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Note

The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities

Susan E. Ellingstad

The police arrested Mattie Lou Thomas for possessing four kilograms of heroin.[1] At the time, she was the sole guardian of two mentally disabled adult children and her four-year-old grandchild.[2] It was her first offense. Based upon Thomas's extreme family responsibilities, the United States District Court departed from the Sentencing Guidelines and imposed a period of probation, rather than a six-year sentence.[3] The Seventh Circuit Court of Appeals reversed the trial court's use of family circumstances as a basis for departing from the Sentencing Guidelines and remanded the case to the district court for resentencing.[4] When Thomas goes to prison, her mentally disabled children will likely be placed in an institution and her four-year-old grandchild in foster care; in addition, she could permanently lose custody.[5]

Congress implemented the Sentencing Reform Act primarily to eliminate disparity in sentencing. Uniformity in sentencing, however, is an elusive, perhaps unascertainable, ideal, because sentencing involves individuals whose actions, characters, and backgrounds can never be truly uniform. The Thomas example suggests that sentences, though numerically equivalent between two defendants, may affect one defendant more severely than another. Furthermore, innocent children,

1. United States v. Thomas, 930 F.2d 526, 527 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991).

2. *Id.* at 529. Thomas was also sole guardian of a third mentally disabled child who did not live with her. *Id.*

3. *Id.* at 527.

4. *Id.* at 530.

5. One possible consequence of the incarceration of a parent is the permanent termination of parental rights. Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 437-38 (1991).

or other third parties, may suffer to achieve numerical equality between defendants convicted of similar offenses.

This Note argues that a district court should be allowed to depart downward from the Sentencing Guidelines on the basis of unusual family responsibilities. Part I of this Note describes the statutory directives and legislative history of the Sentencing Reform Act, the provisions and policy statements of the Sentencing Guidelines, and judicial interpretations of both the Act and the Guidelines. Part II analyzes the Guidelines and critiques the courts' interpretations of them in light of the statutory directives. Part II also suggests a better interpretation based upon the congressional directives and a sociological analysis of the costs and benefits of incarcerating an offender with extraordinary family responsibilities. This Note concludes that extraordinary family circumstances should provide a basis for a downward departure from the Sentencing Guidelines.

I. BACKGROUND

A. THE SENTENCING REFORM ACT: MIXED MESSAGES ON THE COURT'S ROLE IN SENTENCING

Throughout most of the nineteenth century, American social scientists believed imprisonment served two main purposes: retribution and punishment.[6] In 1870, however, the National Congress of Prisons advanced rehabilitation as the primary goal of incarceration.[7] Under the rehabilitative theory, the emphasis of criminal law began to shift from the nature of the crime to the reformation of the criminal.[8] Congress, the United States Supreme Court, and state legislatures adopted the rehabilitative theory of imprisonment, which allowed for incarceration until the offender had reformed.[9]

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6. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893 (1990).

7. *Id.* Congress adopted the increasingly popular "positivist criminology" theory in which crime was analogized to a curable disease: Physicians, upon discovering disease, cannot name the day upon which the patient will be healed; no more can judges intelligently set the day of release from prison at the time of trial. *Id.* at 893 n.62 (quoting NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT (WICKERSHAM COMM'N), REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE 142-43 (1931)).

8. "[P]unishment is directed not to the crime but to the criminal. . . . The supreme aim of prison discipline is the reformation of criminals and not the infliction of vindictive suffering." *Id.* at 893 (quoting AMERICAN CORRECTIONAL ASS'N, TRANSACTIONS OF THE NATIONAL CONGRESS OF PRISONS AND REFORMATORY DISCIPLINE (1870)).

9. *Id.* at 894-95. Congress officially implemented an indeterminate sen-

By 1975, the popularity of the indeterminate sentencing system had significantly diminished. Studies confirmed an increase in recidivism despite the efforts of many rehabilitative programs.[10] Congress concluded that rehabilitation fell outside the scope of incarceration.[11] Furthermore, studies of indeterminate sentencing revealed gross disparity in the types and lengths of sentences.[12] Some studies linked the variance in sentences to discriminatory factors such as race, sex, income, education, and social status.[13] Other studies speculated that the disparities resulted from the "unfettered discretion" conferred upon judges,[14] in addition to the lack of clearly defined sentencing goals and criteria.[15]

In an attempt to eliminate the widespread sentencing dis-

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tencing system in 1910. *Id.* Under this system, the judge would impose a sentence from within a congressionally prescribed range. After the defendant had served one-third of the sentence, the parole board would determine the length of the prison term remaining, which it calculated by the amount of time yet required for the defendant's rehabilitation. Karle & Sager, *supra* note 5, at 394. The Supreme Court approved this Congressional scheme in 1949. Nagel, *supra* note 6, at 895. By 1960, every state in the country had passed an indeterminate sentencing system. *Id.* at 894.

10. Karle & Sager, *supra* note 5, at 395.

11. S. REP. NO. 225, 98th Cong., 1st Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221-23 [hereinafter SENATE REPORT].

12. Nagel, *supra* note 6, at 897. Statistical studies of sentencing in the Second Circuit, for example, revealed that sentences for the identical crime could range from three to 20 years imprisonment. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1988).

13. Nagel, *supra* note 6, at 895. Racial discrimination, for example, "was reflected in stiffer sentences for minority defendants than for Caucasians who had committed the same crimes, and in the greater tendency to incarcerate 'street' criminals than sophisticated white-collar criminals." Karle & Sager, *supra* note 5, at 396. The indeterminate sentencing system afforded judges the liberty to invoke "their own theories regarding criminal sanctions" as well as their individual "biases and prejudices." *Id.* Moreover, the discretionary sentences were not subject to review except in limited circumstances, such as a sentence based upon religion or another constitutionally prohibited factor. Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1942-43 & n.27 (1988).

14. SENATE REPORT, *supra* note 11, at 3221.

15. "The bulk of the variance . . . relates to the judge's perceptions regarding the overall goals of sentences—both the importance attached to the goals and evaluations of how well the goals are being accomplished." Kevin Clancy et al., *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524, 552 (1981). Studies also attributed the variance in the length of prison sentences to differences between judges—differences, for example, in their political ideologies, regions of the country in which they sit, and communities in which they were raised. *Id.* at 551.

parity, Congress enacted the Sentencing Reform Act of 1984 (the Act).[16] The Act created the United States Sentencing Commission (the Commission) and assigned it the task of formulating guidelines and policies[17] which would maintain consistency, fairness, and sufficient flexibility in sentencing.[18] The

16. Pub. L. No. 98-473, ch. 2, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-673 (1988); 28 U.S.C. §§ 991-98 (1988)). In addition to the reduction of sentencing disparity, Congress sought through the Act to achieve "honesty in sentencing." SENATE REPORT, *supra* note 11, at 3225. Under the indeterminate sentencing system, the sentence pronounced by the judge did not represent the actual length of time the defendant would serve in prison. The Parole Commission made the final incarcerative decision. Breyer, *supra* note 12, at 4. Thus, Congress eliminated parole; under the Act, judges impose the actual, "honest" sentence. *Id.*

17. 28 U.S.C. § 994(a)(2) (1988) authorizes the Commission to promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation."

18. The Sentencing Commission shall:

> provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

28 U.S.C. § 991(b)(1)(B) (1988). 18 U.S.C. § 3553 (1988) outlines the process by which a judge should impose a sentence in accordance with the purposes of sentencing:

> (a) Factors to be considered in imposing a sentence—
> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of the subsection. The court, in determining the particular sentence to be imposed, shall consider—
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

Commission completed its guidelines[19] in 1987.

One source of controversy arising from the Sentencing Guidelines concerns the amount of flexibility and discretion that Congress intended the courts to retain. Of particular uncertainty is the courts' authority to consider offender characteristics, including a defendant's family obligations, in departing from the Sentencing Guidelines.[20] The Act created tension between the previous indeterminate sentencing system, with its focus on the individualized sentence, and the new system, with its focus on numerical equality for defendants convicted of similar crimes.[21]

Despite the shift in focus, a majority of the Act's provisions retain some discretion for judges. Congress expressly stated in the Act that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[22] Congress also allowed judges to depart from the Guidelines in limited circumstances. The Act allows a court to depart from a specified sentence if the judge determines that there is an aggravating or mitigating circumstance "of a kind, or to a degree" which the Sentencing Commission failed to consider adequately.[23]

The legislative history of the Act similarly reflects the intent that courts retain discretion to impose individualized sentences in special cases. The Senate Judiciary Committee in-

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> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553 (1988).

19. UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL (1991) [hereinafter U.S.S.G.].

20. *See generally* Ogletree, *supra* note 13, at 1944-54 (describing the history of the Sentencing Guidelines and the Guidelines' directives regarding offender characteristics).

21. The statutory specifications concerning terms of imprisonment illustrate the congressional emphasis on similar offenses receiving numerically similar sentences. One provision states: "If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months." 28 U.S.C. § 994(b)(2) (1988). Thus, Congress restricted the acceptable level of disparity for a specific offense to 25%. *See* Ilene H. Nagel, *Symposium on Alternative Punishments Under the New Federal Sentencing Guidelines*, 1 FED. SENTENCING REP. 102, 102 (1988).

22. 18 U.S.C. § 3661 (1988).

23. 18 U.S.C. § 3553(b) (1988).

structed judges to examine the characteristics of each specific offender thoughtfully and comprehensively.[24] The Committee believed the Guidelines would "actually *enhance* the individualization of sentences as compared to current law."[25]

Other provisions of the Act conflict, however, with the above discretionary language. Section 994,[26] which enumerates the duties of the Sentencing Commission, reflects the congressional ambiguity toward offender characteristics. For example, section 994(a) requires the Commission to promulgate sentencing guidelines and policy statements "consistent with all pertinent provisions of this title and title 18."[27] This reference suggests that courts should include background and character in the computation of all sentences.[28] Section 994(d) similarly directs the Commission to consider certain offender characteristics, including family ties and responsibilities, to the extent it finds such characteristics relevant.[29] Congress specified that the only factors to which both guidelines and policy statements

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24. SENATE REPORT, *supra* note 11, at 3235. "The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences." *Id.*

25. *Id.* at 3235-36 (emphasis added). "The bill *requires* the judge, before imposing sentence, to consider the history and *characteristics of the offender*, the nature and circumstances of the offense, and the purposes of sentencing." *Id.* (emphasis added). Congress explicitly approved the imposition of sentences outside the Guidelines in situations where aggravating or mitigating circumstances are not, in the opinion of the judge, adequately considered. *Id.* at 3234-35. Moreover, Congress intended to consider the case law resulting from appeals of sentences above and below the guideline range in subsequently refining and amending the Sentencing Guidelines. *Id.* at 3235.

26. 28 U.S.C. § 994 (1988).

27. 28 U.S.C. § 994(a) (1988). Title 18 empowers judges with broad discretion. *See supra* notes 23-24 and accompanying text.

28. 18 U.S.C. § 3661 (1988) grants the courts sweeping discretion to consider a defendant's background or character in the sentencing decision. *See supra* text accompanying note 22. 18 U.S.C. § 3553 (1988) lists the history and characteristics of the defendant as the first factors a court should consider when imposing a sentence. *See supra* note 18.

29. The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions . . . shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;
(2) education;
(3) vocational skills;
(4) mental and emotional condition to the extent that such con-

should remain neutral were "race, sex, national origin, creed, and socioeconomic status of offenders."[30]

In contrast, in section 994(e) Congress directed the Commission to "assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the *general inappropriateness* of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."[31] The legislative history pertaining to section 994(e) states, however, that Congress intended courts to employ these factors in other facets of the sentencing decision, such as when considering day leave necessary for a defendant to retain employment,[32] the use of furlough, the location of the prison, and the use of probation in lieu of incarceration.[33] The restrictive language of section 994(e) appears to conflict with the broad grants of discretion in subsections 994(a) and (d).

B. THE SENTENCING GUIDELINES: ADDING TO THE CONFUSION

The Sentencing Reform Act's conflicting directives left the Sentencing Commission with a choice about the appropriate

dition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
(5) physical condition, including drug dependence;
(6) previous employment record;
(7) family ties and responsibilities;
(8) community ties;
(9) role in the offense;
(10) criminal history; and
(11) degree of dependence upon criminal activity for a livelihood.

28 U.S.C. § 994(d) (1988).

30. *Id.*

31. 28 U.S.C. § 994(e) (1988) (emphasis added).

32. SENATE REPORT, *supra* note 11, at 3357.

33. *Id.* Congress stated that a court, in an appropriate case, may consider the factors proscribed in § 994(e) to impose a term of probation in lieu of imprisonment if probation will ensure the public's safety. *Id.* at 3357-58. Allowing probation as a substitute for incarceration appears to conflict with the plain language of § 994(e), which characterizes the enumerated considerations as "generally inappropriate" for "recommending a term of imprisonment or length of a term of imprisonment." *Id.* at 3357. The legislative history, however, emphasizes that the Committee intentionally described the enumerated factors as "generally inappropriate" rather than "always inappropriate" to allow the Commission to explore their relevance. *Id.* at 3358. Congress intended § 994(e) to serve as guidance—cautionary, not proscriptive. *Id.* Moreover, the cautionary language served "to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties." *Id.*

weight to give offender characteristics.[34] The Sentencing Commission chose to ignore them altogether.[35]

In the majority of the other sections, the Commission's guidelines parallel the discretionary language of the Sentencing Reform Act,[36] but the Commission adopted a restrictive interpretation in the area of offender characteristics.[37] As a result, several guideline provisions about judicial discretion and relevant sentencing considerations conflict.

Consistent with the Sentencing Reform Act, the Guidelines call for an active judicial role in determining whether to depart from the Guidelines' recommended sentence. Although the Guidelines generally direct courts to determine an appropriate sentence by matching the offense categories with the offender characteristic categories,[38] the Commission acknowledged that a court may depart from that prescribed range if a particular case should present "atypical features."[39] The Guidelines also limit the information the judge may regard in her sentencing decision by prohibiting consideration of certain factors, but gen-

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34. Breyer, *supra* note 12, at 19-20.

35. The Commission debated extensively over offender characteristics and the proper impact to afford them in sentencing. *Id.* at 19. Ultimately, those opposing the inclusion of offender characteristics as relevant considerations won the debate, in what Judge Breyer labels the traditional "trade-off." *Id.* at 19-20.

36. *See, e.g.*, U.S.S.G., *supra* note 19, § 1B1.4 (paralleling 18 U.S.C. § 3661 (1988)).

37. *See id.* at ch. 5, pt. H (discussing specific offender characteristics).

38. The Guidelines contain a two-dimensional Sentencing Table. One axis represents offense behavior categories and the other represents offender characteristic categories. Karle & Sager, *supra* note 5, at 400. Each combination of categories yields an applicable range of months of imprisonment. *Id.* To determine the incarceration range in a robbery case, for example, a judge would coordinate the offense behavior category, which might include the elements bank robbery, committed with a gun, and $2500 stolen, with the offender characteristic category, which might consist of one prior conviction not resulting in imprisonment. *See* U.S.S.G., *supra* note 19, at 1 (presenting an example in introductory materials to the Guidelines). For a complete overview of the offense and offender categories, see *id.* at 279-81 (presenting a sentencing table and commentary).

39. U.S.S.G., *supra* note 19, at 1 (introducing the Guidelines).

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

Id. at 5-6. In such a case, the court must articulate the reasons for departure. *Id.* at 1. The Sentencing Guidelines marked the first time judges were required to justify their departures. Karle & Sager, *supra* note 5, at 396.

erally the Commission stated its intention not to limit the factors a court may consider.[40]

The Commission specifically allowed judges to depart downward because of a defendant's substantial assistance to authorities.[41] Instead of providing additional specific bases for departure, the Commission listed factors which might constitute grounds for departure but which the Commission admittedly did not discuss.[42] The Commission stated that it did not intend this list of factors to be exhaustive.[43] Rather, the Commission stated that the departure decision would fall within the discretion of the courts.[44] A court could depart even though the Com-

40. The Guidelines exclude several factors from consideration in a downward departure. These include race, sex, national origin, creed, religion, socioeconomic status, physical condition, coercion and duress. U.S.S.G., *supra* note 19, §§ 5H1.4, .10, 5K2.12. "With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, *whether or not mentioned anywhere else in the guidelines*, that could constitute grounds for departure in an unusual case." *Id.* at 6 (emphasis added).

In addition, one guideline section parallels the sweepingly broad § 3661 of Title 18: "[I]n determining the sentence to impose within the guideline range, or whether a departure from the Guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." *Id.* § 1B1.4. The commentary to this section, however, while reiterating the congressional intent not to limit background considerations, also mentions that under some policy statements, "certain factors should not be considered for any purpose, or should be considered only for limited purposes." *Id.* § 1B1.4 cmt. This limitation refers to the policy statements in Chapter Five, Part H (Specific Offender Characteristics) of the Sentencing Guidelines. In Chapter Five, the Commission enumerates three offender characteristics which it deems relevant in imposing the appropriate sentence. These characteristics are the defendant's role in the offense, the defendant's criminal history, and the defendant's dependence upon criminal activity for a livelihood. *Id.* §§ 5H1.7, .8, .9. The Commission deemed three of the 11 factors listed in 28 U.S.C. § 994(d) as appropriate for consideration in sentencing. Congress directed the Commission to consider the relevancy of the 11 in establishing defendant categories. *See supra* note 29.

41. U.S.S.G., *supra* note 19, § 5K1.1. Ironically, the allowance of a downward departure for government cooperation results in tremendous sentencing disparity because the departure is not reflective of a defendant's culpability. Thomas W. Hillier, II, *Congressional Oversight*, 2 FED. SENTENCING REP. 224, 226 (1990). Typically, the least culpable defendants will not benefit from the cooperation departure because they possess information least vital to the case. Thus, the most culpable defendants receive relatively lenient sentences based upon their greater ability to assist the government. *Id.*

42. U.S.S.G., *supra* note 19, § 5K2.0. These factors include physical injury, extreme psychological injury, victim's conduct, and lesser harms. *Id.* §§ 5K2.2, .3, .10, .11.

43. *Id.* at 6.

44. The Sentencing Guidelines state:

Circumstances that may warrant departure from the guidelines pur-

mission adequately considered the specific factor.[45]

While promulgating the preceding provisions that suggest broad judicial discretion, the Commission also issued several policy statements greatly restricting the information the judge may consider in departing from the Guidelines.[46] In these policy statements, the Commission, after electing not to consider a defendant's family ties and responsibilities in devising offender categories,[47] deemed that family responsibilities and other personal characteristics should be "*not ordinarily relevant* in determining whether a sentence should be outside the applicable guideline range."[48] Instead, the Commission stated that family responsibilities may be relevant in determining restitution or fines.[49]

C. Case Law: Disagreement Over the Permissibility of Family Considerations in Departures From the Sentencing Guidelines

Not surprisingly, in light of the inconsistencies between the statutory directives and the Sentencing Guidelines, and the inconsistencies within both, the federal courts disagree over whether to consider a defendant's atypical family ties and responsibilities in determining an appropriate sentence.

The Seventh and Ninth Circuits have narrowly interpreted the Guidelines to preclude consideration of a defendant's family responsibilities in sentencing, regardless of the extraordinary or

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> suant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The *controlling decision* as to whether and to what extent departure is warranted can *only be made by the courts*. . . . Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. . . . Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (*e.g.*, as specific offense characteristic or other adjustment), if the *court determines* that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Id. § 5K2.0 (emphasis added).

45. *Id.*

46. The Commission drafted the provisions of the Sentencing Guidelines in the form of both guidelines and policy statements. The latter indicated tentative policies which had not evolved to the stage of a presumptively valid guideline. Marc Miller & Daniel Freed, *Offender Characteristics and Victim Vulnerability: The Differences Between Policy Statements and Guidelines*, 3 FED. SENTENCING REP. 3, 4 (1990). *See infra* notes 102-08 and accompanying text (discussing the authoritative weight of policy statements).

47. *See supra* notes 34-35 and accompanying text.

48. U.S.S.G., *supra* note 19, § 5H1.6 (emphasis added).

49. *Id.*

burdensome nature of those responsibilities. In *United States v. Thomas*,[50] the Seventh Circuit interpreted the Guidelines to preclude a court from considering family responsibilities in a downward departure.[51] The court focused primarily on the provision of the Guidelines allowing a downward departure for a defendant's substantial assistance to authorities.[52] Invoking a canon of statutory interpretation, *ejusdem generis*,[53] the court concluded that because the Sentencing Commission did not specifically authorize a downward departure for factors unrelated to the defendant's cooperation, it did not intend that these factors should warrant a downward departure.[54] The defendant argued that the Guidelines[55] explicitly direct the court to consider "without limitation" the background and character of a defendant.[56] Rejecting this argument, the court found that the policy statement declaring family ties and responsibilities "not ordinarily relevant"[57] trumped the "without limitation" provision.[58] Admittedly interpreting the guideline provisions narrowly, the court read the policy statement listing instances where family responsibilities are definitely relevant as all-inclusive.[59]

50. 930 F.2d 526 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991).

51. *Id.* at 530.

52. *See id.* at 528-31. The district court had strayed from the Guidelines, in part because Mrs. Thomas provided substantial assistance to the government, and in part because she had unusual family circumstances. *Id.* at 529.

53. "Of the same kind, class, or nature." BLACK'S LAW DICTIONARY 517 (6th ed. 1990). "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 47.17, at 188 (Norman J. Singer ed., 5th ed. 1992) [hereinafter SUTHERLAND] (footnotes omitted). Courts invoke this canon when applying an arguably ambiguous statute to a particular set of facts in order to ascertain the probable legislative intent in such a situation. For an example of the application of *ejusdem generis*, see Heathman v. Giles, 374 P.2d 839 (Utah 1962).

54. *Thomas*, 930 F.2d at 529.

55. U.S.S.G., *supra* note 19, § 1B1.4.

56. *Thomas*, 930 F.2d at 529. The defendant maintained that the district court departed under both § 1B1.4, the discretionary provision, and § 5K1.1, which allows departure based upon substantial assistance to the government. *Id.*

57. U.S.S.G., *supra* note 19, § 5H1.6.

58. *Thomas*, 930 F.2d at 529.

59. *Id.* at 530. Section 5H1.6 lists restitution and fines as sentencing contexts in which family circumstances are relevant. U.S.S.G., *supra* note 19, § 5H1.6. "[Section] 5H1.6 contains no language suggesting that this list is merely illustrative rather than exhaustive. . . . [T]he Commission's affirmative statement that family responsibilities are relevant when probation is an option suggests that the Commission did not intend them to be relevant when, as

In *United States v. Brady*,[60] the Ninth Circuit reached a similar conclusion after a cursory analysis of the issue. The defendant, convicted of one count of bank robbery, challenged as a violation of due process the district court's refusal to consider his family ties and responsibilities.[61] The court, however, characterized the defendant's due process challenge as a facial challenge to the constitutionality of the Sentencing Guidelines, and not as an "as applied" challenge to the constitutionality of his sentence.[62] The court found that because the Guidelines allow courts to consider family responsibilities in sentencing within the applicable range, the defendant's claim actually concerned the weight granted to those factors rather than the Guidelines' consideration of them.[63] Because, in the Ninth Circuit's view, courts have historically refused to permit a defendant to challenge the weight sentencing courts accord to various sentencing factors under the individualized sentencing system, the defendant's claim failed.[64]

In contrast, the Sixth Circuit determined that a court may depart from the Guidelines because of extremely unusual family circumstances.[65] In *United States v. Brewer*,[66] the defendants, both bank tellers, periodically embezzled a total of $28,000 from their employer bank.[67] The district court departed downward from the guideline range, in part because of the defendants' prompt restitution, their degree of remorse, community support for the defendants, and because both defendants had small children at home who needed their care.[68] On appeal, the Sixth Circuit recognized the possibility of sentencing below the guideline range in cases where there are exceptional mitigating

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here, probation is *not* a sentencing option." *Thomas*, 930 F.2d at 530 (citations omitted).

60. 895 F.2d 538 (9th Cir. 1990).

61. *Id.* at 543.

62. *Id.*

63. *Id.* In its analysis, the court assumes that because the Guidelines mention family responsibilities, courts automatically consider that factor and, therefore, the lack of consideration is not an issue. *See id.*

64. The court was not concerned with the possible lack of an individualized sentence. The court rested its superficial analysis on the assumption that a defendant's individual due process rights were *more* at risk under the preexisting discretionary sentencing system than under the Guidelines. *See id.* at 542-44.

65. *See* United States v. Thomas, 930 F.2d 526, 529 (7th Cir.) (giving an overview of the split among the circuits), *cert. denied*, 112 S. Ct. 171 (1991).

66. 899 F.2d 503 (6th Cir.), *cert. denied*, 111 S. Ct. 127 (1990).

67. *Id.* at 505.

68. *Id.* at 505-06.

circumstances not adequately considered by the Sentencing Commission.[69] The court, however, found the defendant's mitigating circumstances not sufficiently exceptional to warrant departure.[70]

The Fourth, Fifth, and Eighth Circuits are internally split on the issue of family obligations.[71] The panels refusing to de-

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69. *Id.* at 506-08.

70. "Although a short prison term may impose hardship, 'unfortunately, it is not uncommon for innocent young family members, including children . . . to suffer as a result of a parent's incarceration.' " *Id.* at 508 (quoting United States v. Fiterman, 732 F. Supp. 878 (N.D. Ill. 1989)). Furthermore, the court did not want to base its decision solely on the sex of the defendants, which is prohibited under Guideline § 5H1.10. *See supra* note 40 and accompanying text.

In another Sixth Circuit case, United States v. Davern, 937 F.2d 1041 (6th Cir. 1991), the court employed its departure authority without hesitation. Although *Davern* involved the appellate review of an upward departure for aggravating circumstances in a drug offense, *id.* at 1043, rather than a downward departure for unusual family obligations, the court's analysis relates to this discussion. The court based its analysis of the Sentencing Guidelines on 18 U.S.C. § 3553(a)-(b), the statutory directive relating to the imposition of a sentence. *Id.* at 1043-44; *see supra* note 18. The court followed in sequence the factors enumerated in the statute. *Davern*, 937 F.2d at 1044-45. In accordance with the first subsection, the court viewed its first duty as imposing a sentence " 'not greater than necessary to comply' with [the] 'purposes' " of sentencing set forth in 18 U.S.C. § 3553(a). *Id.* The court next addressed the provision instructing courts to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." *See* 18 U.S.C. § 3553(a)(1) (1988). Because § 3553(a) does not mention the Guidelines as a consideration until further down the list, the court refused to view the Guidelines as a sentencing imperative until the court had "first considered the facts in light of these qualitative first principles." *Davern*, 937 F.2d at 1044 (footnote omitted). The court then analyzed § 3553(b), which allows a departure from the Guidelines in the event of aggravating or mitigating circumstances not adequately considered. Rather than interpreting this provision as a narrow exception, the court read it as "stat[ing] that the sentencing court *is not bound by the guidelines* if there is in the case '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.' " *Id.* The *Davern* court thus interpreted the Sentencing Guidelines and the Sentencing Reform Act together. In the case of conflict, the court viewed the Act as controlling. *See id.* at 1045.

71. *See* United States v. Burch, 873 F.2d 765, 768-69 (5th Cir. 1989) (court refused to sustain an upward departure based upon a defendant's prominent family ties and education, yet acknowledged courts' departure power in the extraordinary case). *Compare* United States v. Vela, 927 F.2d 197, 199 (5th Cir.) (recognizing that a defendant's family circumstances may constitute grounds for departure in the extraordinary case), *cert. denied*, 112 S. Ct. 214 (1991); United States v. Shortt, 919 F.2d 1325, 1328 (8th Cir. 1990) (finding it "legally possible" to justify a departure with extraordinary family circumstances); *and* United States v. Deigert, 916 F.2d 916, 918-19 (4th Cir. 1990) (per curiam) (permitting the consideration of family ties and responsibilities in a downward departure) *with* United States v. McHan, 920 F.2d 244, 248 (4th Cir. 1990)

part have focused almost exclusively on the "general inappropriateness" phrase of the Sentencing Reform Act and the "not ordinarily relevant" phrase of the Sentencing Guidelines.[72] The courts acknowledging family ties as grounds for departure have analyzed the provisions of the Sentencing Reform Act and the Sentencing Guidelines in totality, and have viewed even the restrictive language as permissive rather than prohibitive. In *United States v. Shortt*,[73] for example, the Eighth Circuit employed the "not ordinarily relevant" language not as a bar, but rather as a starting point from which to determine whether the defendant's family responsibilities qualified as extraordinary, thus warranting departure.[74]

II. ANALYSIS

A. THE DEFICIENCIES OF THE SENTENCING COMMISSION AND THE COURTS

The confusion over the relevance of family responsibilities began with the Commission's restrictive interpretation of the statutory directives relating to offender characteristics.[75] In

(finding the Sentencing Guidelines preclude the consideration of family and community ties in a downward departure); United States v. Lara-Velasquez, 919 F.2d 946, 955-57 (5th Cir. 1990) (stating that offender characteristics should never constitute the basis for departure from the Guidelines); *and* United States v. Sutherland, 890 F.2d 1042, 1043 (8th Cir. 1989) (per curiam) (finding § 5H1.6 a "clear statement" that family considerations are not a ground for departure).

72. In *United States v. Sutherland*, for example, the court cited Sentencing Guideline § 5H1.6 ("not ordinarily relevant") and concluded that "Sutherland's argument has no merit in view of the clear statement in the guidelines with respect to this subject." *Sutherland*, 890 F.2d at 1043; *see also* United States v. Prestemon, 929 F.2d 1275, 1277-78 (8th Cir.) (refusing to depart based upon the "not ordinarily relevant" language of Sentencing Guideline § 5H1.6), *cert. denied*, 112 S. Ct. 220 (1991); United States v. Daly, 883 F.2d 313, 319 (4th Cir. 1989) (finding the defendant's current "family ties and responsibilities" and prior "unstable upbringing" insufficient factors to warrant a downward departure from the Guidelines), *cert. denied*, 110 S. Ct. 2622 (1990).

73. 919 F.2d 1325 (8th Cir. 1990).

74. *Id.* at 1328; *see also* United States v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990) (noting the "not ordinarily relevant" phrase and concluding that the defendant's offender characteristics are extraordinary and of a magnitude not adequately considered by the Sentencing Commission). For a thorough analysis of the statutory directives, the legislative history, and the Guidelines, see United States v. Boshell, 728 F. Supp. 632 (E.D. Wash. 1990), *vacated*, 952 F.2d 1101 (9th Cir. 1991); United States v. Rodriguez, 724 F. Supp. 1118 (S.D.N.Y. 1989).

75. *See supra* notes 34-37 and accompanying text. As Judge Breyer makes clear, the Sentencing Commission did possess the ability to choose which policy to enforce:

choosing to interpret the Act restrictively, the Sentencing Commission removed much of the flexibility and individuality in sentencing that Congress intended courts to retain.[76] The first provision directed the Commission to promulgate guidelines in accordance with Title 18.[77] Title 18 delegated the authority to the Commission to grant courts unlimited discretion to consider a defendant's background and character.[78] In a separate provision, Congress required the Commission to consider eleven different offender characteristics to the extent that they were relevant.[79] The legislative history also illustrates Congress's intent that offender characteristics significantly factor into the sentencing decision.[80]

In light of these clear directives in the Act and the legislative history, the Commission could have either regarded section 994(e) ("general inappropriateness") as somewhat anomalous and, thus, accorded it less weight, or attempted to interpret the section in a way more consistent with the other provisions. Instead, the Commission focused *primarily* on section 994(e), which qualifies several offender characteristics as generally inappropriate in imposing a term of imprisonment.[81] Thus inclined, the Commission attributed relevance to only three of the eleven characteristics that Congress had instructed it to consider in devising offender categories: role in the offense,[82] criminal history,[83] and dependence on criminal activity

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> The Commission extensively debated which offender characteristics should make a difference in sentencing; that is, which characteristics were important enough to warrant formal reflection within the Guidelines and which should constitute possible grounds for departure. . . . [Some] argued that factors such as age, employment history, and family ties should be treated as mitigating factors.

Breyer, *supra* note 12, at 19.

76.
> Although the Sentencing Commission was expected to draft guidelines and develop policy statements that would eliminate disparities, it was also expected to develop policy statements that would leave federal judges with sufficient flexibility to impose individualized sentences warranted by mitigating or aggravating factors not taken into consideration in the general sentencing guidelines.

Ogletree, *supra* note 13, at 1946.

77. *See* 28 U.S.C. § 994(a) (1988).

78. *See* 18 U.S.C. § 3661 (1988) (granting sweeping authority to courts in the consideration of background factors).

79. *See supra* note 29 (listing the characteristics provided in 28 U.S.C. § 994(d) (1988)).

80. *See supra* notes 24-25 and accompanying text.

81. *See supra* note 31 and accompanying text (discussing characteristics provided in 28 U.S.C. § 994(e) (1988)).

82. U.S.S.G., *supra* note 19, § 5H1.7.

83. *Id.* § 5H1.8.

for a livelihood.[84] The Commission precluded departure based on the other eight factors, including family responsibilities, by deeming them "not ordinarily relevant" to sentencing decisions.[85] With virtually no supporting data or research regarding the relevance of offender characteristics,[86] the Commission dictated what courts may and may not consider as relevant.[87]

The confusion over family obligations became more ingrained when the issue reached the courts. Relying on the Commission's flawed determination, courts concluded that fac-

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84. *Id.* § 5H1.9.

85. *Id.* § 5H1.6.

86. The legislative history of the Sentencing Reform Act illustrates that Congress

> encourage[d] the Sentencing Commission to explore the relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate professional analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise.

SENATE REPORT, *supra* note 11, at 3358. The Sentencing Commission, however, published no evidence to support the finding that "offender characteristics are not 'ordinarily relevant' " to the sentencing process. Miller & Freed, *supra* note 46, at 4. Because of an unrealistic timetable to implement the Guidelines, the Commission failed to subject the Guidelines to a "field test" by judges, attorneys, and probation officers, or to any type of study concerning the effect of personal factors on sentencing. Ogletree, *supra* note 13, at 1950.

Similarly, the Commission offered no rationale behind the offender characteristic policy statements when it submitted the original guidelines to Congress in 1987. Miller & Freed, *supra* note 46, at 4.

> Considering the substantial time constraints under which the Commission labored to complete an initial set of guidelines by May 1987, it was not unreasonable to have formulated—as a starting point—some tentative policies regarding offender characteristics. At the very least, those policies had the virtue of challenging judges to justify and share with the Commission their reasons for invoking sentencing factors as to which the Commission had little information.

Id. The Sentencing Commission acknowledged the nonauthoritative nature of these statements by titling them "policy statements" and explaining that, instead of specifying each adequately considered factor, " 'the Commission does not so limit the courts' departure power.' " *Id.* (citing UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL ch. 1A4(b) (1987)).

87. Commenting on the Sentencing Guidelines, Judge Weinstein reacted unfavorably to the Commission's determination of offender characteristics as irrelevant:

> I have never sentenced a defendant for whom all of these personal factors were irrelevant. Their elimination from the guidelines is disappointing—and strays from the spirit of the legislation. It tilts the sentencing determination too much in the direction of retribution, and places too little emphasis on factors that would mitigate the punishment in individual cases.

Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 12 (1988).

tors other than the three affirmatively stated as relevant are not essential to an individualized sentence.[88] The court in *United States v. Brady* placed the burden upon the defendant to prove the necessity of considering factors, such as a defendant's family ties, which are unrelated to the defendant's culpability.[89] The *Brady* court, relying solely on the experimental policy statement deeming family ties "not ordinarily relevant,"[90] concluded that only *criminal* history factors, as opposed to *personal* history factors, need be considered to impose an individualized sentence.[91]

Courts which attribute such credence to the restrictive language of the Guidelines neglect the permissive language. The court in *United States v. Lara-Velasquez*,[92] for example, justified its position that offender characteristics may never constitute a basis for departure by misconstruing a guideline section granting it broad authority in sentencing (the "without limitation" provision). The court held that the "without limitation" provision applies only to the determination of sentences *within* the guideline range.[93] The "without limitation" language of the provision, however, applies also in the determination of whether to depart from the Guidelines.[94]

These interpretations are not only contrary to the majority of the Sentencing Reform Act provisions and their legislative history, but also to the congressional intent behind section 994(e) itself. The legislative history indicates that Congress discouraged courts from considering family ties and responsibilities, education, and vocational skills merely to "guard against the *inappropriate* use of incarceration for those defendants who *lack* education, employment, and stabilizing ties."[95] Congress desired to prevent discrimination in the form of *upward* departures against poor, disadvantaged and minority defend-

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88. *See, e.g.*, United States v. Brady, 895 F.2d 538, 543 (9th Cir. 1990).

89. *Id.*

90. *Id.* (citing the UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 5H1.6 (1989)).

91. *Id.* at 543.

92. 919 F.2d 946 (5th Cir. 1990).

93. *Id.* at 956 (emphasis added).

94. Section 1B1.4 states: "In determining the sentence to impose within the guideline range, *or whether a departure from the guidelines is warranted*, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." U.S.S.G., *supra* note 19, § 1B1.4 (emphasis added).

95. SENATE REPORT, *supra* note 11, at 3358 (emphasis added).

ants.[96] By characterizing the background factors as "not ordinarily relevant," however, the Commission eliminated consideration of factors which one commentator has noted have "frequently and appropriately argued against imprisonment especially in cases involving poor, disadvantaged defendants."[97]

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96. *See* Hillier, *supra* note 41, at 225. The desire to eliminate disparate treatment based upon discriminatory factors provided the incentive for the Sentencing Reform Act. *Id.*; *see also supra* note 16.

97. Hillier, *supra* note 41, at 225. "The need for vocational training, education, drug counseling or physical care have traditionally influenced judges to fashion probationary sentences that include rehabilitative programs designed to help the defendant to solve the problems that contributed to his or her misconduct." *Id.* Conversely, Congress probably did not intend courts to depart upward in cases in which the defendant does possess education, employment, and stabilizing ties. United States v. Burch, 873 F.2d 765 (5th Cir. 1989), supports such a conclusion. The defendant in *Burch* appealed his sentence of five years imprisonment for conspiring to possess marijuana with the intent to distribute it. *Burch*, 873 F.2d at 766. The district court departed upward to the maximum sentence allowed under the applicable statute because of the defendant's high level of education and intelligence, his maturity, and his prominent family upbringing. *Id.* at 767. The district court judge compared Burch to a juvenile delinquent who does not know better, and described him as " 'one of the top persons, scholastically speaking, [with] all your educational pursuits, [you are] an extremely gifted, talented individual. You are not the ordinary person who walks through here.' " *Id.* The Fifth Circuit refused to permit an upward departure based upon those background factors. *Id.* at 768. Furthermore, the court found that factors such as the defendant's sophistication and prominent social background constitute "socio-economic status," a consideration flatly prohibited by the Guidelines. *Id.*

The application of the court's analysis to an *upward* departure is highly significant in light of the apparent inconsistency between § 994(e) and the other provisions of the Sentencing Reform Act. Interestingly, courts have failed to place any significance on the fact that *Burch* involves an upward departure. For example, the *Lara-Velasquez* court cited *Burch* in support of its decision not to depart downward on the basis of the defendant's personal characteristics, which were insufficiently unusual. 919 F.2d at 955. The court found *Burch* to "limit the district court's authority to justify a *downward departure* from an applicable guideline range on a defendant's admirable character traits." *Id.*

In *Burch*, the Fifth Circuit's refusal to sustain an upward departure based on offender characteristics carried out the intent of Congress in enacting § 994(e). Congress recognized a distinction between a downward and an upward departure for the purposes of considering a defendant's background characteristics. Through its desire to "guard against the inappropriate use of incarceration," Congress displayed a concern that courts would apply offender characteristics in a way that would penalize particular defendants. *Burch*, 873 F.2d at 767. This, in turn, suggests the intent to avoid *upward* departures founded upon these factors. The Sentencing Commission should have interpreted § 994(e) to discourage upward departures rather than all departures based on family responsibilities and other offender characteristics. This interpretation would provide an alternative to dismissing the section as anomalous, while attributing meaning to the permissive provisions of the Sentencing Reform Act and its legislative history.

The present state of disagreement and confusion defeats congressional intent in another, broader way. The fact that the Guidelines leave room for differing interpretations leads to the very disparity that Congress sought to remove from the process. Arguably, judicial discretion presently exists within the literal language of the Guidelines, as offender characteristics "not ordinarily relevant" are necessarily relevant in the *extra*ordinary case.[98] Many courts, however, have failed to recognize this inherent discretion and view consideration of even the most burdensome and unusual family responsibilities as absolutely prohibited by the Guidelines.[99]

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98. *See* Federal Courts Study Comm., Tentative Recommendations for Public Comment, 62, 64 (Dec. 22, 1989), *in* 2 FEDERAL COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS JULY 1, 1990 [hereinafter FEDERAL COURTS STUDY].

99. *Id.* The family responsibilities of the defendant in United States v. Thomas, 930 F.2d 526, 527 (7th Cir.) (discussed *supra* notes 1-5 and accompanying text), *cert. denied,* 112 S. Ct. 171 (1991), for example, easily qualified as extraordinary. Nonetheless, the court bound itself to a rigid prohibition which did not exist in the literal language of the Sentencing Guidelines. The Guidelines have also increased sentencing disparities by shifting discretion from judges to lawyers. Because the Sentencing Guidelines have limited judicial flexibility in sentencing, defendants have less incentive to plea bargain and more incentive to proceed to trial. FEDERAL COURTS STUDY, *supra* note 98, at 63. By failing to grant the sentencing court the clear authority to approve sentences outside of the prescribed range, the Guidelines prevent prosecutors from offering many concessions to induce guilty pleas. *Id.* at 62. As plea bargaining constitutes an essential part of the judicial system, however, prosecutors manipulate the Guidelines, according to the Federal Courts Study Committee, to "induce the pleas necessary to keep the system afloat." *Id.*; Hillier, *supra* note 41, at 227 (discussing the shifting of discretion from judges to prosecutors). In the federal system, guilty pleas make up 85-90% of all convictions. FEDERAL COURTS STUDY, *supra* note 98, at 60-61.

Prosecutors engage in three primary forms of manipulation to enhance their bargaining power: charge bargaining, fact bargaining and date bargaining. Albert W. Alschuler & Stephen J. Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, 2 FED. SENTENCING REP. 94, 94-95 (1989). In charge bargaining, prosecutors dismiss provable charges to produce lower sentences than those required under the Guidelines in order to induce defendants to plead guilty. *Id.* at 94. Faced with cases in which the criminal activity began prior to the implementation of the Guidelines, some prosecutors dismiss the later charges which would have fallen under the strictures of the Guidelines, a practice known as date bargaining. *Id.* at 95. Even more common is the practice of fact bargaining, wherein the prosecution will not assert provable facts which would enhance the sentence under the Guidelines. *Id.* Since prosecutors employ this discretion outside the system, it is no longer subject to judicial review. FEDERAL COURTS STUDY, *supra* note 98, at 61.

Judge McNicols expressed discontent with the Guidelines' effect on discretion:

> Congress has thus shifted discretion from persons who have demonstrated essential qualifications to the satisfaction of their peers, vari-

The Guidelines retain disparity in another area as well. Despite the Commission's attempt to achieve uniformity through numerical equality, the Guideline's failure to give courts clear authority to consider pertinent factors such as a defendant's family responsibilities results in disparate punishment for defendants convicted of similar crimes.[100] If the same sentence affects two defendants in drastically different ways, the sentences are not equivalent.[101] Despite Congress's primary intent to rid the judicial system of sentencing disparity, the Commission retained and perhaps increased disparity, though shifting it to different areas.

A final source of confusion surrounding the Sentencing Guidelines concerns the appropriate authoritative weight courts should assign to the guideline provisions labeled policy statements. Many courts err in attributing equal weight to the actual guidelines and to the policy statements.[102] The Commission discussed offender characteristics in both the

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> ous investigatory agencies, and the United States Senate to persons who may be barely out of law school with scant life experience and whose common sense may be an unproven asset. . . . In the judicial arena every decision is subject to review. Every decision rendered must be grounded on articulated facts and legal theories stated on the open record. An error in either regard is subject to appeal and reversal. When the decision is made by the prosecutor, there is no public proceeding, there are no enunciated facts, and legal theories become irrelevant.

United States v. Boshell, 728 F. Supp. 632, 637-38 (E.D. Wash. 1990), *vacated*, 952 F.2d 1101 (9th Cir. 1991); *see also* Weinstein, *supra* note 87, at 5 ("One thing the Guidelines did not do is eliminate the enormous discretion in the prosecutor, resulting from the wide variety of charges he may bring.").

100. FEDERAL COURTS STUDY, *supra* note 98, at 62.

101. Eleanor Bush, *Considering the Defendant's Children at Sentencing*, 2 FED. SENTENCING REP. 194, 194 (1990). For example, a "two year prison sentence does not *equal* two years in prison accompanied by permanent loss of child custody." *Id.* The Supreme Court has recognized that the "consistency produced by ignoring individual differences is a false consistency." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). For a discussion of the effects of incarceration on dependent children, see *infra* notes 124-26 and accompanying text.

102. *See* United States v. Pozzy, 902 F.2d 133, 138 (1st Cir.) (referring to policy statement § 5H1.4 as a guideline), *cert. denied*, 111 S. Ct. 353 (1990); United States v. Brewer, 899 F.2d 503, 511 (6th Cir.) (finding that "a sentencing court should not treat as unique or unusual factors, those circumstances that the guidelines have already taken into account or expressly deemed irrelevant"), *cert. denied*, 111 S. Ct. 127 (1990); United States v. Sutherland, 890 F.2d 1042, 1043 (8th Cir. 1989) (referring to § 5H1.6 as a "guideline"). "Decisions like *Brewer* and *Pozzy* that accord binding influence to policy statements are paying allegiance to tentative ideas that have yet to earn credibility through research, reasoned analysis or practice, and that Congress has not reviewed." Miller & Freed, *supra* note 46, at 4.

guidelines and the policy statements.[103] Interestingly, the provisions relating to a defendant's *criminal history* are nearly all labeled as *guidelines*,[104] while the provisions addressing the defendant's *noncriminal personal history*—such as family ties and responsibilities—are all labeled *policy statements*.[105]

Congress intended the policy statements to be "advisory and non-binding."[106] Judicial noncompliance with the Guidelines automatically invokes appellate jurisdiction by both the government and the defendant, while noncompliance with the policy statements does not confer the same appellate status.[107] Furthermore, the legislative history indicates Congress intended that the policy statements serve as a starting point from which to revise the provisions based upon appellate decisions and judicial comment before Congress considers enacting them as guidelines.[108] Despite the clear authoritative differences between policy statements and guidelines, many courts fail to distinguish the two, assigning them equal weight when interpreting the Sentencing Guidelines.[109]

B. PROPOSAL AND DEFENSE OF SOLUTION

1. Courts versus Sentencing Commission: The Correct Interpretation of the Sentencing Reform Act and the Sentencing Guidelines

The fact that certain courts depart freely from the Guidelines, while other courts do so reluctantly and some not at all,[110] illustrates the existing power struggle between the courts and the Commission. The courts refusing to depart based upon family responsibilities perceive such a departure as a violation

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103. Miller & Freed, *supra* note 46, at 3.

104. *See* U.S.S.G., *supra* note 19, §§ 4A1.1, 4B1.1, .3, .4.

105. *See id.* §§ 5H1.1, .2, .3, .4, .5, .6.

106. Miller & Freed, *supra* note 46, at 3 (quoting U.S. DEP'T OF JUSTICE, PROSECUTORIAL HANDBOOK ON SENTENCING GUIDELINES 1 (Nov. 1, 1987)). 18 U.S.C. § 3553(b) illustrates the nonbinding nature of policy statements. *See supra* note 46. Congress required a court to justify every departure from the *Guidelines*. "Section 3553(b) establishes no rule restricting departures from policy statements. *Nothing in the statute inhibits a judge from not following a policy statement.*" Miller & Freed, *supra* note 46, at 5. Although Congress passed the actual Guidelines following a six month waiting period in which they were reviewed and subject to possible revision, Congress enacted the policy statements with no similar waiting period. *Id.* at 4.

107. 18 U.S.C. § 3742 (1988); Miller & Freed, *supra* note 46, at 4.

108. Miller & Freed, *supra* note 46, at 4.

109. *See supra* note 102.

110. *See* Karle & Sager, *supra* note 5, at 406-12 (study of judicial departure practices).

of the Guidelines and an overextension of their authority.[111] These courts fail to recognize, however, that both Congress and the Sentencing Commission gave them the discretion to depart without violating the Sentencing Guidelines' directives.

To assess the amount of authority delegated to them in sentencing, the courts should follow the "whole act rule" of statutory interpretation.[112] Under this approach, courts must give force to every directive of a statute and interpret the provisions so as not to conflict with the other provisions and statements of the statute.[113]

Consistent with the whole act rule, courts should attempt to ascertain from the Sentencing Reform Act and its legislative history a general congressional intent and give that intent effect. Thus, because the statutory language leans toward the retention of flexibility in sentencing,[114] the courts should exercise that flexibility and impose individualized sentences rather than allow one restrictive policy statement ("not ordinarily relevant") to remove much of their discretion.[115] In order to effectuate each provision of the Sentencing Reform Act and the Sentencing Guidelines, courts should view policy statements as advisory, not prohibitive.

Furthermore, the words "not *ordinarily* relevant" themselves literally indicate the discretion to depart in the extraordinary case. Since the flexibility exists in the language of the Act and the Guidelines, courts should not tie their own hands and interpret the Guidelines, as one court warned, like "robot[s] inside a guidelines glass bubble."[116] The courts should

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111. *See* Alschuler & Schulhofer, *supra* note 99, at 96 (20% of judges surveyed had never departed downward from the Guidelines).

112. "[A] legislature passes judgement upon the act as an entity, not giving one portion of the act any greater authority than another." 2A SUTHERLAND, *supra* note 53, § 47.02, at 139.

113. The Supreme Court has approved of and applied the whole act rule:

> When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.'

Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (quoting Brown v. Duchesne, 60 U.S. 183, 194 (1857)).

114. *See supra* notes 22-25 and accompanying text.

115. An alternative to disregarding § 994(e) ("general inappropriateness") and its Sentencing Guideline parallel § 5H1.6 ("not ordinarily relevant") in light of the other permissive provisions is to interpret the congressional intent as discouraging upward departures based upon offender characteristics. *See supra* note 97.

116. United States v. Lara, 905 F.2d 599, 604 (2d Cir. 1990).

view the Guidelines as a "heartland" for the *typical* case, as Congress intended,[117] but then recognize the available discretion to depart for the *atypical* case.[118]

The flexibility to depart based on offender characteristics not only exists in the literal language of the statutory directives and the Guidelines, but it also existed in the minds of the Commission members when they drafted the Guidelines. A member of the Sentencing Commission confirmed that body's expectation and approval of judicial departures.[119] Despite making an initial choice—numerical uniformity over individualization—the Commission viewed the guidelines, and in particular the policy statements, as evolutionary concepts, capable of analysis and revision.[120] Because of the experimental nature of the Guidelines, courts should not hesitate to depart when compelled by extraordinary family obligations. In doing so, however, courts should clearly articulate the basis for departure for use in subsequent modifications of the Guidelines.

Although possessing the authority to depart from the Sentencing Guidelines, courts should refrain from disregarding them. Unless a court faces a case involving factors which it believes the Sentencing Commission failed to consider adequately, or which compel a sentence outside the guideline range, the court should adhere to the applicable guideline sentence. Only upon the court's independent judgment that specific family obligations warrant departure are the Guidelines not binding.[121]

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117. *See supra* note 39.

118. *See infra* notes 132-34 and accompanying text (discussing factors which constitute the atypical case).

119. Nagel, *supra* note 21, at 105. "I personally don't think departures represent an indictment of the guidelines. I think they are exactly what we anticipated." *Id.*

120. There should be departures and they will teach us something about what should be included in the next iteration of guidelines. It is the Commission's intent to monitor and analyze the departures over time so as to learn from them and to use them in refining and modifying the extant guidelines.

Id.; *see* U.S.S.G., *supra* note 19, at 2, 4; *see also* Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 461 (1988) (discussing the permanence of the Commission, which will enable it in the future to create more accurate guidelines relating to departure); *supra* notes 106-08 and accompanying text (discussing the experimental nature of provisions labeled "policy statements").

121. The House of Representatives contemplated and approved of this result:

> [I]f the court finds that the sentence called for by the applicable sentencing guidelines is greater than necessary to comply with the purposes of sentencing, section 3553(a) would seem to require the court

Courts should also not misinterpret their ability to consider an offender characteristic such as family responsibilities as a reversion to the previous individualized sentencing scheme. The Guidelines provide a framework, within which a judge should typically impose a sentence. When the judge chooses to depart from the prescribed boundaries, she must explain the reasons for the departure. This requirement should dissuade the imposition of sentences based upon impermissible grounds such as racial discrimination. The appellate review process, to which all departures are subject, provides an additional check on discretion. This structure and review should prevent the "unfettered discretion" which undermined the indeterminate sentencing system.[122]

2. Cost/Benefit Analysis of a Prison Sentence

In addition to a thorough and objective statutory interpretation, courts should engage in a sociological analysis of the costs and benefits of incarceration in the imposition of a sentence. A cost/benefit analysis balances the need for sanctions against the social consequences of the sanction.[123] In applying this analysis to decisions about whether to impose a term of imprisonment or an alternative, non-incarcerative sentence, courts should consider the effects of incarceration on dependent children.[124] Children of offenders suffer severely from the incarceration of their parents. Studies of child development have identified typical antisocial behavior that results from the disruption of stable parental relationships. This behavior includes withdrawal by young children and delinquent or crimi-

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> to impose a more lenient sentence. Such an interpretation, it might be argued, is inconsistent with the Sentencing Reform Act's intention to limit judicial discretion in sentencing. That argument, however, is not convincing. The Sentencing Reform Act of 1984 limited, but did not eliminate, judicial sentencing discretion. Section 3553(a) does not give the court unlimited discretion in sentencing, but rather authorizes the court to depart from the guidelines only if the court finds that the sentence called for by the guidelines is greater than necessary to serve the purposes of sentencing.

United States v. Davern, 937 F.2d 1041, 1046 (6th Cir. 1991) (quoting 133 CONG. REC. 31,947 (1987)).

122. Professor Ogletree presents a similar post-guideline sentencing model with additional statutory checks on discretion, such as maximum grade levels by which a mitigating factor could reduce a sentence. *See* Ogletree, *supra* note 13, at 1956-58.

123. Karle & Sager, *supra* note 5, at 437-38.

124. Bush, *supra* note 101, at 195.

nal behavior among older children.[125] Experts maintain that the "[c]ontinuity of relationships, surroundings, and environmental influence are *essential* for a child's normal development."[126]

Distinct from the actual effect of incarceration on the development of the child is the cost to society of a sentence that deprives a child of parental care. Such costs include: foster care, permanent dissolution of the family if a court terminates the parental rights of the offender due to incarceration, and dependence upon government aid if the family loses its primary wage-earner.[127] In addition to precipitating dependence upon government assistance, incarceration could cost society in the form of criminal delinquency of a child occurring as a byproduct of the family disruption.[128]

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125. *Id.*

126. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 31-32 (1979) (emphasis added). These authors analyze the consequences of the disruption of continuity for children of different ages and conclude that stable parental relationships are necessary to offset the emotional instabilities which characterize a child's early life. *Id.* at 32-34.

127. Karle & Sager, *supra* note 5, at 437-38.

128. *Id.* When deciding whether to incarcerate a defendant with unusual, mitigating family circumstances, courts should also consider the costs of maintaining the judicial system. In part because of the perceived restriction on judicial flexibility in sentencing resulting from the Guidelines, the rate of plea bargaining—a crucial element of the sentencing system—has decreased. Although the new minimum mandatory sentences required by Congress for drug offenses, *see* Karle & Sager, *supra* note 5, at 429-30, provide perhaps the primary cause for the reduction of plea agreements, studies also attribute the reduction to the apparent lack of judicial discretion. FEDERAL COURTS STUDY, *supra* note 98, at 62. The ambiguity surrounding judicial authority to depart from the Guidelines has narrowed the ability of judges to partake in bargaining and, consequently, has reduced defendants' incentives to plea bargain. *See supra* note 99; *see also* Karle & Sager, *supra* note 5, at 404. The reduction in the number of plea bargains has, in turn, increased the resources required to process criminal cases. FEDERAL COURTS STUDY, *supra* note 98, at 63. The increased number of cases reaching the sentencing stage and resulting in an incarcerative sentence since the promulgation of the Guidelines has consequently increased the workload of judges, the number of trials, and the time the appellate courts spend resolving sentencing appeals. *Id.* at 60.

The related problem of prison overcrowding constitutes another significant societal cost of incarceration. Congress anticipated the effect of the Guidelines on the prison population and encouraged the Commission to study and draft recommendations concerning the necessity of changes to the current facilities. Congress explicitly required the Sentencing Commission to promulgate guidelines that would "minimize the likelihood that the [f]ederal prison population will exceed the capacity of the [f]ederal prisons, as determined by the Commission." 28 U.S.C. § 994(g) (1988). The Commission declined, however, to respond to the congressional mandate and failed to tailor the Guidelines to limit the foreseeable increase in prison population. Ogletree, *supra*

3. Suggestions for the Courts

At the present time, the Sentencing Guidelines mention family responsibilities only to allow a departure in an extraordinary case. A "departure" by definition is unfixed and uncertain, "[a] deviation . . . from an established rule, plan, or procedure."[129] The Guidelines do not quantify family obligations in fixing a sentence. For example, the Guidelines do not assign to family obligations a number of guideline levels which courts can subtract from the guideline range.[130] Absent any guidance, an attempt by the courts to quantify family responsibilities individually would lead to disparate results between courts. Because the decision to depart involves a subjective judgment, courts should apply their discretion to determine the appropriate sentence for each case.[131] Another subjective determination in which the court must ultimately apply discretion involves the qualification of family responsibilities as "atypical" or "extraordinary." To ensure uniformity to the greatest extent possible, however, courts should base their qualification on certain factors which, alone or in combination, may produce an atypical case. A case involving dependent children should form the basis from which a court should consider

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note 13, at 1955. Although the statutory directives allow probationary sentences in more than 66% of the Sentencing Table's potential combinations, the Sentencing Guidelines permit alternative sentencing in only 17% of the potential combinations. Karle & Sager, *supra* note 5, at 441.

In light of the fact that prisons are presently filled to 60% beyond capacity, the dramatic increase in incarcerative sentences is highly significant. *Id.* at 418-19. The Bureau of Prisons estimates the holding capacity of federal prisons at 38,072 inmates. As of March 4, 1991, the prison population numbered 60,772. *Id.* at 419. The Bureau of Prisons predicts that by 1995, 116,890 people will be incarcerated, more than 70% above the estimated holding capacity for federal prisons. *Id.* Currently, the costs of imprisonment exceed $20,000 per year per individual, as opposed to a cost of $470 per year for a probationary sentence. Hillier, *supra* note 41, at 228. As the federal Bureau of Prisons plans to construct 15,000 new prison cells by 1995 to reduce the overcrowding rate to 20%, costs of incarceration will likely rise even higher. J. Michael Quinlan, *Symposium on Alternative Punishments Under the New Federal Sentencing Guidelines*, 1 FED. SENTENCING REP. 105, 105 (1988). In light of the excessive societal costs of incarceration in the area of prison overcrowding, courts should not hesitate to exercise their discretionary power of departure in the appropriate case.

129. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 354 (1976).

130. *See supra* note 122.

131. Since under the current departure practices, lack of uniformity often results because of discrepancies between judges in their *willingness* to depart, *see* Karle & Sager, *supra* note 5, at 412 n.83, clear authority and increased judicial discretion may actually reduce the existing disparity.

other tangential factors.[132] The court should then ascertain the number of dependent children,[133] their ages,[134] and whether those children have special needs such as physical, emotional, or mental disabilities.[135] The court should consider the likelihood of the defendant losing custody permanently rather than temporarily.[136] Because of the adverse effects on the children, the court should sentence, if possible, to avoid the long-term removal or permanent termination of parental rights.

In weighing the above factors, courts must adhere to the proscription on considerations of race, sex, and socioeconomic status of the defendant.[137] A judge should not, therefore, grant a downward departure to a female defendant solely based upon his personal belief that a woman is the more important parental influence.[138] Similarly, a judge should not conclude that one defendant's social and economic position provides a better family environment for a child than another's and depart on that basis.[139] The fact that sex and socioeconomic status may slightly overlap with family responsibilities,[140] however, does not preclude a court from such considerations.[141] As the Senate concluded, "The requirement of neutrality with regard to such

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132. Because the disruption in the continuity of relationships most harms the developing child, *see* GOLDSTEIN ET AL., *supra* note 126, at 17-23, 31-34, courts should limit the "atypical" case to situations involving children rather than extending it to elderly or disabled parents or other family members for whom the line becomes more difficult to draw.

133. A greater number of dependent children may increase the risk of parental loss and thus should factor in favor of departure.

134. Arguably, younger children are most severely affected by the disruption of the parental relationship. The effects of the disruption may decrease as children reach maturity. *See* GOLDSTEIN ET AL., *supra* note 126, at 31-34.

135. *See, e.g.*, United States v. Thomas, 930 F.2d 526 (7th Cir.) (defendant supported three mentally disabled children), *cert. denied*, 112 S. Ct. 171 (1991).

136. If the defendant is a single parent, for example, or has no immediate family to care for the children, the chances increase that the state would place the children in foster care or a state institution. *Cf.* Karle & Sager, *supra* note 5, at 437-38.

137. *See supra* note 40 and accompanying text.

138. *See, e.g.*, United States v. Brewer, 899 F.2d 503, 509 (6th Cir.), *cert. denied*, 111 S. Ct. 127 (1990). The *Brewer* court, in the absence of more extraordinary circumstances, could not justify a departure on the grounds that the defendants were mothers of dependant children. *Id.*

139. Presumably, the requirement of articulating the bases for departure will prevent racial biases or any other impermissible factors from forming the grounds for departure.

140. A defendant's lack of economic resources, for example, could relate to the decision to place her child into foster care.

141. Bush, *supra* note 101, at 195.

factors is not a requirement of blindness."[142]

In classifying particular family obligations as extraordinary, courts should also weigh counter-considerations, factors which favor against allowing a departure. A long record of criminal convictions indicating the defendant's lack of concern over the possibility of court-imposed separation from her children should suggest the defendant's family bonds do not merit extraordinary consideration.[143] The court should also consider whether the defendant exposed his children to the crime, which could again indicate a lack of concern for their welfare.[144] Finally, the court must scrutinize the sincerity of the defendant.[145] If the court determines that the defendant invoked family obligations merely as a ploy to obtain a lenient sentence, the court should accord less weight to the consequences of incarceration on the family.[146]

If the court concludes that a defendant's family circumstances constitute an unusual case, it should then assess the sentencing options. In light of the societal costs of imprisonment, courts should more frequently implement non-incarcerative alternatives such as halfway houses, home detention, intensive probation supervision, day prisons, and community service.[147] Alternative sentencing provides a means by which courts can satisfy the punitive and deterrent goals of sentencing while retaining the individual dimension.

CONCLUSION

Confusion over the appropriate weight that unusual family circumstances should receive in sentencing has led to disparate results in sentencing. Many courts deprive themselves of the discretion to impose an individualized sentence as is allowed in the language of the Guidelines and was intended by Congress. Rather than interpreting the Guidelines restrictively, courts should interpret the Guidelines in light of the Sentencing Reform Act and its legislative history. Courts should recognize their ability to depart downward on the basis of extraordinary family responsibilities.

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142. SENATE REPORT, *supra* note 11, at 3354 n.409.
143. Bush, *supra* note 101, at 196.
144. *Id.* at 197.
145. *Id.*
146. *Id.*
147. *See* Weinstein, *supra* note 87, at 20-30; *see also* ANDREW R. KLEIN, ALTERNATIVE SENTENCING: A PRACTITIONER'S GUIDE (1988).