines system).

[84] 18 U.S.C. § 3553(a)(1) & (6) (1994).

is unwarranted, as opposed to warranted, disparity among defendants.[85] Ultimately, we should determine what matters when we ask whether one bank robber should receive the same sentence as another bank robber.

The Sentencing Commission, the body charged with answering that question, based its answer on an empirical analysis of past sentencing practices. At the heart of the Guidelines is a statistical analysis of about 110,000 federal criminal sentences, which identified statistically significant factors in historical sentencing practices.[86] The Commission then wrote guidelines designed to impose statistically average sentences for cases involving the identified factors.[87] If a factor did not occur with sufficient frequency, the Commission omitted the factor from the Guidelines, assuming that judges would individualize sentences in cases that presented atypical factors.[88]

The Commission suggests that the empirical approach "helped resolve its philosophical dilemma"[89] of choosing between those who advocated "just deserts"[90] and those who advocated crime control because both groups might "recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective."[91] Many have criticized the Commission's averaging of philosophical positions,[92] its use of past practices motivated by a wider variety of goals, principally rehabilitation, to answer a narrower and largely empirical question, and the insensitivity of its empirical measures to individual differences.[93]

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[85] *See* Alschuler, *supra* note 83, at 915-16.

[86] *See* Breyer, *supra* note 16, at 7 & n.50.

[87] *See* GUIDELINES MANUAL ch. 1, pt. A, cmts. 3, 5.

[88] *See id.*

[89] *Id.* cmt. 3.

[90] *Id.* The Manual defines just deserts as "punishment . . . scaled to the offender's culpability and the resulting harms." *Id.*

[91] *Id.*

[92] *See, e.g.*, Cole, *supra* note 82, at 1336 (identifying the Commission's failure to make principled choices as the cause of doctrinal disarray in Guidelines jurisprudence); Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1743-44 (1995) (citing sentencing guidelines as an example of making laws with low-level agreement on practical issues, rather than more general agreement on principles).

[93] These problems were evident to perceptive early critics. *See, e.g.*, Alschuler, *supra* note 83; Freed, *supra* note 83; Schulhofer, *supra* note 83. The Commission recognized the choice it made and included this language in the text of the Guidelines:

> The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process.

The Commission did not just average past practices, it developed models of the factors judges used to individualize sentences by asking what particular conduct impacted sentencing for each offense.[94] For example, in the typical bank robbery, defendants who used a gun generally received higher sentences, than defendants who did not, so gun use was considered as an offense characteristic meriting harsher sentences.[95] Where the data indicated that a particular feature did not have statistically significant sentencing consequences, or did not occur often enough, the Commission did not include the factor as an offense characteristic.

The Commission did, however, permit consideration of unusual conduct through departures.[96] For example, although most immigration offenses do not involve guns, and thus the relevant guideline does not mention guns, the Commission expects judges to depart upward for gun use in immigration offenses. The empirical approach drove decisions about the "heartland" of offense conduct relevant to sentencing a given offense.[97] Identification of that heartland is key to defining the situations in which judges may depart from the Guidelines.[98]

GUIDELINES MANUAL ch. 1, pt. A, cmt. 3. The first edition of the Sentencing Guidelines Manual contained that language, and ten years later the same language and the same basic guidelines remain in force. Despite some 544 amendments, the Guidelines structure has not changed. Yet the idea of evolutionary change and perfectability remains a powerful illusion at the heart of the Guidelines. The Commission disavows adopting a single philosophical perspective and uses the rhetoric of pragmatic flexibility, ready to respond to new information and changing circumstances. In fact, its continued use of average past sentences, without parole, reflects a choice of an empirical measure of historical practices as its fundamental guiding philosophy, despite statutory directives to balance reducing disparity with other goals. The rigidity of the Guidelines over the first ten years belies its pragmatic rhetoric.

[94] *See* GUIDELINES MANUAL ch. 1, pt. A, cmt. 4.

[95] The Commission used this example when discussing the desirability of a "real offense" system. *See id.* cmt. 4(a).

[96] *See id.* cmt. 4(b) (describing the Commission's view regarding when a departure is warranted).

[97] The Commission's decision that very few characteristics of the offender, rather than the conduct of the offense, would be ordinarily relevant was the result of more traditional political trade offs among commissioners and was not empirically driven. Congress empowered the Commission to consider the relevance of a range of characteristics, including age, education, vocational skills, physical condition including drug dependence, family ties and responsibilities, and community ties. *See* 28 U.S.C. § 994(d) (1994). The Commission made all of those factors not "ordinarily relevant" in the Guidelines. GUIDELINES MANUAL § 5H1.1 ("Introductory Comments"); *see also* Stith & Koh, *supra* note 15, at 249-50, 283 (asserting that the Commission was not required by law to make most individual characteristics not ordinarily relevant).

[98] *See* GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(b).

The Guidelines themselves have completely changed the exercise of judicial discretion in federal sentencing.[99] Under the Guidelines, judges make legal determinations about the applicability of rules—the particular Guidelines sections—to the case at hand. This is the familiar application of law to facts, the archetypal exercise of the judicial craft. It often requires the exercise of judgment, i.e., Dworkin's weak discretion of the first type,[100] but the Guidelines reflect an effort to draft a comprehensive set of detailed rules designed to leave few hard cases. Those legal decisions about which rules are applicable in a given case, and how they are to be applied, are reviewable on

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[99] At the same time that Congress adopted a set of mandatory guidelines, it also passed mandatory minimum drug sentences which effectively took 40% of the cases out of the new sentencing regime and made guidelines sentencing impossible in those cases. *See, e.g.*, 21 U.S.C. § 841(b) (1994); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999) (discussing the impact of mandatory minimum sentences). This defect has received much comment. *See* JONATHON P. CAULKINS ET AL., RAND DRUG POLICY RESEARCH CENTER, MANDATORY DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY 124-26, 143-44 (1997) (arguing that mandatory minimums are not cost effective); U.S. SENTENCING COMM. MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 34-35 (1991) (noting conflicts between the Guidelines and mandatory minimums).

The expansion of mandatory minimum sentences shifted significant discretion to determine sentences from judges to prosecutors. *See* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994). The prosecutor's charging decisions determine the applicability of mandatory minimums and can determine the applicable guidelines. *See generally* Schulhofer & Nagel, *supra* note 19, at 1284 (discussing plea bargaining under the Guidelines). The prosecutor's decision to certify the defendant's "substantial assistance," GUIDELINES MANUAL § 5K.1.1, can take the case below the sentencing guidelines range. *See* Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199-201 (1997) (noting that if the government "files a motion requesting downward-departure, the court may depart and impose a sentence below the applicable guideline range"). Furthermore, "evidence exists that prosecutors sometimes use plea bargaining to manipulate or circumvent the Guidelines." *Id.* at 236. Others have argued that power has shifted to Congress. *See, e.g.*, James B. Burns et al., *We Make the Better Targets (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)*, 91 NW. U. L. REV. 1317, 1318 (1997).

Congress took a small step away from mandatory minimums when it passed the "safety valve" provision in 1994. *See* 18 U.S.C. § 3553(f) (1994). This statute permits judges to sentence low level, non-violent first time narcotics offenders to a sentence within the Guidelines, but below the mandatory minimum. *See generally* Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851 (1995).

[100] *See supra* note 52.

appeal.[101] Federal criminal sentencing, once an exercise of unreviewable individual judgment, now looks much more like the rest of judging.

Once those legal determinations are made, two areas of discretion as judicial choice remain. The first is the unreviewable authority to decide where in the applicable range to sentence the defendant.[102] By statute, the maximum sentence, or top of the range, cannot exceed the minimum sentence, or bottom of the range, by more than the greater of either twenty-five percent or six months.[103] That area of choice is clearly defined and presents most of the primary and all of the secondary (i.e., nonreviewable) discretion left to sentencing judges in the roughly seventy percent of the cases sentenced within the applicable guideline range.[104]

The roughly thirty percent of the cases sentenced outside the Guidelines fall into two groups. Two thirds of the cases outside the range, or just under twenty percent of all cases,[105] were sentenced outside the Guidelines because the defendants provided substantial assistance in the investigation or prosecution of others.[106] Only the prosecutor can trigger these departures,[107] but once the government requests a substantial assistance departure, the extent of the departure is up to the judge. In those cases, the judge has unreviewable (i.e., complete secondary) discretion over the length of the sentence.[108] Moreover, judges also have moderate primary discretion in these cases be-

[101] *See* 18 U.S.C. § 3742.

[102] *See* 18 U.S.C. §§ 3742(a)(3) & (b)(3) (authorizing appeal of any sentence below or above the range, but not for any sentence within the range absent any other reason).

[103] *See* 28 U.S.C. § 994(b)(2) (1994).

[104] The creation of the Sentencing Commission and its statutory mandate to measure the effectiveness of the Guidelines system, *see* 28 U.S.C. §§ 991(b)(1)(C) & (b)(2), has resulted in a tremendous wealth of readily available data. The Commission publishes annual reports each year and maintains an extensive data base of collected data. In the 1996 fiscal year, October 1, 1995 through September 30, 1996, a total of 42,436 sentences were imposed under the Guidelines; 69.6% of the cases were sentenced within the guideline range. *See* U.S. SENTENCING COMM'N, 1996 ANN. REP. 34 (1997).

[105] In fiscal 1996, 19.2% of all the sentences involved departures on account of substantial assistance in the prosecution of others. *See* U.S. SENTENCING COMM'N, 1996 ANN. REP. 34 (1997).

[106] *See* GUIDELINES MANUAL § 5K1.1. These substantial assistance departures can be very significant in narcotics cases, where they are usually paired with motions to sentence below the mandatory minimum. *See* 18 U.S.C. § 3553(e); Melendez v. United States, 518 U.S. 120, 124-31 (1996) (holding that a government motion to depart from the Guidelines does not confer authority upon the court to ignore the mandatory minimum; a separate motion pursuant to § 3553(e) is required); *see also* U.S. SENTENCING COMM'N, SUBSTANTIAL ASSISTANCE DEPARTURES (1997) (reporting statistical evidence suggesting the extent of the departures may vary with race, gender, and other problematic factors).

[107] *See* GUIDELINES MANUAL § 5K1.1.

[108] *See id.* § 5K1.1.(a).

cause the Guidelines spell out the factors to consider in evaluating the defendant's cooperation.[109]

In the remaining cases,[110] the judges exercised their authority, subject to appellate review, and found the cases unusual enough to require sentencing outside the guideline scheme. This group of non-substantial assistance departures[111] represents what remains of the completely unfettered primary sentencing discretion once enjoyed by federal judges.

The proper exercise of the remnants of what was once a much greater power has been a matter of contention since the Guidelines were first proposed. The decision to make the Guidelines mandatory, but permit departures in some cases, was a compromise between proponents and opponents of judicial discretion.[112] Congress decided that judges should have the authority to sentence outside the Guidelines in some cases. The statute requires that:

> The court shall impose a sentence of the kind, and within the range, referred to in 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.[113]

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[109] *See id.* § 5K1.1.(a)(1)-(5) (providing a non-exhaustive list of factors courts may consider).

[110] In fiscal 1996, 11.2% of all cases were not sentenced within the Guidelines for reasons other than substantial assistance, 10.3% of all cases involved a downward departure, and 0.9% involved an upward departure. *See* U.S. SENTENCING COMM'N, 1996 ANN. REP. 34-35 (1997).

[111] The 0.9% of all cases involving upward departures are not discussed in this Article. Upward departures are governed by a separate set of more restrictive principles. They most often involve cases in which the defendant's criminal history under represents his true past criminal conduct. Such upward departures are structured by reference to the criminal history rules. *See* GUIDELINES MANUAL § 4A1.3 (providing standards for upward departures when the defendant's criminal history category does not truly reflect his or her criminal history); Michael Gelacek et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 339 (1996) (analyzing pre-*Koon* upward departures). The very small number of upward departure cases, compared to the almost 30% sentenced below the guideline range, suggests that many judges believe the Guidelines are generally harsh enough and need to be moderated with leniency.

[112] *See* Stith & Koh, *supra* note 15, at 271-73.

[113] 18 U.S.C. § 3553(b) (1994). Commentators have debated whether § 3553(b) is the only statutory provision authorizing departure, although courts (including the Supreme Court in *Koon*) have not taken up the invitation to use other provisions. *Compare* Judy Clarke & Gerald McFadden, *Departures from the Guideline Range: Have We Missed the Boat, or Has the Ship Sunk?*, 29 AM. CRIM. L. REV. 919, 921-31 (1992) (reading other sections of the SRA as granting independent and broader authority to depart), *with* Gelacek

The Commission's approach to departures shows that it narrowly interpreted this directive and other statutory language favoring individualized decision making and judicial discretion.[114] That approach flowed from the Commission's strong reliance on the empirical data. Taking the position that it had captured most, if not all, of the factors judges relied upon, the Commission saw little room for individualization. Put another way, the Commission viewed sentencing as largely reduced to general principles, spelled out in the Guidelines, requiring little need for individualizing.

III. *KOON V. UNITED STATES*

We all have come to know the awful story of the beating of Rodney King by several Los Angeles police officers.[115] In *Koon v. United States*,[116] the government appealed the sentences imposed on two of the officers involved in the beating who were convicted of federal charges.[117] The case presented the question of whether the United States Court of Appeals for the Ninth Circuit was correct when it gave no deference to the trial court's decision to depart downward from the Sentencing Guidelines.[118] The Supreme Court ruled that the circuit court should have deferred to the trial court under an abuse of discretion standard.[119] The Court encouraged giving trial courts greater discretion to individualize sentences because the sentencing decision is, and always has been, an inherently individualized factual judgment.[120]

However, what the Court treats as a fact about the "nature" of sentencing is actually the very issue requiring resolution. At the heart of the problem is the need to find the right degree of individualization within the system of rule-determined, uniform sentencing introduced by the Guidelines. The Court conflated the limited discretion of the Guidelines—which intended to balance individualized sentencing with the need to reduce disparity—with the old tradition of complete discretion, which individualized sentences without any countervailing goal. The analysis of the "factual nature" of sentencing masks the Court's refusal to grapple with the difficult job of defining the limits of individualized sentencing within the Guidelines.

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et al., *supra* note 111, at 318-28 (arguing that § 3553(b) is the sole statutory authority for departures).

[114] *See* Gelacek et al., *supra* note 111, at 319-22 (arguing for a narrow reading of § 3553(b)); Stith & Koh, *supra* note 15, at 284 (stating that the Commission has chosen rigidity over flexibility).

[115] *See* Koon v. United States, 518 U.S. 81, 85-88 (1996) (reciting the account of King's beating).

[116] 518 U.S. 81 (1996).

[117] *See id.* at 88.

[118] *See id.* at 91.

[119] *See id.*

[120] *See id.* at 96-100.

If the issue is simply the appropriate standard of review of an inherently factual judgment, then it is only a short step to the deferential abuse of discretion standard of review and deferential but individualized appellate analysis of each departure. But the adoption of the malleable abuse of discretion standard offers little guidance as to how deferential that review should be. The old system of unreviewed and standardless sentencing upon which the Court relied offers no guidance. Nor can courts rely upon first principles or agreement on the larger goals of sentencing to strike the right balance. The contradictory strands within the Guidelines and the disagreement between the Commission and the Court about the degree of individualization appropriate under the Guidelines leave ample room for the circuit courts of appeals to go their own way, as they have since *Koon* was decided.[121] The Supreme Court did not go far enough when it held that the district courts should be reviewed for abuse of discretion.

It is evident from the start of the analysis of the Guidelines that the Court disagrees with Sentencing Commission orthodoxy. According to the Court, Congress moved from a regime of judicial discretion to mandatory guidelines to address the "perceptions" of disparate treatment of similarly situated offenders.[122] Justice Kennedy ends that discussion by noting that the Guidelines are mandatory, "if the case is an ordinary one."[123] He goes on to characterize the SRA as "[a]cknowledging the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances . . . ."[124]

The Court looks to the Sentencing Guidelines Manual to understand the structure of departures and chooses a section in which the Commission acknowledged that the question of how amenable sentencing is to complete categorization remains unresolved.[125] The Court cites the discussion of the Commission's reasons for completely prohibiting only a small group of factors but permitting consideration of other factors if in a very circumscribed manner.[126] Quoting from the Manual, Justice Kennedy notes:

> "First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sen-

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[121] See Part IV *infra* for a discussion of the post-*Koon* cases.

[122] *See Koon*, 518 U.S. at 92.

[123] *Id.*

[124] *Id.* "Wisdom" and "necessity" are strong words here, as Congress has the power to pass mandatory guidelines without departure power.

[125] *See id.* at 93-94. This is the struggle between individualized sentencing and Guidelines sentencing. If guidelines are to be applied, some differences among cases cannot be accounted for with differing sentences. The issue is always which differences are relevant and which differences are not. *See, e.g.*, Cole, *supra* note 82, at 1339; Schulhofer, *supra* note 83, at 864-65.

[126] *See Koon*, 518 U.S. at 94. The Court notes that the Guidelines do provide some guidance on what factors may be considered. *See id.* at 94-95.

> tencing decision. The Commission also recognizes that the initial set of guidelines need not do so. 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 analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.
>
> Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is 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."[127]

The Commission's view that it is difficult to capture all the potentially relevant conduct is surely an understatement. It is impossible to capture it all. Again, the contested ground is over what is to be declared irrelevant. The notion that continued monitoring of ongoing decisions will permit refinement will only get the Commission so far. If departures are really based on the atypical, we must question the grand design of perfecting the Guidelines over time.

The justification for why departures should not occur "very often" suffers a related flaw. It assumes that the Commission's historical approach captures the unusual. But by definition, departures are based upon factors that operate in an unusual or atypical way in a given case. The Commission cannot have it both ways. It pays lip service to individual sentencing, but as many have commented, it chose sentencing in the aggregate.[128] The Supreme Court nods to the Commission's dream of a sufficiently complex set of rules to "encompass[ ] the vast range,"[129] but it chooses a model much more consistent with the common law idea of case by case adjudication. In so doing, it makes no mention of that gulf, even while quoting the Commission as if the two visions were consistent.

After reviewing the Commission's general orientation toward departures and defining the typical and atypical case, the Court adopts Commissioner, Judge, and Justice Breyer's departure road map for sentencing courts, listing the inquiries that a sentencing court considering a departure should ask:

> 1) What features of this case, potentially, take it outside the Guidelines' 'heartland' and make of it a special, or unusual, case?

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[127] *Id.* at 93-94 (quoting GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(b)).

[128] *See* Alschuler, *supra* note 83, at 902 ("[G]uidelines regimes substitute punishment based on aggregations of similar cases."); Stith & Cabranes, *supra* note 14, at 1281 (criticizing the Commission's effort to capture all possible factors as "micro-managing").

[129] *Koon*, 518 U.S. at 93.

2) Has the Commission forbidden departures based on those features?

3) If not, has the Commission encouraged departures based on those features?

4) If not, has the Commission discouraged departures based on those features?[130]

If a factor is forbidden, the district court is prohibited, as a matter of law, from basing a departure upon it.[131] If a factor is encouraged, a court is authorized to depart if the applicable Guideline does not already take it into account.[132] If it is discouraged, the factor must (1) be present to an exceptional degree, or (2) make the case different from the ordinary case presenting that factor.[133] If the Guidelines do not mention a factor, the court must consider the Guidelines as a whole, bearing in mind that departures on grounds not mentioned will be "highly infrequent."[134]

With that background, the Supreme Court holds that district court decisions to depart will be reviewed for abuse of discretion.[135] The Court based its holding on the traditional role of district and appellate courts in sentencing, which, the Court tells us, the SRA did not fundamentally alter.[136] The Court makes two arguments in support of that questionable view of the SRA. The first argument is that "Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions. Indeed, the text of § 3742 manifests an intent that district courts retain much of their traditional sentencing discretion."[137] Two aspects of this argument are unconvincing.

First, mandatory guidelines, subject to appellate review, completely changed the kind of discretion exercised by district courts. Although the new system retains some discretionary elements, the Court uses two different senses of discretion to minimize a fundamental change. The old system offered an example of both standardless and unreviewable discretion. These represented one of Dworkin's weak categories and perhaps an example of

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[130] *Id.* at 95 (quoting United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993)) (opinion by then-First Circuit Chief Judge Breyer).

[131] *See id.* at 95-96.

[132] *See id.* at 96.

[133] *See id.* (citing *Rivera*, 994 F.2d at 949).

[134] GUIDELINES MANUAL ch. 1, pt. A (1995).

[135] *See Koon*, 518 U.S. at 91.

[136] *See id.* at 98.

[137] *Id.* at 97. Section 3742(e) provides, "The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district 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(e) (1994).

strong discretion,[138] as well as both primary and secondary discretion in Rosenberg's terms.[139]

The appellate review introduced by the SRA changed all that. Decisions formerly standardless and unreviewable are now subject to detailed rules and review. The suggestion that § 3742 "manifests an intent that district courts maintain much of their traditional sentencing discretion,"[140] stands the SRA on its head. Contrary to the Court's assertion, the creation of substantive appellate review (which Justice Kennedy tendentiously labels "limited") dramatically changed the landscape. The Court quotes its own arguably contentious observation that "except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court.'"[141] The statute at issue, the SRA, specifically directs appellate courts to substitute their judgment for a number of sentencing issues formerly left entirely to the district court.[142]

The Court's second argument rests upon the principles that appellate courts should defer to factual determinations of trial courts, and more contentiously, though not argued here, that these departures decisions are factual, not legal questions.[143] Justice Kennedy makes the transition between the argument about the "traditional" relationship between trial and appellate courts in sentencing and the factual nature of departure decisions by observing that some trial court decisions are not owed deference. His example posits a mathematical error in Guideline calculations, where the appellate court is in as good a position to address the error as the district court would be. He contrasts the case of mathematical error with most departure determinations, which "embod[y] the traditional exercise of discretion by a sentencing court."[144]

Identification of the "traditional" exercise of discretion begins by distinguishing fact from law, as a functional classification.[145] The classification of an issue as fact, law, or mixed determines the appropriate standard of review. At one end of the spectrum are judicial decisions about particular historical events.[146] When a district judge must determine what happened

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[138] *See supra* note 52.

[139] *See supra* notes 36-38 and accompanying text.

[140] *Koon*, 518 U.S. at 97.

[141] *Id.* (quoting Williams v. United States, 503 U.S. 193 (1992) (quoting Solem v. Helm, 463 U.S. 277, 290 n.16 (1983))).

[142] See 18 U.S.C. § 3742 (1994) (providing authority for an appellate court to review, and overturn if necessary, a district court's sentencing judgment).

[143] *See Koon*, 518 U.S. at 98.

[144] *Id.*

[145] *See id.*

[146] *See* Thompson v. Keohane, 516 U.S. 99, 110-11 (1995) (collecting cases and discussing the "slippery" line between law and fact in the cases). In *Townsend v. Sain*, the Court defined fact as "basic, primary or historical facts: facts 'in the sense of a recital of

and the closely related question of whom to believe, the decisions will only be overturned if it is clearly erroneous.[147] That standard has been justified largely in terms of institutional competence and efficiency. The trial judge is in the best position to make a decision, as the trial judge has observed the evidence first hand and is able to weigh everything in context. Hence, appellate judges should not spend time learning the record in sufficient detail to interpose their own judgment as their judgment might not be generally applicable to other cases.

In contrast are general questions whose answers do not depend on any of the particulars of the case at hand and, hence, are readily identifiable as questions of law. Those questions are reviewed de novo because the trial court is in no better position to make the decision than the appellate court. Moreover, only the appellate court is able to compare the many lower court cases and bring uniformity to a given area.[148]

Relying on that analysis, the Court reasons that the standard of review in *Koon* flows from the fact sensitive, context-dependent nature of the sentencing decision.[149] But the normative question of whether or not sentencing decisions should be fact- and context-sensitive is at the heart of the dispute. The Court's choice of the abuse of discretion standard is not determined by the nature of the sentencing decision; rather, its choice of a model of sentencing determines the standard of review.

Although there are many examples of pure fact and pure law, the two categories are not analytically distinct[150] and the Supreme Court has disa-

external events and the credibility of their narrators.'" 372 U.S. 293, 309 n.6 (1963) (quoting Brown v. Allen, 344 U.S. 443, 506 (1953)). *Thompson* discusses the mixed question, which requires the application of law to fact, but not fact in the *Townsend* sense, sometimes turning on evaluation of the "related circumstances" from the perspective of a reasonable person. *See* 516 U.S. at 113. As reasonable person assessments "fall within the province of the drier of fact," the issue is left largely to the trial court. *Id.* at 113 n.13.

[147] That standard has been defined as requiring "the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400 (1990).

[148] Whether under an abuse of discretion or de novo standard, errors of law are never given deference. *See* Koon v. United States, 518 U.S. 81, 100 (1996); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402 (1990).

[149] *See Koon*, 518 U.S. at 99-100.

[150] The relationship between facts and law has received attention from the legal realists, *see* JEROME FRANK, LAW AND THE MODERN MIND 125 (1963) ("The judge, in arriving at his hunch, does not nicely separate his belief at the 'facts' from his conclusion as to the 'law'; his general hunch is more integral and composite, and affects his report—both to himself and to the public—concerning the facts."), the legal process school, *see* HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS 349-62 (1994) (defending the view that the distinction is not merely functional, but relying upon institutional and process

vowed any comprehensive test for cases not governed by statute or long historical practice.[151] The Court has most often reasoned about institutional competence to decide a particular question[152] and uses susceptibility to useful generalization as a test for distinguishing generalizable law from ungeneralizable fact.[153] Although the Court has recognized that the use of fact or law labels turns on decisions about who should decide and whether general rules should control the area, it also continues to use the labels to justify its decision. Labeling departure decisions as factual is *Koon's* outcome, not its rationale.

The question of whether sentencing decisions involve "the consideration of unique factors that are 'little susceptible . . . of useful generalization' and as a consequence, de novo review is 'unlikely to establish clear guidelines for lower courts'"[154] turns on whether the departure factor is judged extraordinary against the unique context of all the other facts of the particular case, or only as compared to that same factor in other cases. Although the Court chose the first view, the government's view, that the sentencing court must compare the particular factor at issue to the "heartland" of cases to determine if the factor is exceptional, presents the alternative, rule-determined model of sentencing.[155]

For example, victim misconduct is an allowable departure factor in certain cases.[156] The government's concept of measuring the factor against its typical version in the "heartland" suggests that appellate courts could, as a general matter, rule that certain kinds of misconduct like cursing, would never be enough to warrant a departure. Meanwhile, other misconduct like threats of physical harm, coupled with some physical aggression but, not enough to amount to a self-defense claim, could justify a departure. The district court's role would be to determine if the threats and aggression in a particular case were sufficient.

Under *Koon*, the inquiry is whether the factor is in the heartland, considering all the facts of the particular case, and then comparing it to the heart-

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based justifications for the distinction), and critical theory, *see* BERNARD JACKSON, LAW, FACT AND NARRATIVE COHERENCE 262-63 (1988).

[151] *See* Pierce v. Underwood, 487 U.S. 552, 558-59 (1988).

[152] *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 114 (1985).

[153] *See Koon*, 518 U.S. at 99 (quoting Pierce v. Underwood, 487 U.S. 552, 559-60 (1988); Miller v. Fenton, 474 U.S. 104, 114 (1985); and citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403 (1990)).

[154] *Id.* (quoting *Cooter & Gell*, 496 U.S. at 404).

[155] *See id.* "The relevant question, however, is not, as the Government says, 'whether a particular factor is within the 'heartland' as a general proposition,' but whether the particular factor is within the heartland given all the facts of the case." *Id.* (quoting Brief for United States at 28).

[156] *See* GUIDELINES MANUAL § 5K2.10.

land.[157] Under this approach, cursing might be sufficient misconduct to warrant departure in one case, perhaps involving a mild mannered church going defendant roused to a single punch by foul language. On the other hand, actual victim violence might not justify a departure in a case where a slap by a much smaller victim led to a pummeling by an already angry aggressor.

The choice to treat this as a case-specific, or factual matter, flows from the Court's decision to maintain as much individualized sentencing as possible within the Guidelines scheme. Although the opinion suggests "it does not advance the analysis much to determine that a victim's misconduct might justify a departure in some aggravated assault cases,"[158] it would advance the analysis if the Court held that certain misconduct would never justify a departure.

The Court also argues that the factual nature of the inquiry gives the district court relatively greater institutional competence to determine whether a factor is exceptional in a particular case:

> District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. In 1994, for example, 93.9% of Guidelines cases were not appealed.[159]

Beyond the issue of the nature of the decision, there is also a problem with appealing to institutional competence. The question is not whether district judges, as a group, see more cases but rather whether a given court is in a better position to evaluate hard cases. The 4262 cases that raised at least one sentencing issue on appeal in fiscal 1996[160] could certainly go a long way toward developing a comprehensive body of case law. Given the wide range of the criminal cases, each district court does not see many of each type of case.[161] This gives them no institutional advantage over circuit judges, who hear a wider selection of cases and have the benefit of the views of the district judge and the other members of their panels.

The Court's adoption of the abuse of discretion standard is not supported by the history of judicial exercise of another kind of discretion, nor the analytically factual nature of the sentencing decision. Rather, the Court chose this standard based on its judgment that departures should be determined case

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[157] *See Koon*, 518 U.S. at 99-100.

[158] *Id.* at 100.

[159] *Id.* at 98-99 (citing Letter from Pamela G. Montgomery, Deputy General Counsel, United States Sentencing Commission (Mar. 29, 1996)).

[160] *See* U.S. SENTENCING COMM'N, 1996 ANN. REP. 39-41 (providing a breakdown of appeals presenting only sentence issues, sentence and conviction issues and only conviction issues).

[161] Narcotics cases may be the exception. Some district courts routinely see hundreds of these cases every year. *See* CAULKINS ET AL., *supra* note 99, at 159 (noting that there were 25,084 federal drug prosecutions in 1990).

by case, rather than by applying general principles.[162] This choice reflects the Court's adherence to the model of old law discretion and largely unfettered judicial power to impose sentence. It rejects the Commission's dream of seamless, comprehensive rules, which would further concentrate sentencing power in the Commission.

The Court then applied the standard to the case at hand. At the trial, two police officers, Stacey Koon and Laurence Powell, were convicted of violating Rodney King's civil rights under color of law.[163] At sentencing, the guideline imprisonment range for both officers was seventy to eighty-seven months.[164] The district court departed downward a total of eight levels, five levels based on its finding that King's misconduct provoked the attack, and three levels based on a combination of four factors particular to these defendants and this case.[165] The sentencing court departed to an imprisonment range of thirty to thirty-seven months and sentenced both defendants to thirty months imprisonment.[166] Both defendants appealed their convictions and the government appealed the sentences.[167] The United States Court of Appeals for the Ninth Circuit applied the de novo standard of review and rejected all the departure grounds upon which the district court relied.[168]

Applying the abuse of discretion standard, the Supreme Court held that the district court's five level departure pursuant to guideline § 5K2.10[169] was not an abuse of discretion.[170] The Supreme Court closely analyzed the guideline under which the defendants were sentenced and found that because it covers both unprovoked attacks by officials, as well at those that begin as legitimate uses of force but later become excessive, the district court had discretion to determine that this situation involved provocation that was outside the heartland of the guideline.[171]

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[162] *See Koon*, 518 U.S. at 99-100. As the Court stakes out this area of case specific review, and holds that deference to the trial court is appropriate because generalizations are not useful in fact intensive cases, it also notes that errors of law are always an abuse of discretion. *See id.* Therefore, appellate courts will always decide the legal question of whether a given factor is permissible as a matter of law. That a departure decision, in an occasional case, may call for a legal determination does not mean that parts of the review must be labeled de novo while other parts are labeled an abuse of discretion. *See id.* at 100.

[163] *See id.* at 88. Two others, Timothy Wind and Ted Briseno, were acquitted. *See id.*

[164] *See id.* at 89 (applying guideline sections to reach sentence).

[165] *See id.*

[166] *See id.* at 90.

[167] *See id.*

[168] *See id.* at 99-100.

[169] GUIDELINES MANUAL §5 K.210 (allowing downward departure when victim contributes to provoking the substantive offense).

[170] *See Koon*, 518 U.S. at 105.

[171] *See id.* at 102-05.

The Court then examined the three level departure based on four different factors: collateral employment consequences, low likelihood of recidivism, susceptibility to abuse in prison and the burden of successive prosecutions.[172] The Court began by rejecting the government's argument that all the factors should be ruled improper in all cases.[173] The Court reaffirmed the rule that if a factor is not explicitly prohibited by the Guidelines, a court may not categorically reject it as a matter of law, but rather must consider the factor in the individual case.[174]

The Court continued, ruling that the sentencing court abused its discretion in departing downward based on the collateral employment consequences of the convictions and the low likelihood of recidivism.[175] The adverse employment consequences to Officers Koon and Powell did not take this case out of the heartland of cases involving violation of rights under color of law because the defendant in such cases is typically a public official who will suffer career related consequences.[176] The Court reasoned that the Commission already considered low likelihood of recidivism in setting the criminal history category.[177] Therefore, that factor can never be a basis for departure.[178] The sentencing court did not abuse its discretion, however, in departing downward based on the susceptibility to abuse in prison and the burden of dual or successive prosecution in the state and federal courts.[179] The Court found that the district court's determination that exceptional media attention to this case put these defendants at particular risk was "just the sort of determination that must be accorded deference by the appellate courts."[180] It also found that the district court correctly considered the lengthy state trial and the burdens of successive prosecutions in this case.[181]

Others have noted that *Koon's* rhetoric of deference is paired with a very close analysis of the district court's reasoning and only limited approval of the sentence imposed by the district court.[182] But the problems with the de-

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[172] *See id.* at 106-12.

[173] *See id.* at 106.

[174] *See id.* at 108-09.

[175] *See id.* at 109-12.

[176] *See id.* at 110.

[177] *See id.* at 111.

[178] *See id.*

[179] *See id.* at 111-12.

[180] *Id.* at 112.

[181] *See id.*

[182] *See* United States v. Otis, 107 F.3d 487, 492 (7th Cir. 1997) (Evans, J., concurring) (*Koon's* "rhetorical embrace of deference, doesn't jibe well with its non-deferential behavior—although the major basis for the district court's downward departure was approved, several lesser reasons for the departure were questioned. Thus *Koon* will continue, not soothe the friction that exists today between district and appellate courts on departure jurisprudence."); *see also* Stith & Cabranes, *supra* note 14, at 1278 (noting

cision go deeper. *Koon's* failure to distinguish between the tradition of complete secondary (non-reviewable) discretion and the post-SRA regime of reviewable primary (decision-making) discretion, has furthered doctrinal incoherence and decisional disarray in the lower courts. *Koon* does not recognize that the circuit courts are reviewing the exercise of a new kind of discretion. The decision fosters continued debate about the way things were done under the old law, when it should refocus on the question of how discretion should be exercised under the new law.

The abuse of discretion standard of review is widely acknowledged to encompass a broad spectrum of appellate deference to lower court decisions, "from the virtually irresistible to the virtually meaningless."[183] As Childress & Davis explain, "[t]he level of deference given to discretionary decisions by the trial court varies with the issue, the stage of legal development, and the court."[184] When there is a history of the exercise of discretion, case law gives courts guidance on the actual level of deference to be used when applying the abuse of discretion standard to a particular issue. In reviewing the district court's decision to depart from the Sentencing Guidelines, the Supreme Court's reliance on a "uniform and constant . . . federal judicial tradition"[185] of discretion holds out false hope for consistent application of the abuse of discretion standard. The old law system of standardless and unreviewed discretion offers no guidance for developing decision and review-limiting discretion. The SRA's adoption of appellate review dammed a free flowing stream. The Supreme Court's adoption of the abuse of discretion standard in *Koon* offers little control over how much water will be permitted to flow through the spillway.

Koon's expansive rhetoric of discretion but analyzing that rhetoric as in tension with the holding and reasoning of the opinion); Reitz, *supra* note 62, at 1466 (characterizing *Koon* as an effort to reverse the rigidity of the appellate decisions).

[183] Rosenberg, *supra* note 33, at 660. *See generally* CHILDRESS & DAVIS, *supra* note 39, § 4.21 (defining and discussing a contextual definition of the abuse of discretion standard); *id.* § 7.06 (discussing the malleability of the standard); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982) (arguing that abuse of discretion is not a unitary standard, but denotes a level of review appropriate to the nature of the trial court decision).

[184] CHILDRESS & DAVIS, *supra* note 39, § 7.06. In this area, it varies with the reviewing court. *See infra* notes 190-92.

[185] *Koon*, 518 U.S. at 113.

IV. *KOON* IN THE CIRCUIT COURTS[186]

Koon has changed the rhetoric of departure jurisprudence in the courts of appeals, but it has done little to change outcomes.[187] Its individualizing language has been embraced by the Second Circuit, which most actively encouraged individualization before *Koon*, while courts that emphasized uniform sentencing before *Koon*, such as the Fourth Circuit, continue to cite the SRA's goal of reducing disparity.[188] An analysis of all the downward departure cases decided by the courts of appeals from the time *Koon* was decided through January 23, 1998,[189] shows that those courts fall into three groups. Seven courts have applied the elastic abuse of discretion standard as

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[186] This Article discusses the developing doctrine of individualization of sentencing through review of appellate court opinions. Appellate doctrine has an impact on sentencing patterns in the district courts, *see* Gelacek et al., *supra* note 111, at 358-59 (finding that pre-*Koon* circuit court cases were, to some extent, reflected in district court practices), but appellate analysis only provides limited insight into the sentences actually imposed in the district courts. Government appeal of downward departures is discretionary and the government does not have the same incentive to appeal every case as does the convicted defendant. *See id.* at 302-04 (describing the article's focus on district court results before *Koon* and discussing the limits of generalizing about departure patterns on the basis of appellate case analysis). There were 4201 non-substantial assistance downward departures in the 1996 reporting year, *see* U.S. SENTENCING COMM'N, 1996 ANN. REP. tbl.26, but only about 100 appellate decisions concerning non-substantial assistance downward departures in that period. The vast majority are not appealed and the reality of that low rate of appeal might be an important source of practical judicial discretion. For a discussion of the need for empirical work in this area, see Reitz, *supra* note 62, at 1489-92.

[187] Sentencing habits persist despite changes in the law. For example, district courts have tended to impose guidelines sentences consistent with their pre-guidelines sentencing practices. *See* Gelacek et al., *supra* note 111, at 361-62 (finding that those districts that were relatively lenient before the Guidelines remain relatively lenient).

[188] *See* Reitz, *supra* note 62, at 1468 n.97 (collecting pre-*Koon* cases reversing downward departures). Reitz offers a fascinating, pre-*Koon* systemic explanation for what he calls the "high enforcement/low judicial creativity approach" of the federal appellate courts. *See id.* at 1466. Although his citations suggest less willingness to affirm departures than a complete catalog would show, he does capture an important and significant thread. The approach he notes is in evidence in the majority of circuits, as they have enforced the Commission's goal of uniformity and placed little emphasis on common law development. He notes that "it is possible *Koon* will effect changes . . . but it is too soon to tell." *Id.* at 1466 n.98. This Article demonstrates that *Koon* is too weak to change those patterns. Stith & Cabranes' analysis also notes the differences among the circuits discussed in this article, *see* Stith & Cabranes, *supra* note 14, at 1278, but they focus on the Commission's power to constrain discretion by exercising its authority to denominate a given factor as a forbidden basis for departure.

[189] This Article analyzes all the circuit court cases, decided before January 23, 1998, that apply *Koon* in reviewing district court decisions granting a defendant's motion for a downward departure. *See supra* note 111 for a discussion of why upward departures cases are not discussed.

a general rule to reverse every downward departure,[190] while one court has affirmed every downward departure it has reviewed.[191] In the middle are four courts that use the language of individualized, discretionary sentencing when they affirm, and write off the importance of uniform sentencing when they reverse district court decisions to depart downward from the Guidelines.[192] The deference actually shown to district courts under the abuse of discretion standard depends on the reviewing court and which of the two competing visions it chooses for the particular case.[193]

A. *Discretion as Individualized Sentencing: The Second Circuit*

The Second Circuit has set the standard for individualized sentencing under the Guidelines in affirming all four downward departure cases it has re-

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[190] The First, Third, Fourth, Sixth, Seventh, Eighth, and D.C. Circuits had not yet affirmed a downward departure. However, the Seventh and Eighth Circuits have affirmed some grounds for departure while reversing others in particular cases. The First, Fourth, and Sixth Circuits have been most aggressive in defending uniform sentencing, with the Eighth Circuit close behind. Those courts have reversed each time they have reviewed the core discretionary determination of whether the departure ground is exceptional, given all the facts of the case. The D.C. Circuit had only considered, and reversed, one downward departure case, although that case also shows a willingness to engage in independent, i.e., non-deferential, review. The Third Circuit has only reversed on legal grounds, finding the departure factors impermissible. The fact that half the circuits have not affirmed a downward departure since the deferential *Koon* standard was announced strongly supports Reitz's characterization that the federal appellate courts have placed a heavy emphasis on guidelines enforcement and a low value on judicial creativity. *See* Reitz, *supra* note 62, at 1465; *see also* Gelacek et al., *supra* note 111, at 336-51 (analyzing pre-*Koon* circuit court cases). For a discussion of the cases, see *infra* notes 272-365 and accompanying text.

[191] The Second Circuit has affirmed all the downward departures it has reviewed since *Koon*. *See infra* notes 194-215 and accompanying text.

[192] The Fifth, Ninth, Tenth, and Eleventh Circuits have affirmed some downward departures and reversed others. *See infra* notes 216-71 and accompanying text.

[193] One might argue that the pattern of circuit court decisions reflects the wisdom of federal prosecutors' exercise of their discretion to appeal downward departures. Most downward departures are not appealed. *See* Koon v. United States, 518 U.S. 81, 98-99 (1996) (noting that in 1994, 93.9% of Guidelines cases were not appealed) (citing Letter from Pamela G. Montgomery, Deputy General Counsel, United States Sentencing Commission (Mar. 29, 1996)). If prosecutors are using their discretion wisely, and only appealing the cases where judges egregiously granted an improper downward departure, then the government should win most of these appeals. Therefore, it may not be surprising that half the circuit courts have yet to affirm a downward departure. Although there is certainly a grain of truth in that view, as the government does forego appeals in many easy downward departure cases in which the defendant rightfully deserves a lower sentence, the analysis which follows shows that prosecutorial wisdom is only a small part of the explanation. The cases in the Fourth Circuit are not obviously weaker than those in the Second Circuit and the differing styles of analysis are not explained by the prosecutors' choices of cases to appeal.

viewed since *Koon*.[194] That court has shown great deference to the district judge's finding that a given factor is exceptional and falls outside the heartland. In *United States v. Rioux*,[195] the Second Circuit affirmed a departure based on the defendant's poor health and good acts.[196] After a lengthy discussion of several legal issues which did not merit reversal of the underlying conviction, the court affirmed the downward departure in three paragraphs.[197] The Court of Appeals first noted the *Koon* abuse of discretion standard.[198] It then cited prior cases holding that physical impairment and good works are not ordinarily relevant, but may justify a departure in extraordinary cases, either singly or in combination.[199] The analysis of the departure in this case consisted solely of the Court of Appeals repeating the facts upon which the district court relied and holding that the district court did not abuse its discretion in concluding that the factors, in combination, warranted a downward departure.[200] *Rioux* illustrates the most deferential application of *Koon*. After finding the factors relied upon by the district court permissible, the reviewing court simply recites the facts relied upon by the district court and offers no independent analysis.

The Second Circuit expounded on the deference due district courts in *United States v. Galante*.[201] In that case, the court affirmed the district court's downward departure on the basis of extraordinary family circum-

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[194] *See* United States v. Galante, 111 F.3d 1029 (2d Cir. 1997); United States v. Najjar, No. 96-1478, 1997 WL 87231(2d Cir. Mar. 3, 1997); United States v. Caba, No. 96-1069(L), 1996 WL 685764 (2d Cir. Nov. 29, 1996); United States v. Rioux, 97 F.3d 648 (2d Cir. 1996).

[195] 97 F.3d 648 (2d Cir. 1996). The defendant, who was the elected sheriff of Hartford County, Connecticut, was convicted by a jury of extorting money from the Deputy and Special Deputy Sheriffs he appointed and reappointed annually. *See id.* at 653. Rioux appealed his conviction and the government cross-appealed the district court's downward departure from an offense level of 20, which would have required a term of imprisonment of at least 33 months, to an offense level of 10, which permitted the nonincarceratory sentence imposed (three years probation, six months home confinement and 500 hours of community service). *See id.* 653-54.

[196] *See id.* at 654. In this case, the health problems included a 20-year-old kidney transplant which required medication and monitoring, and a double hip replacement due to bone problems caused by the medication. The good acts cited included his hiring of an impoverished Hispanic woman, a personal loan to an immigrant who purchased a home from the defendant, charitable contributions, and leadership in fund-raising efforts. *See id.*

[197] *See id.* at 662-63.

[198] *See id.*

[199] *See id.* at 663.

[200] *See id.*

[201] 111 F.3d 1029 (2d Cir. 1997).

stances.[202] Judge Cardamone, citing *Koon*, observed that the SRA "did not alter the deference an appellate court owes to the exercise of the sentencing court's discretion. . . . We are generally obliged to defer to a sentence imposed in district court, in light of that court's special competence regarding the exceptional circumstances present in a sentencing case."[203] Highlighting the theme of individualized sentencing, he noted that "a trial judge's discretion when granting a downward departure is to be exercised prudently in light of the Guideline's [sic] aim of reducing sentencing disparity—while at the same time considering the history and characteristics of an individual defendant . . . ."[204] Prudent discretion is generously defined as anything not "so far removed from those [circumstances] found exceptional in existing case law [so] that the sentencing court may be said to be acting outside permissible limits; then, and only then, should we rule [that the sentencing court] has misused its discretion."[205]

The opinion concludes by rejecting the government's contention that this case would open the floodgates, observing that the district court found the case exceptional and the principle remains that family circumstances are not ordinarily relevant.[206] Judge Cardamone observes, "we might—had we been the sentencing court—have decided this case differently . . . . But . . . we may not simply substitute our judgment for his . . . ."[207]

Judge Kearse, in dissent, argued that the case "do[es] not reveal family circumstances that are outside the heartland," because disruption and disintegration of family life is a "normal consequence[ ] of the imposition of a prison sentence."[208] She argued that "approval of the present departure either guarantees disparities in sentencing or eliminates the family-impact 'heartland' altogether."[209] The disagreement between the majority and dissent in *Galante* reprises the tension between reviving the old model of individualized sentencing through deferential application of abuse of discretion

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[202] *See id.* at 1032-33. The district court departed from the applicable sentencing range of 46-57 months to a sentence of eight days time served, five years supervised release with special conditions including two years home detention, and 225 hours of community service. *See id.* at 1031. Galante was a first time offender involved in a kilogram heroin transaction who had been married for 10 years, shared child care responsibilities for two children, ages eight and nine, with his wife and frequently visited his elderly, hospitalized father. *See id.* at 1032. The district court relied, in part, upon the defendant's role as his family's chief money maker and the consequences of his imprisonment on the family. *See id.*

[203] *Id.* at 1035-36.

[204] *Id.* at 1036.

[205] *Id.* The opinion goes on to survey circuit and district court decisions. *Id.* at n.2

[206] *See id.* at 1037.

[207] *Id.*

[208] *Id.* at 1037-38.

[209] *Id.* at 1039.

review and realizing the Guidelines goal of uniformity through more active appellate review.

In *United States v. Caba*,[210] the Second Circuit displayed its commitment to individualized sentencing in cases presenting the question of whether, as a legal matter, certain offense conduct fell outside the heartland of the relevant guideline. In *Caba*, the government prosecuted the defendant's violation of food stamp redemption regulations under both food stamp and money laundering statutes.[211] The district court departed from the "relatively severe" money laundering guideline and imposed a thirty-month sentence consistent with prosecution under the relevant food stamp fraud guideline.[212] The Court of Appeals' affirmance of the district court's finding that the heartland of the money laundering guideline could easily be interpreted to cover only the proceeds of the illegal drug trade and "serious money laundering fraud."[213] In this case, the money had nothing to do with drug proceeds, "the crime did not divert government monies from their intended purpose, but instead violated regulations designed to deter such diversion," and the defendant was "hardly trying to hide his activities."[214] *Caba* illustrates the individualized approach to the legal question of the identification of permissible departure factors. In concluding, the Second Circuit buttressed its analysis with the observation that Caba's thirty-month sentence was "reasonable given his crime."[215]

B. *Discretion as the Choice Between Individualization and Uniformity in Sentencing: The Fifth, Ninth, Tenth and Eleventh Circuits*

The Fifth, Ninth, Tenth and Eleventh Circuits have affirmed some departures and reversed others in cases that choose either the individualizing or disparity reducing models, depending on the outcome of the case. The Tenth Circuit cited the Supreme Court's use of the history of discretion in affirming

[210] No. 96-1069(L), 1996 WL 685764 (2d Cir. Nov. 29, 1996).

[211] *See id.* at *1.

[212] *Id.* at *3. The money laundering guidelines would have resulted in a sentencing range of 87-108 months as Caba laundered in excess of $10 million. *See id.* at *1; *see also* GUIDELINES MANUAL § 2S1.1.

[213] *Caba*, 1996 WL 685764, at *3.

[214] *Id.* The same question, the application of money laundering guidelines to food stamp fraud, resulted in the same answer in *United States v. Najjar*, No. 96-1478, 1997 WL 87231 (2d Cir. Mar. 3, 1997), with the additional analysis that the guideline separates drug proceeds and non-drug proceeds. Thus, the fact that the case did not involve drug proceeds was not alone sufficient for a departure, but the combination of factors in that case was an adequate basis.

[215] *Caba*, 1996 WL 685764, at *4.

the downward departure in *United States v. Goodluck*,[216] an arson case presenting atypical offense conduct. The district court found that the defendants, while intoxicated, lit small fires in a warehouse to illuminate and warm the interior, but determined that the conduct at the heartland of the guideline is insurance fraud, revenge, riot and similar circumstances.[217] The Tenth Circuit deferred to the district court's individualization of the sentence, concluding its two page order and judgment with this observation:

> In *Koon*, the Supreme Court stressed that "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[218]

In another short order and judgment, the Tenth Circuit affirmed a downward departure in *United States v. Ramirez*,[219] a narcotics distribution case. The district court based the departure on a combination of factors, including the defendant's diabetes, extreme obesity, and severe depression, her daily care of her mother, her assistance to her elderly father, and her sole responsibility for the care of her fourteen-year-old son.[220] The court of appeals noted that all of the factors are permissible grounds as either discouraged or unmentioned factors.[221] Without any analysis, the circuit court recited the district court's finding that the combination of factors put the case outside the guideline and held that it was not an abuse of discretion to depart.[222]

The Tenth Circuit took a less deferential approach in two other cases, *United States v. Maden*[223] and *United States v. Contreras*.[224] The court re-

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[216] No. 95-2099, 1996 WL 700036 (10th Cir. Dec. 6, 1996). The district court departed from an unspecified range to a sentence of six months imprisonment, three years supervised release, nine months community service, and restitution. *See id.* at *1.

[217] *See id.*

[218] *Id.* (quoting Koon v. United States, 518 U.S. 81, 113 (1996)).

[219] No. 95-2198, 1996 WL 480210 (10th Cir. Aug. 26, 1996). The district court departed downward from the applicable guidelines sentencing range of 30-37 months to 12-18 months, 12 months imposed, with a three-year supervised release period and a special assessment of $100. *See id.* at *1.

[220] *See id.*

[221] *See id.* at *2.

[222] *See id.*

[223] 114 F.3d 155 (10th Cir. 1997). Maden was convicted of possession with intent to distribute more than 50 grams of crack cocaine. The district court sentenced him to 240 months imprisonment, departing downward from the applicable guideline range of 360 months to life. *See id.* at 156.

[224] 108 F.3d 1255 (10th Cir. 1997). Contreras was convicted of drug conspiracy and money laundering crimes; the district court sentenced the defendant to 120 months imprisonment, departing downward from the applicable guideline range of 235-293 months. *See id.* at 1259.

versed both of these downward departures based on disparity between co-defendants and held that whether or not disparity can ever be grounds for departure, it is not grounds where the disparate sentences are because one defendant pleads guilty instead of going to trial or because defendants have different criminal histories.[225] In these two instances, the district court gave reasons for its decision, but the reviewing court accorded those reasons less deference, looking closely at the sentencing courts' judgment of the individual case.

The Fifth Circuit has explicitly invoked both sentencing models when reviewing downward departures, citing the goal of decreasing disparity when reversing while highlighting *Koon*'s emphasis on deference when affirming. Given the need to balance these competing goals and the compromises at the heart of the Guidelines, the Fifth Circuit reflects the reality of federal sentencing but does little to advance doctrinal clarity.

In *United States v. Winters*,[226] the Fifth Circuit reversed the downward departures granted to two prison lieutenants who participated in an assault on a prison escapee.[227] After laying out *Koon*'s analytical framework, the re-

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[225] *See* United States v. Maden, 114 F.3d 155, 159 (10th Cir. 1997); United States v. Contreras, 108 F.3d 1255, 1271-72 (10th Cir. 1997); *see also* United States v. Gallegos, 129 F.3d 1440 (10th Cir. 1997) (reversing downward departure granted to one of Maden's codefendants, when one basis for departure was disparity between Gallegos' sentence and that of a third codefendant who had received a plea bargain; the circuit court also rejected the four other departure grounds relied upon by the district court); United States v. Blackwell, 127 F.3d 947, 953 (10th Cir. 1997) (reversing district court's vacating of defendant's sentence and guilty plea, holding that "where the record is insufficient to show co-defendants or co-conspirators were similarly situated offenders engaged in similar conduct, a disparity between their sentences is not grounds for a downward departure from the minimum guideline range").

[226] 105 F.3d 200 (5th Cir. 1997).

[227] Defendant Terry Winters was convicted of deprivation of rights under color of law, *see* 18 U.S.C. § 242 (1994), use of a firearm during and in relation to a crime, *see* 18 U.S.C. § 924(d), and obstruction of justice, *see* 18 U.S.C. § 1503. *See Winters*, 105 F.3d at 203. The district court imposed a sentence of concurrent 12-month terms of imprisonment for the deprivation of rights under color of law and obstruction of justice counts, a consecutive 60-month term of imprisonment for use of a firearm, concurrent three-year terms of supervised release, a special assessment of $150, and a fine of $2,000. *See id.* The applicable guideline range dictated a sentence of 108-135 months of imprisonment for the deprivation of rights under color of law and obstruction of justice violations, to which the mandatory consecutive 60 months imprisonment for the firearms violation would have been added. *See id.* at 206. The district court justified its downward departure because Winters' crime was a single act of aberrant behavior. *See id.*

Defendant David Johns was convicted of influencing and impeding the due administration of justice, *see* 18 U.S.C. § 1503. *See Winters*, 105 F.3d at 203. The district court departed downward from the applicable guideline range of 37-46 months of imprisonment to a sentence of three years of probation, conditioned upon Johns' serving six months of in-home detention and participating in a mental health treatment program. *See id.* In

viewing court concluded that Winters' course of criminal behavior could not be "converted into a single aberrant act by viewing it in the context of . . . his being under the influence of the [prison's] institutional culture or accepted code of conduct."[228] The court determined that the Commission specifically addressed and incorporated within the Guidelines punishment for crimes that involve the abuse of a public position (such as that of a prison lieutenant), considering such circumstances to be *aggravating* rather than mitigating.[229] Thus, the Fifth Circuit concluded, "[t]o decide here that either encouraging or condoning such an activity by the branch itself somehow establishes a framework that could convert such behavior into a single instance of aberrant behavior would be entirely inconsistent with the structure and theory of the Guidelines."[230] The court then applied the same reasoning to Winters' steady employment record and support of his family.[231] The circuit court chided the district court's individualization of the sentence, implying that a sentencing court's dissatisfaction with the Guidelines' dictates may indicate that it lacks the proper detachment or is motivated by bias when sentencing. Quoting from *Koon*, the court stated:

> "The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system."[232]

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granting the departure, the district court cited Johns' adverse physical and mental conditions, as well as his history of decorated military service and distinguished career at the Mississippi Department of Corrections. *See id.*

[228] *Winters*, 105 F.3d at 207. The court determined that Winters's behavior constituted a course of criminal conduct rather than a single act, by categorizing the assault with the subsequent attempts to coerce witness testimony as multiple infractions that were "not a proper ground for a downward departure." *Id.*

[229] *See id.* (citing GUIDELINES MANUAL § 3B1.3).

[230] *Id.*

[231] *See id.* at 207-08. ("The Commission considered and expressly discouraged sentencing courts from departing from the Guidelines on the basis of either employment records on family ties."). Similarly, the Fifth Circuit reversed the downward departure granted to Johns, ruling that the district court did not express why his medical and physical condition should be treated as exceptional, nor why his military career was so extraordinary as to justify a downward departure. *See id.* at 208-09. As was the case with Winters, the circuit court held that the district court's reliance on Johns' employment record, without articulating why those circumstances were exceptional, was not an appropriate departure basis. *See id.* at 209. Finally, the court found that the district court's statement that the punishment in Johns' case did not fit the crime, without additional articulation, was not sufficient to justify a sentence outside the applicable range. *See id.* Even pre-*Koon*, the Fifth Circuit "has consistently held that the district court's disagreement with the mandates of the Guidelines is not justification for departing from the Guidelines." *Id.*

[232] *Id.* (quoting Koon v. United States, 518 U.S. 81, 113 (1996)).

Prior to its decision in *Winters*, the Fifth Circuit showed more sympathy for individualized sentencing and a great deal more deference to the district court's sentencing decision. In *United States v. Walters*,[233] the Fifth Circuit affirmed the downward departure granted to an insurance agent convicted of mail fraud, money laundering, and conspiracy.[234] The court observed that the district court unmistakably determined that Walters deserved mitigation "[s]ince Mr. Walters himself did not receive any of the misappropriated funds [and] the guideline calculation therefore overstates the seriousness of his own involvement."[235] The court deemed Walters' lack of personal benefit from his crime to be an unmentioned factor in the money laundering guideline and believed that this failure was a mitigating factor in determining sentence.[236] The Fifth Circuit highlighted that its deference to the district courts was "all the more buttressed" by *Koon* which "emphasized in the strongest terms that the appellate court rarely should review de novo a decision to depart from the Sentencing Guidelines, but instead should ask whether the sentencing court abused its discretion."[237] The court affirmed the district court's downward departure, concluding that there was no abuse of discretion.[238]

The Ninth Circuit has reviewed five downward departure cases, affirming one,[239] reversing two,[240] and remanding two for either additional factual findings[241] or a fuller explanation of the departure basis.[242] In *United States*

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[233] 87 F.3d 663 (5th Cir. 1996).

[234] *See id.* at 665. The district court relied on comment 10 of § 2F1.1 of the Guidelines, which provides that when the amount of calculation used to assess the offense level overstates the seriousness of the offense, a downward departure may be warranted. *See id.* at 671 n.9. The government, in appealing the sentence, contended that comment 10 was an invalid ground for departure; the Fifth Circuit found it unnecessary to address that contention because it found that the district court would have imposed the same sentence irrespective of the legal error asserted by the government. *See id.*

[235] *Id.* at 671. The Fifth Circuit acknowledged another applicable guideline as a basis for the downward departure that the district court could have relied upon in making its sentencing decision. The court looked to the general departure provision, § 5K2.0, which allows a district court to depart from the applicable sentencing range if there exists a mitigating circumstance of a kind or degree not adequately considered by the Guidelines. *See id.* (citing GUIDELINES MANUAL § 5K2.0).

[236] *See id.* at 671-72.

[237] *Id.* at 672 n.10 (citing *Koon*, 518 U.S. 81 (1996)).

[238] *See id.* at 672.

[239] *See* United States v. Lopez, 106 F.3d 309, 311 (9th Cir. 1997).

[240] *See* United States v. Colace, 126 F.3d 1229, 1232 (9th Cir. 1997); United States v. Harris, Nos. 95-10506, 95-10551, 1997 WL 85569 (9th Cir. Feb. 25, 1997).

[241] *See* United States v. Cubillos, 91 F.3d 1342, 1345 (9th Cir. 1996).

[242] *See* United States v. Green, 105 F.3d 1321, 1322 (9th Cir. 1997).

v. Lopez,[243] the district court had dismissed an indictment for governmental misconduct after the prosecutor engaged in plea negotiations with the defendant without his attorney. The Ninth Circuit reversed the dismissal of the indictment in 1993.[244] When the defendant was subsequently convicted after remand and trial in 1995, the district court departed downward to restore the defendant to the position he would have been in had the government not engaged in the original misconduct.[245] The circuit court, in 1997, affirmed the departure because it found "[t]he prejudice Lopez encountered as a direct result of the government's conduct was, in our view, significant enough to take this case out of the heartland of the Guidelines."[246]

In *United States v. Harris*,[247] the Ninth Circuit reversed the district court's ten level downward departure following a conviction for conspiracy to commit a bank robbery, armed bank robbery, and use of a firearm in relation to a violent crime.[248] The district court departed downward because it found the defendant's criminal conduct to be a spontaneous, aberrant first offense.[249] The court also justified the departure as it achieved proportionality between both defendants' sentences.[250] In finding an abuse of discretion, the circuit court reasoned that the criminal history category already considers first offender status and therefore cannot be a basis for departure.[251] The court also found that a conspiracy conviction is contrary to a finding of spontaneity, although it did not analyze the facts underlying the sentencing court's decision in this case.[252] Although the circuit court noted that district judges have latitude in departing, it declared that district judges may not consider prohibited factors including disparities in sentences received by codefendants.[253] In his one sentence dissent, Chief Judge Hug declared that he would have affirmed the departure under the abuse of discretion standard of review mandated by *Koon*.[254]

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[243] 106 F.3d 309 (9th Cir. 1997). The district court departed from a (probable) range of 188-235 months down to a sentence of 135 months. *See id.* at 310.

[244] *See id.*

[245] *See id.*

[246] *Id.* at 311 (citing United States v. Lopez, 4 F.3d 1455, 1464-67 (9th Cir. 1993) (Fletcher & Nelson, JJ., concurring) (detailing the prejudice to Lopez).

[247] Nos. 95-10506, 95-10551, 1997 WL 85569 (9th Cir. Feb. 25, 1997).

[248] *See id.* at *1.

[249] *See id.* at *2.

[250] *See id* at *1.

[251] *See id.*

[252] *See id.*

[253] *See id.*

[254] *See id.* at *3 (Hug, C.J., concurring in affirming the conviction but dissenting from vacating the sentence).

The Eleventh Circuit has reviewed four downward departures[255] and affirmed only one. The court, in *United States v. Bernal*, affirmed the sentence given to the defendants, who were convicted of the little prosecuted federal crime of unlicensed exportation of endangered primates.[256] Because the defendants had exported the apes for breeding and exhibition, rather than to harm them, the district court determined that the defendants did not "cause or threaten the harm or evil sought to be prevented by the [licensing] law."[257] The circuit court ruled that because the lesser harm is an encouraged departure factor,[258] the district court "did not abuse its discretion in making this decision [to depart downward]."[259]

Of the three cases in which the Eleventh Circuit reversed downward departures, two were reversed after analyses of the legality of the factors, rather than their application to the facts of the particular case.[260] In *United States v. Hoffer*,[261] the Eleventh Circuit reversed a district court departure based upon the defendant's voluntary disgorgement of $50,000 of profit from the crime and loss of his medical license.[262] The reviewing court offered a detailed analysis of the role of forfeitures in the Guidelines and, by relying on pre-*Koon* cases, concluded that civil forfeiture can never be a basis for departure.[263] In its analysis of the loss of the medical license as a factor warranting downward departure, the court also relied upon categorical legal analysis, rather than individualized consideration.[264] Hoffer's sentence was enhanced for abuse of a position of trust, but the reviewing court found, without any textual support in the Guidelines, that the Commission must have considered collateral employment consequences in abuse of position of

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[255] *See* United States v. Hoffer, 129 F.3d 1196 (11th Cir. 1997); United States v. Bush, 126 F.3d 1298 (11th Cir. 1997); United States v. Phillips, 120 F.3d 227(11th Cir. 1997); United States v. Bernal, 90 F.3d 465 (11th Cir. 1996) (per curiam).

[256] *See Bernal*, 90 F.3d at 467-68. The defendants were convicted of various violations of the Lacey Act Amendments of 1981 and the Endangered Species Act of 1973. *See id.* at 466. The district court departed from the applicable guideline ranges of 24-30 months for defendant Bernal and 15-21 months for defendant Berges down to a sentence of seventy days time served and supervised release for each defendant. *See id.* at 466-67 & n.3.

[257] *Id.* at 467 (quoting, GUIDELINES MANUAL § 5K2.11).

[258] *Id.* at 467-68.

[259] *See id.*

[260] United States v. Hoffer, 129 F.3d 1196, 1206 (11th Cir. 1997) (rejecting factor categorically); United States v. Bush, 126 F.3d 1298, 1302 (11th Cir. 1997) (factor not supported by record); United States v. Phillips, 120 F.3d 227, 232 (11th Cir. 1997) (rejecting factor categorically).

[261] 129 F.3d 1196 (11th Cir. 1997).

[262] *See id.* at 1204-06. The defendant was a doctor convicted of narcotics distribution. The district departed from an imprisonment range of 108-135 months to a range of 70-87 months and sentenced him to 70 months imprisonment. *See id.* at 1198-99.

[263] *See id.* at 1203-04.

[264] *See id.* at 1204-05.

trust cases.[265] This precluded consideration of the loss of the medical license as a basis for downward departure.[266]

The circuit court's reasoning ignores *Koon's* instruction that the determination of whether a factor is prohibited "is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no—as it will be most of the time—the sentencing court" must consider the application of the factor to the particular case.[267] But for the odd facts of the *Bernal* case, the Eleventh Circuit consistently upholds the uniformity model of sentencing. The Eleventh Circuit has ignored *Koon* and has categorically rejected potential factors, precluding the district courts from even arguing that the factor applies to an individual case.[268]

When the Fifth, Ninth, Tenth, and Eleventh Circuits affirm downward departures, they do so without much analysis, and either with tremendous and blind deference to district courts or with citation to *Koon*'s discretion of language as their principal justification. The Fifth and Tenth Circuits have specifically discussed the goal of uniformity in reversing the departures.[269] Although these courts have reached mixed results in deciding whether a given situation falls outside the heartland, the opinions make no effort to bridge the two worlds of individualization and uniformity in any principled way. The rulings from these circuits that categorically reject factors as illegal offer another important contrast. While the Ninth Circuit decision in *United States v. Harris* is respectful of *Koon's* admonition of the limited role of proscribed factors,[270] the Eleventh Circuit's decisions are not.[271]

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[265] *See id.*

[266] *See id.* at 1206.

[267] Koon v. United States, 518 U.S. 81, 109 (1996).

[268] *See* United States v. Bush, 126 F.3d 1298, 1301 & n.3 (11th Cir. 1997) (holding that a downward departure for aberrant behavior "will not normally be available" where the "more minimal planning" enhancement is imposed); United States v. Phillips, 120 F.3d 227, 231-32 (11th Cir. 1997) (noting that a downward departure cannot be used to "circumvent the rule prohibiting a collateral attack on a prior conviction" used in the criminal history calculation).

[269] *See supra* notes 214-38 and accompanying text.

[270] *See* Nos. 95-10506, 95-10551, 1997 WL 85569 (9th Cir. Feb. 25, 1997) (noting the factors cited by the district court do not satisfy *Koon* either because they are "those that make the case atypical, or have already been taken into account").

[271] *See supra* notes 255-68 and accompanying text. There is a similar contrast between the Fourth Circuit, *see infra* notes 272-302, which takes a view similar to the Eleventh, and the Third Circuit, *see infra* notes 340-52, which joins the Ninth Circuit in offering more careful analysis in this area.

C. *Discretion as Uniform Sentencing*

1. The Fourth, First, Sixth, Eighth and Seventh Circuits

The seven remaining circuits, led by the Fourth Circuit, champion uniform sentencing by repeatedly supporting the Guideline ranges for offenses over downward departures. The Fourth Circuit has reviewed sixteen downward departures since *Koon*, and in pursuing the Commission's aspiration of keeping every case within the Guidelines, the court has eschewed *Koon's* focus on the history of discretion.[272]

In *United States v. Wilson*,[273] the Fourth Circuit reversed the district court's downward departure based on family circumstances.[274] Having staked out very different ground from the Second Circuit on family circumstances departure before *Koon*, the court noted that it "has held improper departures based on [family circumstances], under circumstances much more compelling than Wilson's."[275] In so doing, the Fourth Circuit uses the abuse of discretion standard to exercise independent review and redecide the sentencing issue without giving any deference to the district court and without elucidating any general standards.[276] The ruling effectively creates a per se rule that family circumstances are not an allowable basis for departure by inferring that no case can ever present exceptional enough facts warranting a departure.

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[272] *See* United States v. Banks, 130 F.3d 621 (4th Cir. 1997); United States v. Lathrop, No. 96-4904, 1997 WL 639332 (4th Cir. Oct. 17, 1997); United States v. Mudie, Nos. 96-4884, 96-4910, 1997 WL 633232 (4th Cir. Oct. 14, 1997); United States v. Morin, 124 F.3d 649 (4th Cir. 1997); United States v. Lawrence, Nos. 97-4006, 97-4007, 1997 WL 563134 (4th Cir. Sept. 11, 1997); United States v. Gillespie, 121 F.3d 701, 1997 WL 499942 (4th Cir. Aug. 25, 1997); United States v. Wilson, 114 F.3d 429 (4th Cir. 1997); United States v. Williams, Nos. 96-4258, 96-4309, 1997 WL 195918 (4th Cir. Apr. 23, 1997); United States v. Leasure, Nos. 96-4481, 96-4516, 1997 WL 137982 (4th Cir. Mar. 27, 1997); United States v. Perkins, 108 F.3d 512 (4th Cir. 1997); United States v. Stump, Nos. 96-4279, 96-4283, 1997 WL 20398 (4th Cir. Jan. 21, 1997); United States v. McHan, 101 F.3d 1027 (4th Cir. 1996); United States v. Withers, 100 F.3d 1142 (4th Cir. 1996); United States v. Rybicki, 96 F.3d 754 (4th Cir. 1996), *affirmed per curiam* No. 97-4375, 1997 WL 791682 (4th Cir. Dec. 29, 1997); United States v. Hairston, 96 F.3d 102 (4th Cir. 1996); United States v. Weinberger, 91 F.3d 642 (4th Cir. 1996).

[273] 114 F.3d 429 (4th Cir. 1997).

[274] *See id.* at 432-34. Wilson was convicted of selling crack cocaine in a total amount of between 150 and 500 grams. *See id.* at 430. The district court cited the defendant's efforts to be a responsible teenage father as a basis for departure in a crack conspiracy prosecution. *See id.* The court departed from the applicable guidelines range of 151-188 months to 121-151 months and imposed a 130 month sentence. *See id.* at 430-431.

[275] *Id.* at 434 (citing pre-*Koon* Fourth Circuit cases).

[276] *See* Post, *supra* note 2, at 213-18 (discussing the proper forms of appellate review).

United States v. Withers[277] offers a more detailed analysis of the Fourth Circuit's choice of sentencing models. There the district court departed downward based on "minimal participation" and diminished mental capacity.[278] The circuit court reversed the sentencing decision in two steps, first by adopting a more restrictive legal standard for the particular departure factor,[279] then by analyzing the case at hand. The Fourth Circuit rejected the district court's factual finding of depression as unsupported by the evidence.[280] Characterizing the defendant as suffering from "emotional problems and not from any diminished mental capacity,"[281] the court explicitly rejected departure, noting that "[i]f we were to approve the application of the diminished capacity departure in this case, we would be holding that anyone who could point to a sufficiently tragic event in his or her life would be eligible for a sentence reduction."[282] Disagreeing with the Second Circuit's willingness to let district judges exercise primary authority to control the flow of departures,[283] the Fourth Circuit agreed with the Seventh Circuit's decision in *United States v. Pullen*,[284] which limited such departures because they "'would resurrect the pre-guidelines regime of discretionary sentencing.'"[285] Emphasizing the goal of reducing disparity, and rejecting the individualized sentencing model realizable through deference to the district court, the opinion closes with this warning:

> To manipulate the Guidelines will reduce them to a sham set of rules which would exacerbate the very problem they were designed to correct—unconstrained discretionary sentencing. We decline to endorse an approach that would again reduce sentencing to a game of roulette in

[277] 100 F.3d 1142 (4th Cir. 1996).

[278] *Id.* at 1144. Withers was convicted of importing heroin into the United States. *See id.* The district court reduced her sentence from a guideline range of 121-151 months to a range of 37-46 months pursuant to GUIDELINES MANUAL § 3B1.2 (minimal participation) and § 5K2.13 (diminished capacity).

[279] The court adopted the views of other circuits by requiring the defendant to be suffering something greater than emotional problems or hardship. *See Withers*, 100 F.3d at 1147-48. Moreover, the defendant must demonstrate that his or her "significantly reduced mental capacity bears a causal relationship to the crime," and show "an inability to process information or reason." *Id.* at 1148.

[280] *See id.*

[281] *Id.*

[282] *Id.* Compare this reasoning to the Second Circuit's rejection of floodgates reasoning in *United States v. Galante*, 111 F.3d 1029 (2d Cir. 1997). *See supra* notes 201-06 and accompanying text. The floodgates argument rejects every effort at individualization as the tip of the wedge that will overwhelm uniformity.

[283] *See supra* notes 194-215 and accompanying text.

[284] 89 F.3d 368 (7th Cir. 1996).

[285] *Withers*, 100 F.3d at 1148 (quoting *Pullen*, 89 F.3d at 371).

which the length of the sentence is determined by the draw of the judge.[286]

In *United States v. Hairston*,[287] the Fourth Circuit applied *Koon* to reverse a district court departure based on extraordinary restitution.[288] In reversing, the court found "no case in which such a small percentage in restitution has been held to constitute an exceptional circumstance."[289] Suggesting a rule for evaluating restitution cases, the court noted that "[c]ourts have generally found restitution in amounts greater than that stolen to be a possible ground for departure."[290] Moreover, the court recognized that "exceptional acceptance of responsibility might be indicated by partial restitution gained through especially hard work,"[291] but found no evidence of such exceptional acceptance in this case.[292] Although the case suggests what might be exceptional, it does not defer to the district court's determination that individualization was warranted in this case.

United States v. Rybicki,[293] a case the Supreme Court had remanded for reconsideration in light of *Koon*, similarly defers to the Guidelines rather than the district court.[294] On remand, the Fourth Circuit adhered to its earlier decision, with only a one paragraph rejection of family circumstances and military service as a basis for departure, claiming that the record did not indicate these discouraged factors were present to an "exceptional" degree.[295] Here again, the reviewing court substituted its own judgment for the district court's evaluation of whether a factor was exceptional. However, whether a factor is exceptional is precisely the determination that *Koon* mandated the district judges decide and appellate judges uphold if the district

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[286] *Id.* at 1149 (citation omitted).

[287] 96 F.3d 102 (4th Cir. 1996).

[288] *See id.* at 104-05. Hairston had plead guilty to bank fraud and at sentencing argued that her efforts at restitution warranted a departure from the Guidelines. *See id.* at 104. The district court found that but for her extraordinary efforts, the bank would not have recovered any of its loss. *See id.* Therefore, the court departed downward five levels, from a range of 24-30 months and ultimately imposed a sentence of six months and supervised release. *See id.* at 104-05.

[289] *Id.* at 108 (noting that Hairston had repaid less than half of what she embezzled).

[290] *Id.*

[291] *Id.*

[292] *See id.* at 109.

[293] 96 F.3d 754 (4th Cir. 1996).

[294] *See id.*

[295] *See id.* at 759. The Fourth Circuit again remanded the case for consideration of whether Rybicki's sentence should be enhanced for obstruction of justice. *See id.* at 760. On remand, the district court did not impose an obstruction enhancement and sentenced Rybicki to 18 months of imprisonment followed by two years of supervised release; the court of appeals affirmed this decision. *See* United States v. Rybicki, No. 97-4375, 1997 WL 791682 (4th Cir. Dec. 29, 1997).

judges do not abuse discretion. *Koon's* procedural holding is simply too weak to compel courts of appeals that support uniformity to shift back, to any significant degree, toward individualized sentencing.

In four other post-*Koon* cases, the Fourth Circuit promoted uniform sentencing by ruling that a given factor is not a legally permissible basis for departure.[296] In *Perkins*, the court of appeals denied a departure finding that the Guidelines define sentencing disparity and that relative differences among co-defendants are not permissible factors.[297] In *McHan*, the court determined that a previously completed sentence for a conviction that served as a predicate crime in the defendant's continuing criminal enterprise could not serve as a factor warranting a downward departure.[298] In *Stump*, the circuit court reversed a departure following Stump's conviction for possession of silencers, finding that the district court's ruling that the defendant possessed the silencers for a brief period and a sporting purpose was a forbidden factor.[299] *Stump* expressly ignored *Koon's* directive that only the Sentencing Commission can create forbidden factors and then, only by express direction.[300] Moreover, the Fourth Circuit confused the reach of the applicable statute with the issue of whether the particular conduct was outside the heartland of the guideline, as this conduct may have been. The circuit court also misconstrued the Guidelines in *Weinberger*.[301] In finding restitution to be a forbidden factor, the *Weinberger* court quoted a pre-*Koon* case, "[g]iven the comprehensive sentencing structure embodied in the guidelines, '[o]nly rarely will we conclude that a factor was not adequately taken into consideration by the Commission.'"[302]

The First Circuit has taken a similarly dim view of district court discretion, reversing both downward departure cases it has reviewed since *Koon*. In *United States v. Dethlefs*,[303] the district court departed because the defendants' guilty pleas allowed significant conservation of judicial resources.[304] The First Circuit professed to follow *Koon* by distinguishing between the legal question of whether the grounds are permissible and the discretionary

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[296] *See* United States v. Perkins, 108 F.3d 512 (4th Cir. 1997); United States v. Stump, Nos. 96-4279, 96-4283, 1997 WL 20398 (4th Cir. Jan. 21, 1997); United States v. McHan, 101 F.3d 1027 (4th Cir. 1996); United States v. Weinberger, 91 F.3d 642 (4th Cir. 1996).

[297] *See Perkins*, 108 F.3d at 515-16.

[298] *See McHan*, 101 F.3d at 1040.

[299] *See Stump*, 1997 WL 20398 at *1.

[300] *See* Koon v. United States, 518 U.S. 81, 95-96 (1996).

[301] 91 F.3d 642 (4th Cir. 1996).

[302] *Id.* at 644 (quoting United States v. Jones, 18 F.3d 1145, 1149 (4th Cir. 1994)). The court emphatically stated that *Weinberger* was "not one of those rare cases." *Id.*

[303] 123 F.3d 39 (1st Cir. 1997).

[304] *See id.* at 41.

judgment to depart once such grounds are found.[305] Although it agreed that a timely guilty plea did conserve judicial resources and thereby facilitated the administration of justice, nonetheless it was an "unmentioned" factor, using the *Koon* vocabulary, and as such, in light of the "structure and theory" of the Guidelines, could be considered in the decision to depart.[306]

In the very next section of the opinion, the *Dethlefs* court emphatically rejected the district court's evaluation of the judicial conservation factor under the circumstances of the case, finding that the sentencing court had an insufficient factual predicate to depart.[307] The court noted that "[t]his case does not appear to present problems so out of the ordinary as to pluck it from the mainstream."[308] Thus, the defendants' guilty pleas provided only a readily foreseeable level of facilitation of judicial administration, a level "well shy of what is necessary to take a case out of the heartland."[309] In other words, the First Circuit allowed consideration of an unmentioned factor, but found the facts of the particular case not worthy of a departure.

In *United States v. Brennick*,[310] the First Circuit reversed a downward departure granted to a defendant convicted of tax evasion, structuring, and obstruction crimes.[311] The district court had departed downward based on its determination that the defendant genuinely intended to pay the required taxes at some point and that the ultimate tax losses to the government attributed to the defendant were overstated due to contributing causes not within his control.[312] Mentioning *Koon* only in passing,[313] the First Circuit concluded that the district court paid inadequate attention to the factors weighing against any departure, particularly a departure of the degree granted by the sentencing court.[314] The First Circuit's rulings follow a similar pattern in which reviewing courts reevaluate, with little explanation or analysis, the very issue

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[305] *See id.* at 43-44.

[306] *See id.* at 46. The court explained, "We read *Koon* to mean that courts, as a general rule, should not categorically reject any factors (save only forbidden factors and factors which lack relevance) as possible bases for departures." *Id.* (citing Koon v. United States, 518 U.S. 81, 108-09 (1996)).

[307] *See id.* at 47.

[308] *Id.* at 48.

[309] *Id.* at 49.

[310] 134 F.3d 10 (1st Cir. 1998).

[311] *See id.* at 13.

[312] *See id.* The guideline range for Brennick was 41-51 months; he received a 13-month sentence, which was the midpoint in the range for a first offender who caused $40,000 in government tax losses, absent any other adjustments. *See id.* at 16. Brennick caused the government a tax loss of over $1.5 million. *See id.*

[313] *See id.* "[T]he quid pro quo for departures is reviewability, including review for abuse of discretion, and even if review is hedged by deference, it has to mean something." *Id.* (citing Koon v. United States, 518 U.S. 81, 98 (1996)).

[314] *See id.* at 16-17.

that *Koon* left to the district court judge's discretion: the "exceptionalness" of the departure factor under all the circumstances of the case.

The Sixth Circuit has made its commitment to the uniform model of sentencing clear. In *United States v. Barajas-Nunez*,[315] the circuit court found the district court's reliance on an improper factor to be plain error, permitting review in the absence of a timely government objection.[316] The court remanded the case, instructing the district court to determine whether it would have imposed the same sentence had it not considered the impermissible factors, specifically his inability to speak English and his lack of education as grounds for a diminished mental capacity departure.[317] In finding that the error affected substantial rights, the court of appeals concluded that if the defendant's improper lower sentence stood, it "would fly in the face of one of the primary purposes of the sentencing guidelines—the elimination of disparities in sentencing."[318] Thus, the Sixth Circuit chose uniformity over individualization. The Sixth Circuit has upheld this reasoning in reversing two other downward departures.[319]

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[315] 91 F.3d 826 (6th Cir. 1996). The defendant was convicted of illegal reentry after deportation after an aggravated felony. *See id.* at 828. The district court departed from 57-71 months of imprisonment to eight months of imprisonment and two years of supervised release, after which defendant would be deported again. *See id.* at 829. At the time of the appeal, the defendant had completed his sentence and had been deported, although he had re-entered the country and been arrested again. *See id.*

[316] *See* FED. R. CRIM. P. 52(b) (permitting a reviewing court to review issues forfeited by lack of timely objection if the error is plain and affects substantial rights); United States v. Olano, 507 U.S. 725, 731-32 (1993) (discussing forfeiture of errors and the plain error doctrine).

[317] *See Barajas-Nunez*, 91 F.3d at 834. The Sixth Circuit concluded that "Barajas-Nunez's inability to speak English and lack of formal education do not affect [his] ability to process information or to reason" and "[t]hus, these factors do not constitute significantly reduced mental capacity as a matter of law." *Id.* at 831. The court deemed a defendant's inability to speak English a forbidden basis for departure, while a lack of formal education is a discouraged ground for departure. *See id.* at 831-32. Although the court recognized that lack of education could be present to such an exceptional degree as to constitute a permissible departure factor, the Sixth Circuit rejected the district court's equation of lack of education with diminished mental capacity in the instant case. *See id.* at 832. The district court also cited the "lesser harms" guideline as a justification for a downward departure, finding that the defendant believed that his pregnant girlfriend was in danger of physical harm and re-entered the country, thereby committing a crime, to avoid a perceived greater harm. *See id.* (citing GUIDELINES MANUAL § 5K2.11). On this point, the circuit court followed *Koon's* admonition regarding the deference due to the sentencing court, although it believed the district court's findings did not justify a departure. *See id.*

[318] *Id.* at 833.

[319] *See* United States v. Weaver, 126 F.3d 789, 793 (6th Cir. 1997) (vacating and remanding for resentencing where court granted downward departure on basis of guidelines' disproportionately harsh treatment of relatively minor white-collar offenders as compared with more serious white-collar offenders); United States v. Gaines, 122 F.3d 324, 330 (6th

The Eighth Circuit Court of Appeals shares the willingness of the First, Fourth, and Sixth Circuits to scrutinize the district judge's finding that a departure factor was exceptional. It has reversed all of the post-*Koon* downward departures it has reviewed.[320] In *United States v. Weise*,[321] the circuit court disagreed with the district court's evaluation of factors it relied on in departing from the Guideline range.[322] The court remanded the case for additional findings on one departure ground, the defendant's struggle to lead a decent life in the difficult environment of an Indian reservation, and rejected on a second ground, the aberrational nature of the conduct.[323] The dissent argued that *Koon* required substantial deference to the district court's findings, due to the "institutional advantage the district court's possess."[324]

After the district court departed downward on the same two grounds on remand, the Eighth Circuit reversed and remanded the case for resentencing, admonishing the district court for again departing on the aberrant behavior basis, after foreclosing that approach in the first appeal.[325] The circuit court also concluded that the district court abused its discretion in granting the downward departure based on Weise's triumph over the difficulties of reservation life, as none of the factors the sentencing court relied on was present to an exceptional degree.[326]

Similarly, in *United States v. Kapitzke*,[327] the Eighth Circuit ruled that departure was unwarranted because three of the four factors the district court relied upon—family circumstances, susceptibility to abuse in prison and the negative impact incarceration would have on the defendant's rehabilitation—were not exceptional or extraordinary.[328] Although the majority found the

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Cir. 1997) (rejecting downward departure on the basis of disparities inherent in guidelines' 100:1 crack and powder cocaine ratio).

[320] *See* United States v. Morken, 133 F.3d 628 (8th Cir. 1998); United States v. Drew, 131 F.3d 1269 (8th Cir. 1997); United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997); United States v. Wind, 128 F.3d 1276 (8th Cir. 1997); United States v. Bing Wong, 127 F.3d 725 (8th Cir. 1997); United States v. Kalb, 105 F.3d 426 (8th Cir. 1997); United States v. Weise, 89 F.3d 502 (8th Cir. 1996), *on remand sub nom.* United States v. Weise, 128 F.3d 672 (8th Cir. 1997).

[321] 89 F.3d 502 (8th Cir. 1996).

[322] *See id.* at 507.

[323] *See id.* The circuit court rejected the district court's determination that Weise's criminal conduct was aberrant, finding his actions neither spontaneous nor thoughtless, the standard for aberrant behavior. *See id.* (citing United States v. Garlich, 951 F.2d 161, 164 (8th Cir. 1991)).

[324] *Id.* at 510 (citing Koon v. United States, 518 U.S. 81, 98 (1996)).

[325] *See* United States v. Weise, 128 F.3d 672 (8th Cir. 1997).

[326] *See id.* at 674-75. These factors included the "extraordinary problems and difficulties [Weise] struggled against and overcame on the [reservation]," as well as Weise's employment history, family ties, and reputation in the community. *Id.* at 674.

[327] 130 F.3d 820 (8th Cir. 1997).

[328] *See id.* at 822-23.

record insufficient to justify the departure,[329] the dissent argued that *Koon* affirmed that same departure ground on the same kind of record.[330] Judge Arnold, in dissent, cited *Koon's* observation that this "'was just the sort of determination that must be accorded deference by the appellate courts.'"[331] Despite *Koon's* mandate, the Eighth Circuit has joined the other circuits in independently reviewing the district court's departure decisions based on exceptional factors.[332]

The Seventh Circuit has reviewed only one district court downward departure since *Koon*. In *United States v. Besler*,[333] the Seventh Circuit Court of Appeals remanded an encouraged factor departure after determining that the record was inadequate to permit review of whether the legal requirements of the guideline section were met.[334] However, the Seventh Circuit has otherwise indicated very strong support for the uniform application of the Guidelines. In *United States v. Pullen*,[335] a defendant challenged the district court's refusal to grant a downward departure based on a history of sexual abuse that the defendant claimed affected his mental condition.[336] On review, writing for the court, Judge Posner offered an advisory opinion,[337]

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[329] *See id.* at 821 (noting that the record did no more than show Kapitzke was in a class—child pornographers—subject to abuse in prison).

[330] *See id.* at 824 (Arnold, J., dissenting) (citing *Koon's* affirming a downward departure based purely on Officers Koon and Powell's membership in a class—police officers—subject to abuse in prison).

[331] *Id.* (Arnold, J., dissenting) (quoting Koon v. United States, 518 U.S. 81, 112 (1996).

[332] However, the Eighth Circuit did affirm one downward departure ground in *Kapitzke*, noting that "we are dealing with a fact-based judgment that falls within the district court's sentencing discretion." *Id.*

[333] 86 F.3d 745 (7th Cir. 1996).

[334] *See id.* at 748. The district court departed downward based on Besler's voluntary disclosure of his activities. *See id.* The Guidelines permit a departure on this ground if the defendant's disclosure occurs "prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise." GUIDELINES MANUAL § 5K2.16. Although the circuit court found insufficient findings by the trial court to support departure, it professed to "express no opinion as to whether the evidence before the district court would support a finding that discovery was unlikely, nor whether the district court could without abusing its discretion base a downward departure on some other provision." *Besler*, 86 F.3d at 748.

[335] 89 F.3d 368 (7th Cir. 1996).

[336] *See id.* at 369-70.

[337] A district court's denial of a request to grant a downward departure is usually affirmed on the grounds that refusal to depart is not reviewable, *see, e.g.*, United States v. McQuilkin, 97 F.3d 723, 729 (3d Cir. 1996); United States v. Millar, 79 F.3d 338, 345 (2d Cir. 1996); United States v. Wright, 37 F.3d 358, 361 (7th Cir. 1994), unless the case presents the question of whether the departure grounds are legally permissible, *see, e.g.*, United States v. Millar, 79 F.3d 338, 345 (2d Cir. 1996); United States v. Jones, 55 F.3d

warning that use of individualized sentences based on family history would cause the Guidelines to be "unraveled before the eyes of the judge."[338] Judge Posner suggested that only the sentencing commission can decide how to account for family circumstances and "[t]he individual judge cannot."[339]

2. The Third and D.C. Circuits: A More Moderate Uniformity

The Third Circuit has reversed the only two post-*Koon* downward departures it has reviewed, finding in both that the factors relied upon by the district court in departing were legally impermissible.[340] The circuit court did indicate some willingness to individualize sentences, however, by including a suggestion to consider an alternate departure ground when it remanded one case.[341] In *United States v. Romualdi*,[342] the court held that a defendant convicted of possession of child pornography was not entitled to a downward departure by analogy to a guideline provision permitting an adjustment for minor participants in an offense.[343] The reviewing court distinguished *Romualdi's* case, involving an individual crime, from a pre-*Koon* case permitting departure where the defendant was a minor participant in concerted activity.[344]

289, 292 (7th Cir. 1995). *Pullen* was argued before *Koon* was decided, but the opinion recognized that under *Koon*, the ground for departure urged by the defendant is not a legally prohibited factor. *See Pullen*, 89 F.3d at 371. Although the appellate court should have remanded the case to the district court to determine if this case warranted departure, the opinion offered the advisory ruling that a departure in this case "would have been an abuse of discretion." *Id.* at 372.

[338] *Pullen*, 89 F.3d at 371.

[339] *Id.* at 372.

[340] *See* United States v. Haut, 107 F.3d 213, 221-22 (3d Cir. 1997); United States v. Romualdi, 101 F.3d 971, 976-77 (3d Cir. 1996).

[341] *See Romualdi*, 101 F.3d at 976-77 (noting that the district court "may want to consider" whether the defendant's six month home confinement warranted a departure).

[342] 101 F.3d 971 (3rd Cir. 1996).

[343] An adjustment is a change in guideline range by operation of a specific rule, while a departure simply takes the case outside the rules. *See* GUIDELINES MANUAL § 1B1.1(c) (after determining base level offense, the judge should "apply the adjustment as appropriate related to the victim, role and obstruction of justice"); *id.* § 3B1.2 ("Mitigating Role") ("Based on the defendant's role in the offense, decrease the offense level" if the defendant was a minimal or minor participant in any criminal act.).

[344] *See* United States v. Bierley, 922 F.2d 1061 (3d Cir. 1990). Bierley was convicted of receipt of child pornography. *See id.* at 1064. Bierley was the only participant in the crime because the postal inspector who sent the child pornography could not be held criminally responsible in the offense. *See id.* at 1065. The district court held that Bierley was not entitled to a downward departure as a minor or minimal participant in the offense under GUIDELINES MANUAL § 3B1.2 because that guideline requires another "participant" to whom the defendant can be compared. *See id.* at 1065-66. The Third Circuit reversed, holding that the Guideline could be applied by analogy and instructed the district court that

The court then set forth the *Koon* analytical framework of encouraged, discouraged and unmentioned factors, suggesting that the district court consider whether Romualdi's completion of six months of home confinement consisted of an "unmentioned" factor warranting departure.[345] Although the third circuit emphasized that the inquiry was "primarily within the discretion of the sentencing court,"[346] it went on to repeat *Koon*'s admonition that "departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'"[347] Thus, *Romualdi* displays an appealing honesty within the doctrinal incoherence of this area. The reviewing court clearly distinguished between its de novo review of whether the ground is legally permissible and the discretionary determination of whether or not some factor is exceptional, given all the circumstances of the case. However, it left unresolved the question of what makes a sentence appropriate.

The Third Circuit also reversed a downward departure in *United States v. Haut*,[348] holding that the district court erred when it reduced the defendants' sentences based on its determination that the prosecution's trial witnesses lacked credibility, despite the defendant's conviction by the jury.[349] The reviewing court categorically rejected the district court's downward departure on that basis, reasoning that "necessarily embedded in the heartland of every guideline is the assumption that individuals sentenced under it have been found guilty beyond a reasonable doubt."[350] The district court independently assessed the credibility of witnesses and gave effect to those judgments through the severity of the sentences imposed, although it refused to enter a judgment of acquittal.[351] Permitting a district court to carve out space for a case in which a judgment of acquittal is not required as a matter of law, but doubt about the trial evidence renders the guideline sentence too harsh would, as the reviewing court noted, "sap the integrity of both the Guidelines and the jury system."[352]

The District of Columbia Circuit has reversed the one downward departure it has reviewed. In *United States v. Atkins*,[353] the district court placed the defendant on probation after it found that he was suffering from post-traumatic stress disorder, and therefore felt compelled to carry the weapon

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it could depart from the applicable sentence if the court believed that Bierley would have been a minor or minimal participant had the postal inspector been a participant. *See id.*

[345] *See Romualdi*, 101 F.3d at 976-77.

[346] *Id.* at 976.

[347] *Id.* (quoting Koon v. United States, 518 U.S. 81, 96 (1996) (quoting GUIDELINES MANUAL ch. 1, pt. A)).

[348] 107 F.3d 213 (3d Cir. 1997).

[349] *See id.* at 219.

[350] *Id.*

[351] *See id.* at 222-23.

[352] *Id.*

[353] 116 F.3d 1566 (D.C. Cir. 1997).

he was convicted of possessing.[354] The sentencing court relied upon the encouraged "diminished capacity" departure factor[355] after finding no need to incarcerate the defendant to protect the public.[356] The district court also relied upon a miscalculation in a prior sentence and the defendant's failure to violently attack law enforcement officers despite repeated opportunities.[357]

In an opinion that attends carefully to the record in the particular case, the D.C. Circuit found that the sentencing court had abused its discretion.[358] Although lower courts have the authority to depart if a defendant's mental disorder makes him or her less dangerous than others,[359] "[a]bsent a finding that Atkins would in fact receive (or even seek) treatment . . . his condition's amenability to treatment has no relevance."[360] Similarly, the court held that the district court's findings that Atkins' age was a mitigating factor was insufficient because it was supported only by general observations about age and criminality, not particularized findings relevant to the progress of this specific defendant's mental illness over time.[361]

The D.C. Circuit also ruled that the district court improperly relied upon a miscalculation of an earlier sentence as a grounds for departure, holding that "[t]he remedy for an error occurring in a different court lies with that court or the appropriate appellate court, not collaterally with the district court."[362] Finally, the circuit court noted Atkins' history of "violent resistance to arrest, hostage-taking and armed threats against law enforcement"[363] militated in favor of incarceration, rejecting the sentencing court's finding that Atkins did not actually injure law enforcement officers and therefore deserved a downward departure.[364] The opinion closed by noting that while *Koon* requires deference, the trial court's decision in this case presented an abuse of discretion in both its consideration of improper factors and its inappropriate weighing of the legitimate factors presented.[365]

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[354] *See id.* at 1568.

[355] *See* GUIDELINES MANUAL § 5K2.13 (allowing downward departure for "significantly reduced mental capacity" but forbidding it if the court finds a need to protect the public from the defendant).

[356] *See Atkins*, 116 F.3d at 1568 (noting the treatability of the illness and the defendant's advanced age upon release).

[357] *See id.*

[358] *See id.* at 1571.

[359] *See id.* at 1569.

[360] *Id.* at 1570.

[361] *See id.* at 1570-71 (noting, as well, that the "Guidelines indicate a general reluctance to place much weight on age").

[362] *Id.* at 1571.

[363] *Id.*

[364] *See id.* (concluding that this district court decision was an abuse of discretion).

[365] *See id.*

In sum, these post-*Koon* downward departure cases decided by the various United States courts of appeals demonstrate that problematic discretion in federal sentencing still exists. In these cases, the identity of the reviewing court is often all too important in determining the outcome, a problem the Guidelines' goal of uniformity meant to resolve. Although some courts are struggling to analyze particular cases and understand their role in reviewing discretion under the Guidelines, too many are fighting a different battle.

CONCLUSION

Ten years after the Sentencing Reform Act, the Supreme Court and the Second Circuit are still defending and applying the unreviewable, standardless judicial power to individualize punishment that characterized old sentencing law, while the Sentencing Commission and the Fourth Circuit continue to inveigh against it.[366] While the Supreme Court states that case specific factual judgments are simply in the nature of sentencing, the Sentencing Commission views them as temporary blemishes in a perfectible structure. The Second Circuit has yet to set any limits, permitting its judges to individualize so long as they do not go too far beyond the last case.[367] On the other hand, the Fourth Circuit views any individualization as reducing the Guidelines to a "sham"[368] and sending us back to the old law game of "roulette."[369] Both sides of this debate miss the fact that the focus should be on how reviewable discretion can further justice in particular cases.

Our experience with the Guidelines shows that judges use their limited discretion to individualize in only approximately ten percent of the cases, while seventy percent of the cases are sentenced within the Guideline range.[370] Despite those who predict doom, like Judge Posner in the *Pullen* case,[371] the current system has managed to combine rule-determined sentencing with a measure of reviewable individualization for the past ten years. But appellate case law has not been able to express a clear view of the pragmatic coexistence of limited, reviewable discretion to individualize sentences with a system of detailed rules. This has led to circuit courts doing a very poor job explaining why a given case comes out as it does.[372]

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[366] *See supra* Parts III-IV.

[367] *See supra* notes 194-215 and accompanying text.

[368] United States v. Withers, 100 F.3d 1142, 1149 (4th Cir. 1996).

[369] *Id.*; *see also supra* notes 272-302 and accompanying text.

[370] *See supra* note 104 and accompanying text.

[371] *See* United States v. Pullen, 89 F.3d 368, 371 (7th Cir. 1996) (noting that the "fundamental goal" of the SRA, placing federal sentencing on an "objective, uniform, and rational basis" would be contravened if departure were allowed for ordinary, rather than exceptional, cases).

[372] *See* Stith & Cabranes, *supra* note 14 (arguing that appellate judges have been denied the opportunity to develop a principled sentencing jurisprudence by the Commission's micro-management of sentencing); Reitz *supra* note 62, at 1465-71 (criticizing the federal

Instead of discussing the particular case at hand, circuit courts have adopted one of the two categorical—and unhelpful—approaches discussed above. Courts either raise the specter of disparity to deny individualization or wave the flag of discretion to affirm it. District judges, however, need clearer guidance than a general sense of whether their particular appellate court will affirm or deny their decision, on appeal. Individual appellate opinions are a particularly bad vehicle for imposing discipline over 40,000 or so sentences that will be imposed this year,[373] but they are well suited to exploring the *reasons* that a given case does or does not merit individualization.[374] Neither the Supreme Court, nor the courts of appeals have met that challenge.

The Supreme Court, in *Koon*, failed to seize the opportunity to step beyond the categorical approach that reflects the old debate about unlimited and unreviewed discretion. Although the Court's desire to reinvigorate judicial sentencing discretion is evident from *Koon's* rhetoric of discretion,[375] the opinion's failure to come to grips with the fundamental change in the nature of judicial discretion under the Guidelines renders its procedural approach impotent. Instead, the Supreme Court should acknowledge that the SRA fundamentally altered the exercise of sentencing discretion and discuss the role of reviewable, limited individualization under the Guidelines.

The Court must forthrightly remind reviewing courts that the role of abuse of discretion review under the Guidelines is to limit and channel individualization, not eliminate it. Although Congress did not completely abandon individualized sentencing, it now plays only a subsidiary role in the larger

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courts for taking a high enforcement/low judicial creativity approach in the guidelines area).

[373] There are too many cases, issues, and jurisdictions for the Fourth Circuit's uniformity rhetoric to change the national departure practices. Even within each circuit, the low likelihood of government appeal makes appellate case law a relatively weak check on the overall rate of departures. The Sentencing Commission, charged with collecting data and conducting ongoing evaluations of the Guidelines and empowered to amend them, would be the ideal institution to focus on the overall picture, had it not proven itself so devoted to minutiae and resistant to input. *See* Stith & Cabranes, *supra* note 14, at 1269-77 (detailing the ways the Commission has resisted an increased judicial role by making the Guidelines very detailed and amending them to overrule court decisions reading them more broadly).

[374] The *Pullen* case offers just the opposite view, suggesting that the Commission must make general rules about how a factor, such as a defendant's history of physical abuse, should factor into sentencing. *See supra* notes 335-45 and accompanying text. But *Koon* eschews those general rules, holding that case by case judgments are required. *See supra* notes 157-62 and accompanying text. Although case by case judgment is required by the regime of limited discretion, the Guidelines' inconsistent principles, and, most importantly, the language of the statute, this Article has argued that *Koon* is wrong to require case by case judgment inherent in criminal sentencing.

[375] *See supra* note 182 (commentators discussing *Koon's* rhetoric of discretion).

sentencing structure that emphasizes uniformity. Indeed, appellate review of sentences individualized by downward departure introduced a unifying element to even these individualized cases—district court decisions must withstand appellate scrutiny. Yet even with all those qualifications, a place still remains for the discretion to individualize sentences. The larger question is how courts should decide when the rules to individualize do not fit the case.

In the end, the Sentencing Guidelines have reduced, but not eliminated, the exercise of judgment in sentencing. Given the Guidelines' internal inconsistencies and the compromises upon which they are founded, no single reigning idea behind sentencing emerges against which every downward departure can be judged.[376] Sentencing courts must make judgments about whether the case at hand falls outside the "heartland," and reviewing courts must evaluate that particular judgment. This Article has argued that the history of unfettered sentencing discretion has made reviewing courts unnecessarily wary about the exercise of reviewable discretion under the Guidelines. Their reluctant step away from the categorical approach ignores the analytic differences between the unreviewable and largely standardless discretion of the old system and the reviewable and channeled discretion of the Guidelines. If that theoretical difference is not enough to stop courts from citing the parade of horribles associated with old law sentencing, our ten years of experience with the Guidelines' combination of rules and limited discretion proves that departures will not swallow rules in this system.

The Guidelines may not be the best possible sentencing system, but they have reached a reasonable and relatively stable balance between uniformity and individualization.[377] Given that relative stability, the courts of appeals should abandon the rhetoric of competing models of sentencing and accept the typically judicial task of reviewing individual cases. Although *Koon* muddied the waters by conflating different kinds of judicial discretion, it clearly directs courts to separate out the legal, and generalizable question of the permissibility of a given departure factor from the factual and case specific inquiry into whether a given factor is exceptional in a given case. Obviously, courts should follow *Koon's* legal framework in deciding whether a given factor may be a basis for departure. Some courts of appeals, perhaps motivated by their attachment to either individualized or uniform sentencing have not followed *Koon* in that regard, but the problem of bending legal

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[376] As this Article has argued, that conclusion flows from the particular rules we have, not from any fundamental view on the nature of sentencing. We could have a system of mandatory sentences for every offense, or guidelines without departures, or other categorical, inflexible approaches.

[377] The debate continues over whether there should be a greater role for individualization in sentencing. *See* MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 170 (1995) (arguing for increased individualization of sentencing, "by loosen[ing] up sentencing laws and guidelines in order to let judges more often mitigate sentences to take account of offenders' personal circumstances").

doctrine to accommodate policy concerns is not unique to federal sentencing law.

The new challenge posed by *Koon* is how to give substance to the deferential review of the district court's decision on case specific factors underlying departures. Too often, abuse of discretion review of downward departures is little more than a ruling without reasoning; a mere recitation of the district court's reasons followed by a statement of agreement or disagreement. Reviewing courts must wade into the messy business of opining about the merits of particular sentences, for in the end the test of whether a given factor is exceptional given all the circumstances of the case is a test of the appropriateness of the sentence. Reviewing courts must explain why, giving deference to the trial court determination, the sentence in a particular case is just or unjust.

These explanations should not announce, or advance, sentencing theories. They should address the narrower question of the sentence at issue. The current style of review attends far too much to the old debate between the sentencing theories of uniformity and individualization. *Koon* counsels a deferential, case specific and factually rooted review of the few cases that have been identified as likely instances of individualization within a system of unifying rules and principles. Although individual cases may not, by themselves, each provide satisfactory vehicles for elucidating broad guiding principles, the complex mix of levels and kinds of judicial discretion and review in the current sentencing law offers a chance to develop a common law which moves beyond the antinomy of uniformity and individualization to a set of sentencing norms that could offer useful, if not completely theoretically satisfying guidance.

Pound and Rosenberg, among others, remind us that some cases require the exercise of discretion because we believe the rules simply don't fit the case. Despite the Commission's rhetoric, current sentencing law reflects Congressional judgment that the Guidelines will not fit every case. In this sentencing regime, the judicial task is only to explain why strict application of the rules is not appropriate for the case at hand, not to fight old battles when deciding a case under new law. The judicial task is not to use the lessons of the old region when deciding a case.