Chicago-Kent Law Review

Volume 67
Issue 1 *Symposium on the Seventh Circuit as a Criminal Court*

Article 4

April 1991

The Seventh Circuit and Departures from the Sentencing Guidelines: Sentencing by Numbers

Terence F. MacCarthy

Nancy B. Murnighan

THE SEVENTH CIRCUIT AND DEPARTURES FROM THE SENTENCING GUIDELINES: SENTENCING BY NUMBERS

TERENCE F. MACCARTHY*
NANCY B. MURNIGHAN**

> "[M]ere calculations, . . . , when unassisted by imagination and when they have gained mastery over common sense, are the most deceptive exercises of the intellect."[1]

Although Joseph Conrad aimed these remarks at the engineers of the ill-fated *Titanic*, the criticism could easily be attributed to a modern day federal judge reflecting on the state of criminal sentencing under the federal sentencing guidelines. Because the guidelines attempt to reduce the art of sentencing human beings to a mathematical science, they have been roundly criticized by most everyone involved in the federal criminal justice system.[2] What the courts and commentators do not universally agree upon is how much room the guidelines actually do leave for imagination and common sense. To what extent do the district courts retain the discretion to sentence an individual outside the sentence set by the guidelines?

This article examines the statutory and guidelines provisions governing departures from the guidelines. We conclude that courts retain significant discretion to depart from the guidelines in all but a very limited number of circumstances. The article surveys the Seventh Circuit's departure decisions in light of this background. Although the Court has recognized the authority to depart in some cases, for the most part it prohibits downward departures based on most mitigating offender characteristics. By taking this extreme position, the Seventh Circuit unnecessarily permits the calculations of the guidelines to gain mastery over common sense, a result that is contrary to both the statute creating the guidelines system and the guidelines themselves.

* Executive Director, Federal Defender Program, Northern District of Illinois. B.A., St. Joseph's College; J.D., DePaul University.

** Staff Attorney, Federal Defender Program, Northern District of Illinois. B.A., University of Wisconsin/Madison; J.D., IIT Chicago-Kent College of Law.

1. JOSEPH CONRAD, CERTAIN ASPECTS OF THE ADMIRABLE INQUIRY INTO THE LOSS OF THE TITANIC (1912), *reprinted in* NOTES ON LIFE AND LETTERS 229, 230 (Doubleday, Page & Co. 1925).

2. *See infra* notes 33-35 and accompanying text.

I. BACKGROUND

A. Departures From the Federal Sentencing Guidelines

1. The Statutory Mandate

In 1984 Congress passed the Sentencing Reform Act ("the Act").[3] It created the United States Sentencing Commission and decreed as its principal purpose to:

> 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 . . . .[4]

In order to accomplish these lofty and competing goals of decreasing disparity while preserving some semblance of individualized sentencing, Congress directed the Sentencing Commission to promulgate guidelines and general policy statements for federal courts to use to determine the sentence in criminal cases,[5] and to establish a sentencing range for each category of offense and type of defendant.[6] The Act then directs the federal courts to impose a sentence within the range established by the Sentencing Commission in a particular case, "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."[7] This language is the source of the courts' statutory authority for what has come to be known as "departures" from the sentencing guidelines.

The legislative history of the Act is replete with references to the role Congress intended departures to serve under the new scheme. In its introductory comments the Senate Report explains:

> The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender,

3. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 235, 98 Stat. 2031, (1984) [hereinafter, the Act]. The Act became effective November 1, 1987; *reprinted in* U.S.C.C.A.N. 3182, 3235.
4. 28 U.S.C. § 991(b)(1)(B) (1985).
5. 28 U.S.C. § 994(a)(1)-(2) (1988).
6. 28 U.S.C. § 994(b)(1) (1988).
7. 18 U.S.C. § 3553(b) (1988).

not to eliminate the thoughtful imposition of individualized sentences.[8]

In its analysis of the departure provision, the Senate Report further explains that "the provision provides the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines."[9] Thus, the Act anticipated that departures would play an integral role in the new sentencing procedure.

2. The Commission's Response

a. The Heartland Approach

The Commission's response to its directive from Congress was to create guidelines establishing a numerical offense level for most federal offenses[10] and guidelines for arriving at a number representing a defendant's criminal history.[11] It then charted the offense levels on a vertical axis and the defendant's criminal history on the horizontal axis of a grid.[12] The point of intersection establishes the guideline range for a defendant. The Sentencing Commission set out its basic philosophy regarding departures from this range in its introduction to the sentencing 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.[13]

The Commission notes that only three sections of the guidelines are intended to absolutely preclude departure.[14] "[W]ith 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."[15] The reason

8. S. REP. No. 225, 98th Cong., 2d Sess. 151 [hereinafter S. REP.], *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

9. *Id.* at 78, *reprinted in* 1984 U.S.C.C.A.N. at 3261.

10. UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL, ch. 2.1 (Nov. 1990) [hereinafter, MANUAL]. The sentencing guidelines have been amended numerous times and published in five different editions. All references to the guidelines and the manual are to the November 1990 edition, unless otherwise noted.

11. *Id.*, ch. 4 at 4.1.

12. *Id.*, ch. 5, pt. A., Sentencing Table, at 5.2.

13. *Id.*, ch. 1, pt. A.4(b), at 1.5-1.6.

14. *Id.* at 1.6. The Commission states that a court cannot take into account as grounds for departure the following factors: race, sex, national origin, creed, religion, and socio-economic status (§ 5H1.10); drug dependence or alcohol abuse (§ 5H1.4); and economic hardship (§ 5K2.12). Of these provisions, the first was statutorily mandated by Congress at 28 U.S.C. § 994(d) (1988). The later two have no similar basis in statutory authority.

15. *Id.*

for this approach, the Commission explains, is that the guidelines are, as the Act contemplates, but the first step in an evolutionary process[16] in which departures play a key role.

b. *"Suggested" Departures*

In addition to describing its basic philosophy underlying departures, the Commission sets out fifteen policy statements identifying possible grounds for departure. Eleven of those policy statements suggest a basis for upward departure[17] whereas only six suggest considerations that warrant a downward departure.[18] Other suggested bases for departure are interspersed throughout the provisions of the guidelines themselves.[19] Perhaps the most frequently used of these suggested departure provisions (and in fact, the most frequently used of all departure provisions) is the policy statement permitting courts to depart when they find that a defendant's criminal history score does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes.[20]

c. *"Other" Bases for Departure*

Apart from these specific suggestions for departure, all "other" de-

16. *Id.*, ch. 1, pt. 3, at 1.6. The Commission explains its choice of this approach as follows:
> [I]t is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing 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.

17. The policy statements suggest departure based on such considerations as death (§ 5K2.1), physical injury (§ 5K2.2), extreme psychological injury (§ 5K2.3), abduction or unlawful restraint (§ 5K2.4), property damage or loss (§ 5K2.5), weapons and dangerous instrumentalities (§ 5K2.6), disruption of governmental function (§ 5K2.7), extreme conduct (§ 5K2.8), criminal purpose (§ 5K2.9), public welfare (§ 5K2.13), and terrorism (§ 5K2.15).

18. The Commission suggests that under certain circumstances, a downward departure may be based on a defendant's substantial assistance to authorities (§ 5K1.1), the victim's conduct (§ 5K2.10), if the defendant committed the offense to avoid a greater harm (§ 5K2.11), if the defendant committed the offense because of coercion or duress (§ 5K2.12), if the defendant has diminished capacity (§ 5K2.13), or the defendant voluntarily discloses an offense (5K2.15).

19. For instance, the Commission recommends a downward departure of eight offense levels if the court finds that there was no profit motive in a Mann-Act type offense (§ 2G1.1, n.1.). The Commission also recommends that departure may be appropriate where the dollar amount overstates the seriousness of a fraud offense, (§ 2F1.1, n.10), or where an offense involves a single act of aberrant behavior on a defendant's part. MANUAL, *supra* note 10, at ch. 1, pt. A (4)(d), at 1.7. Other suggested bases for departure appear throughout the guidelines.

20. *Id.* at § 4A1.3, *Adequacy of Criminal History Category* (Policy Statement). For example, in 1989 just under half (42.3%) of the Sentencing Commission's random sampling of upward departures involved adequacy of criminal history. UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT, TABLE VIII, at 49 (1989).

partures are governed by the Commission's "catch-all" departure provision. This policy statement reiterates the "heartland approach" originally set out in the introduction, and explains that "circumstances that may warrant departure from the guidelines pursuant 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."[21] The Commission then explains that departure may be called for where it did not take some relevant factor into account at all, or where its consideration of that factor was inadequate "in light of unusual circumstances."[22]

Although the heartland approach to departures has some logical appeal, it has not been a simple concept for the courts to grasp and apply. Most of the problems courts encounter stem from the fact that, in many cases, it is difficult (if not impossible) to figure out exactly what the Commission did or did not consider in formulating a particular guideline. In exploring whether a given circumstance was "adequately considered" by the Commission, courts are allegedly statutorily limited to considering the guidelines themselves, policy statements, and official commentary.[23] Occasionally, the Commission will expressly identify circumstances that it did not consider when formulating the guidelines.[24] For the most part though, the Commission does not explain what factors went into drafting a particular guideline.[25] In such cases, courts are left struggling to deter-

21. *Id.*, § 5K2.0, *Grounds for Departure* (Policy Statement), at 5.42. The policy statement provides in pertinent part:

> Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (*e.g.*, as a 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.

22. *Id.*

23. 18 U.S.C. § 3553(b) (1988). *See* William W. Wilkins, *Sentencing Reform and Appellate Review*, 46 WASH. & LEE L. REV. 429, 440 (1989) (parameters of "heartland" are to be determined based on written Commission pronouncements within "four corners" of *Guidelines Manual* and reasonable inference drawn therefrom).

24. *See, e.g.*, MANUAL, *supra* note 10, § 2L1.1, n.8, at 2.116, where the Commission expressly states that it has not considered immigration smuggling cases where exceptionally large numbers of aliens are involved or where the conditions under which they were smuggled were unusually dangerous or inhumane.

25. *See* Dissenting View of Commissioner Paul H. Robinson on the Promulgation of the Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18121, 18129 n.83 (criticizing guidelines because commentary rarely says what factors have been assumed when the base offense level is set); *see also Public Hearing On Proposed Amendments To The Sentencing Guidelines*, (testimony of Judge Mark Wolf), *reprinted in* 3 FED. SENTENCING REP. 287 (Vera)(March/April 1991)(asking Sentencing Commission for fuller explanation of reasons for amendments to the guidelines).

mine what the Commission may or may not have considered to be a "typical" offense or offender.[26]

In addition to this difficulty the courts have experienced in discerning the contours of the mythical "heartland," the apparently liberal attitude toward departures that the approach suggests is contradicted somewhat by additional language in the introduction indicating the Commission's belief that courts will rarely in fact need to exercise their legal freedom to depart from the guidelines.[27] Thus, the guidelines give the courts mixed messages regarding the extent of their authority to depart. Not surprisingly, these mixed signals, combined with the difficulty of identifying the heartland, have fostered great debate as to the precise reach of the courts' departure powers in general and have left courts struggling to understand where the contours of the heartland lie.

d. Departures Based on Offender Characteristics

The debate over the courts' authority to depart from guidelines intensifies when the subject is the Commission's treatment of mitigating offender characteristics. In the Act, Congress explicitly directed the Sentencing Commission, in establishing its offender categories, to consider the possible relevance of a defendant's age, education, vocational skills, mental and emotional condition, physical condition, including drug dependence, previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon criminal activity for a livelihood.[28] The Commission chose to designate only the last three factors as relevant. For example, a defendant's role in the offense, whether aggravating or mitigating, may call for up to a 4 level adjustment in the offense level.[29]

Other than these limited considerations regarding a defendant's role in the offense, and a two-level decrease for those defendants who "accept responsibility" for their offense,[30] the Commission's consideration of the

26. *See* Marc Miller & Daniel J. Freed, *Offender Characteristics And Victim Vulnerability: The Differences Between Policy Statements and Guidelines*, 3 FED. SENTENCING REP. 6, 7 n.4 (June/July 1990)(identifying cases where the courts are forced to assume or speculate as to what the Commission "must have considered.")

27. MANUAL, *supra* note 10, ch. 1, pt. A. 4(b), at 16.

28. 28 U.S.C. § 994(d) (1988). This section also provides that "[t]he Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."

29. A defendant's leadership role in the offense may net her an increase of between 2 and 4 offense levels (§ 3B1.1); a minimal or minor role begets anywhere from a 2 to 4 level decrease in offense level (§ 3B1.2); and if the defendant abuses a position of trust or uses a special skill it warrants a 2 level increase in the offense level (§ 3B1.3). MANUAL, *supra* note 10.

30. *Id.* at § 3E1.1.

defendant as an individual is based solely on his or her past criminal behavior. The criminal history guidelines give "points" for various kinds of prior convictions and then place the defendant in the appropriate category on the horizontal axis of the Sentencing Table according to the number of points the defendant has accumulated. Those defendants who have led exemplary lives prior to the offense find themselves in "Criminal History Category I," along with those whose transgressions (or convictions, anyway) have to date been minor. The Commission alleges these criminal history scores accurately portray the defendant as an individual because they "are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior."[31]

Thus, for purposes of the guidelines, defendants' lives have been neatly reduced to rap sheets, which in turn are transformed mathematically into a "risk of recidivism" coded as a number on the horizontal axis of the sentencing table. The Commission bypassed completely the remaining personal characteristics of a defendant, *i.e.*, the defendant's age, family responsibilities, mental and emotional problems, etc., as "not ordinarily relevant" to the decision to sentence below the guideline range.[32]

This dehumanizing aspect of the federal sentencing guidelines has spawned widespread criticism. The Federal Courts Study Committee[33] highlighted in its tentative proposals this inability to consider the personal characteristics of a defendant as among its key criticisms of sentencing under the new system. It tentatively recommended that Congress amend the Sentencing Reform Act to give judges clear authority to depart from the guideline range by considering a defendant's personal characteristics and history.[34] In response to this suggestion two hundred and seventy people, including trial and appellate court judges, testified in

31. *Id.*, ch. 4, pt.A, intro comment at 41; *see also* Stephen Breyer, *The Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 19-20 (1988)(explaining that guidelines' offender characteristics rules focus on the likelihood of recidivism).

32. MANUAL, *supra* note 10, at §§ 5H1.1-5H1.6.

33. The Federal Courts Study Committee was created by Congress to examine problems facing the federal courts, to develop a long range plan for the federal judiciary, and to report to the Judicial Conference of the United States, the President and the Congress, among others, on any revisions in the laws of the United States it deemed advisable. Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4644 (1988).

34. FEDERAL COURTS STUDY COMM., TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT 61-62 (Dec. 22, 1989). The report states:

> The Guidelines as implemented do not give the sentencing judge clear authority to adjust the sentence in the individual case in light of all pertinent factors. For example, the guidelines do not authorize the court to adjust the sentence in light of the defendant's personal history. Yet, it works an injustice to give the same sentence to two defendants, each of whom drives cocaine across the border, when one defendant is a 19 year-old gang member, and the other a 39 year-old father of three whose minimum wage job does not provide health insurance covering the expensive care required for his premature infant.

public hearings before the Committee. All but four of those testifying (three present or former Sentencing Commissioners and the Attorney General of the United States) supported the Committee's tentative recommendation to Congress to make consideration of the individual part of the guidelines.[35] Despite this overwhelming support for modification of the present sentencing scheme, as well as repeated pleas from those testifying that the guidelines are unduly rigid in their failure to authorize courts to adjust the sentence in light of a defendant's personal history,[36] the Committee backed off of its tentative recommendation for an amendment to the Act. Instead, it "endorse[d] serious consideration of proposals" that the guidelines, and *if necessary* the Sentencing Reform Act, be amended to permit consideration of an offender's age and personal history.[37]

That "if necessary," it turns out, is the center of judicial and academic debate over the extent of the courts' departure authority. Although there is practically universal agreement that the guidelines' treatment of offender characteristics has been woefully inadequate, there is substantial disagreement over the extent to which judges actually do retain the ability to depart based on mitigating offender characteristics under both the statute and the guidelines as they are now written.[38] Some argue that the Commission's pronouncements on offender characteristics do not impose significant restraints on a judge's ability to depart and that any limits on those departures have been, for the most part, self-imposed.[39]

One argument against affording the policy statements on offender characteristics much weight is that the Commission's one-line, unsupported pronouncement that none of a defendant's personal characteristics are "ordinarily relevant" to sentencing can hardly qualify as "adequate consideration" of those factors under the departure standards established by statute.[40] The legislative history of the Act indicates that

35. FEDERAL COURTS STUDY COMM., REPORT 136-37; ADDITIONAL STATEMENT BY JUDGE KEEP 142 (joined by Mr. Aprile and Chief Justice Callow).

36. *Id.* at 137.

37. *Id.* at 135-136.

38. See the discussion of United States v. Thomas, 930 F.2d 526 (7th Cir. 1991), *infra* notes 97-116 and accompanying text; *infra* notes 113-15 (other cases cited).

39. *See* Ronald F. Wright, *Sentences, Bureaucrats, and the Administrative Law Perspective on The Federal Sentencing Commission*, 79 CAL. L. REV. 3, 55 n.252 (1991)(noting that "judges have both complained about their loss of discretion under the guidelines and failed to exercise their full measure of control over sentencing allowed under the departure power.")

40. *See id.* at 65-66 (arguing that policy statements prohibiting departures based on offender characteristics normally provide *no* explanation and that departures in this area are a legitimate response to the Commission's failure to explain itself); *see also* Albert W. Alschuler, *Departures And Plea Agreements Under The Sentencing Guidelines*, 117 F.R.D. 459, 465 ("The Commission may

when Congress listed offender characteristics, it expected the Sentencing Commission to consider their relevance, whether obvious or not, *and* "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 system it can devise."[41] Obviously, the Sentencing Commission's policy statements on offender characteristics do not even begin to meet these statutory requirements.

Another statutory argument against giving decisive weight to the offender characteristics policy statements is that the Act requires the courts to consider the "history and characteristics of the defendant" *prior to* considering the guidelines and policy statements in determining a sentence.[42] Furthermore, it is clear that even the Sentencing Commission did not intend to prohibit the courts from treating offender characteristics as bases for departure, as evidenced by the fact that it elected to promulgate the sections dealing with offender characteristics as nonbinding policy statements rather than as guidelines.[43] Finally, the Commission's policy statements themselves do not say that offender characteristics are never relevant; they simply state that they are not "*ordinarily*" relevant, thereby expressly leaving open the possibility of departure based on "*extraordinary*" circumstances.[44] In fact, former Sentencing Commissioner and now Chief Judge of the First Circuit, Stephen Breyer, repeatedly voiced the opinion that when the Commission stated that offender characteristics are "not ordinarily relevant," by definition it intended courts to depart if they found that offender characteristics

have taken its stance of 'no mercy' for Jean Valjean deliberately, but it is not clear that a one sentence *ipse dixit* can impose so pitiless a policy on the federal courts.")

41. S. REP. NO. 225, *supra* note 8, at 175, *reprinted in* 1984 U.S.C.C.A.N. 41, 3358 (emphasis added).

42. 18 U.S.C. § 3553(a) (1988). *See* Marc Miller & Daniel J. Freed, *Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 FED. SENTENCING REP. 235 (March/April 1991)(demonstrating that under § 3553(a) of the SRA, courts are directed to first undertake a common-law assessment of the case, including, as one of the primary factors, the history and characteristics of a defendant, and only *after* undertaking such an assessment should the court consider the guideline sentencing range).

43. *See* Marc Miller & Daniel J. Freed, *Offender Characteristics and Victim Vulnerability: The Differences Between Policy Statements and Guidelines*, 3 FED. SENTENCING REP. 3-6 (June/July 1990)(explaining the difference between guidelines and policy statements and arguing that 5H policy statements are unsupported by research, are extremely unsound, and as such entitled, even as policy statements, to very little deference); *see also* Daniel J. Freed & Marc Miller, *Handcuffing the Sentencing Judge: Are Offender Characteristics Becoming Irrelevant? Are Congressionally Mandated Sentences Displacing Judicial Discretion?* 2 FED. SENTENCING REP. 189-190 (December 1989/January 1990)(arguing that the Sentencing Commission deliberately chose to deal with offender characteristics in policy statements, thus inviting courts to explore the relevance of offender characteristics through departures).

44. *See infra* notes 113-15 (for cases cited).

presented an unusual case.[45]

As will be seen during our discussion of the Seventh Circuit's departure decisions, however, the courts are not unanimous on how much, if any, discretion remains to depart based on offender characteristics.[46] The Judicial Conference of the United States apparently believes that even if they do allow some departures, the policy statements on offender characteristics need to be clarified. The Conference has, therefore, asked the Sentencing Commission to add an application note explaining that those offender characteristics deemed "not ordinarily relevant" by the Sentencing Commission may nonetheless be considered as a basis for departure "if the factors, alone or in combination, are present to an unusual degree and are important to sentencing purposes in the individual case."[47]

3. The Role of Courts of Appeals With Regard To Departures

The Sentencing Reform Act, in addition to placing new restraints on the district courts' exercise of discretion in sentencing, also radically expanded the role of Courts of Appeals in reviewing sentencing decisions.[48] The Act now directs appellate review of sentences under many more circumstances than those that had previously existed. It provides for appeal of a sentence by either the defendant or the government[49] if the sentence was imposed in violation of law, as a result of an incorrect application of the guidelines,[50] or for an offense for which there is no sentencing guideline and is plainly unreasonable.[51] The Act also provides for appeal of any departure from the guidelines; a defendant may appeal an upward departure[52] and the government may appeal a downward departure.[53]

45. *See Sentencing Commissioner Stephen Breyer's Testimony Before The Federal Courts Study Committee: Concerning The Committee's "Tentative Recommendations" About Guideline Sentencing*, Jan. 31, 1990, *reprinted in* 2 FED. SENTENCING REP. 201 (December 1989/January 1990)(arguing in response to Federal Courts Study Committee's Tentative Recommendation that Congress amend the Act to permit greater sentencing discretion, *see supra* notes 33-36, that judges already have significant discretion to depart and that the provisions stating that offender characteristics are not "ordinarily" relevant "foresee[] departures in unusual cases."); *see also* Stephen G. Breyer & Kenneth R. Feinberg, *The Federal Sentencing Guidelines: A Dialogue*, 26 CRIM L. BULL. 5, 16-19 (describing Sentencing Commission's use of the word "ordinarily" as "the lawyer's dream" permitting departure if judge finds unusual circumstances).

46. *See infra* notes 96-116 and accompanying text.

47. *See Recommendations of the Judicial Conference Of The United States To the United States Sentencing Commission, September 1990, Recommendation #5, reprinted in* 3 FED. SENTENCING REP. 282, 283 (March/April 1991).

48. *See, e.g.*, Wilkins, *supra* note 23, at 430-32 (prior to Act sentences imposed within statutory limits were, with few exceptions, generally not reviewable on appeal).

49. 18 U.S.C. § 3742(a) - (b) (1990).

50. 18 U.S.C. § 3742(a)(1)-(b)(1) (1986); 18 U.S.C. § 3742(a)(2)-(b)(2) (1990).

51. 18 U.S.C. § 3742(a)(4)-(b)(4) (1990).

52. 18 U.S.C. § 3742(a)(3).

53. 18 U.S.C. § 3742(b)(3).

The standard of review in the statute directs the Courts of Appeals to give due regard to the district courts' determination regarding credibility of witnesses, to accept the fact findings of the district court unless clearly erroneous, and to give "due deference" to the district court's application of the guidelines to the facts.[54] In directing review of departure provisions in particular, however, Congress was less than explicit regarding the standard of review. The Act provides only that a Court of Appeals should consider whether the departure is "unreasonable" in light of the Act's stated goals of sentencing and the district court's stated reasons for the departure.[55]

Although the statutory standard is vague, the legislative history of section 3742 provides greater insight into the scope of appellate review Congress intended for departures. It also gives some idea as to how Congress envisioned the appellate courts' new power of review would fit into the entire scheme of sentencing. The Senate Report states that its provisions:

> are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court. At the same time, they are intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing.[56]

Though the Report explains that it intends the new sentencing guidelines to "do much to eliminate unwarranted disparities in Federal Sentences," it simultaneously cautions against overly rigid application of those guidelines:

> [e]ach offender stands before a court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors—the facts in the case; the mitigating or aggravating circumstances; the offender's characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case—cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.[57]

Finally, the Report explains that appellate review of sentences is intended not only to assure that the guidelines are properly applied, but also to develop case law on the "appropriate reasons for sentencing outside the guidelines," thereby assisting the Sentencing Commission "in

54. 18 U.S.C. § 3742(e)(1988).
55. 18 U.S.C. § 3742(e).
56. S. REP. NO. 225, *supra* note 7 at 151, *reprinted in* 1984 U.S.C.C.A.N. 3333-3334.
57. *Id.*

refining the sentencing guidelines as the need arises."[58] Thus, both the actual language of "unreasonableness" chosen by Congress to define the standard of review for departures,[59] as well as the legislative history of that provision, indicate that Congress intended appellate review of departure decisions to be deferential. At the same time, Congress clearly intended the appellate courts to play an integral part in the evolution of the guidelines system by encouraging the courts to develop a common law of departure.

The appellate courts, however, have not interpreted the statute as requiring deferential review of departure. Rather, they have fashioned on their own a three-part standard of review where the basis for the decision to depart is reviewed *de novo*. Under this standard, the factual findings supporting the departure are then reviewed for clear error, and the actual extent of the departure for "reasonableness."[60] The Fifth Circuit stands alone in utilizing a standard of review that gives district courts the amount of discretion the statute calls for.[61]

Scattered voices in the Courts of Appeals have questioned this stringent review of departures, protesting that Congress did not intend, and the guidelines do not provide for such plenary review of a district court's decision to depart. For example, Judge Ryan, of the Sixth Circuit, regards sentencing as "an art" and departure power as "inherently discretionary." He calls the three-part standard of review "a convoluted intellectual exercise that is an open invitation to appellate courts to substitute their sentencing judgment for the trial court's."[62] Chief Judge

58. *Id.* at 3334.

59. *See* Miller & Freed, *supra* note 42, at 238 ("In most areas of the law, reasonableness review calls for a determination of whether the sentencing judge abused his or her discretion. It is, typically, a very deferential standard.")

60. This standard was originally set out by the First Circuit in United States v. Diaz-Villafane, 874 F.2d 43, 49 (1st Cir.), *cert. denied*, 493 U.S. 862 (1989). Most of the circuit courts have followed suit, *see, e.g.*, United States v. Burns, 893 F.2d 1343, 1345 (D.C. Cir. 1990) *rev'd on other grounds*, 111 S. Ct. 2182 (1991); United States v. Lara, 905 F.2d 599, 602 (2d Cir. 1990); United States v. Ryan, 866 F.2d 604, 610 (3d Cir. 1989); United States v. Chester, 919 F.2d 896, 900 (4th Cir. 1990); United States v. Rodriguez, 882 F.2d 1059, 1067 (6th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990); United States v. Williams, 901 F.2d 1394, 1396 (7th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 2845 (1991); United States v. Whitehorse, 909 F.2d 316, 381 (8th Cir. 1990); United States v. Pearson, 911 F.2d 186, 188-89 (9th Cir. 1990)(using modified five-step standard of review); United States v. Dean, 908 F.2d 1491, 1494 (10th Cir. 1990); United States v. Russell, 917 F.2d 512, 515 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1427 (1990).

61. *See, e.g.*, United States v. Murillo, 902 F.2d 1169, 1172-73 (5th Cir. 1990)(sentences within statutory maximum, although above the guidelines range, will not be disturbed absent "gross abuse of discretion;" district court must articulate reasons for departure that are "acceptable" or "reasonable").

62. United States v. Barnes, 910 F.2d 1342, 1346-47 (6th Cir. 1990)(Ryan, J., concurring); *see also* United States v. Perkins, 929 F.2d 436, 438-40 (8th Cir. 1991)(Heaney, S. J., concurring)(voting to uphold the district court's upward departure, despite his personal disagreement with the degree of

Merritt, also of the Sixth Circuit, urged the Courts of Appeals to afford the district courts great discretion in the area of departures since the appellate courts are "flying blind in this area with no instruments of navigation," and since, as courts of review, they are simply too remote from the flesh and blood defendants to know when departure is truly called for.[63]

Ultimately, the issue regarding the proper standard of review of departures implicates a broader concern about what the role of Courts of Appeals should be in the new scheme of things. Should the Courts of Appeals, already overworked, serve as the guidelines "police," enforcing the guidelines on a large, heterogenous group of district judges,[64] or should they restrain themselves from interfering with the district courts' reasoned decisions to depart? In testimony before the Sentencing Commission, Judge Vincent Broderick expressed concern that too many of the Courts of Appeals have come to view their role as enforcers, who "believe that the guidelines are written in stone and that an act of departure is something which has to be curbed."[65] This belief, and the decisions it engenders, is contrary to the goals of Congress and probably the Sentencing Commission. Both intended that the guidelines would serve as the heartland and that the courts would take an active role in sentencing by encouraging constructive departures as a way of ensuring "the future resiliency and health" of the guidelines system.[66]

II. THE SEVENTH CIRCUIT'S DEPARTURE DECISIONS

A. Departures and The Heartland Approach

The Seventh Circuit's departure decisions amply illustrate the con-

departure, in order to reaffirm his view "that the district courts are best equipped to determine which cases merit departure from the guidelines and must be given ample discretion to do so").

63. United States v. Brewer, 899 F.2d 503, 513-14 (6th Cir.), *cert. denied*, 111 S. Ct. 127 (1990)(Merritt, C.J., dissenting).

64. *See* Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?* 27 AM. CRIM. L. REV. 367, 380 (1989).

65. *Excerpts of Testimony of Judge Vincent L. Broderick at Public Hearing On Proposed Amendments To The Sentencing Guidelines*, Mar. 5, 1991, *reprinted in* 3 FED. SENTENCING REP. 287, 288 (March/April 1991).

66. Statement of Judges Broderick and Wolf before the United States Sentencing Commission, Mar. 5, 1991, *reprinted in* 3 FED. SENTENCING REP. 276 (March/April 1991); *see also* Ronald Weich, *The Strange Case of the Disappearing Statute*, 3 FED. SENTENCING REP. 239, 242 n.13 (March/April 1991)(departure is more than "surgical remedy for the aberrational case. It is a feedback mechanism through which courts can, . . . , suggest improvements in the guidelines."); United States v. Smith, 909 F.2d 1164, 1169 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 691 (1991)("[b]y acknowledging and explaining the departures required to do justice, sentencing courts—like the juries Justice Holmes envisioned working pure the law of negligence—contribute to a better set of future guidelines.").

tours of the debate over the extent of courts' authority to depart. Generally, the heartland approach is followed in the Seventh Circuit with some success, but only when the departure involves some wholly objective factor which lends itself to ready identification and quantification by analogy to some other existing guidelines provision. The particular circumstances of the offense (as opposed to that of the offender) usually will lend themselves much more easily to a departure. In such cases, the court has had no significant trouble spotting the heartland and determining whether a given factor is part of it. The court does, however, closely scrutinize the extent of all departures, and has discouraged departures that exceed two levels.[67]

The court's decisions show that exploring the heartland sometimes involves little more than an analysis of the specific guidelines provisions dealing with the offense of conviction. For example, the court has stated in two separate decisions that the "typical" drug offense involves the distribution of dilute mixtures[68] and is likely to involve a continuing course of conduct.[69] The court knows this because the guidelines determine quantity of drugs by the amount of a "mixture or substance" containing a controlled substance. The guidelines also provide for aggregation of amounts sold over a course of time by adding them together in the tables. It also knows, for instance, that prior to the 1989 amendments, the Commission had taken drug offenses involving quantities of up to 10 kilos of heroin or 50 kilos of cocaine into consideration but that it had not accounted for those cases involving astronomical amounts of drugs beyond the upper limits of the drug quantity table,[70] and had not considered quantity at all when it came to convictions for "telephone counts."[71] In such cases, determining what is or is not a heartland drug offense has been a relatively simple chore.

Nor has it been difficult in some cases for the court to determine factors that are part of the heartland of every offense. For instance, a judge's personal view about the severity of a given kind of crime will not

67. *See, e.g.*, United States v. Ferra, 900 F.2d 1057, 1064 (7th Cir. 1990)("departures of more than two levels should be explained with a care commensurate with their exceptional quality"), *cert. denied*, 112 S. Ct. 1939 (1992); United States v. Gentry, 925 F.2d 186, 189 (7th Cir. 1991)(50% reduction from guideline range required "explicit justification"); United States v. Thomas, 930 F.2d 526, 531 (7th Cir.)(renewing *Ferra's* caution), *cert. denied*, 112 S. Ct. 171 (1991).

68. United States v. Marshall, 908 F.2d 1312, 1324 (7th Cir. 1990)(en banc), *cert. denied*, 111 S. Ct. 2796 (1991).

69. *Ferra*, 900 F.2d at 1063-64.

70. United States v. Vasquez, 909 F.2d 235, 240-42 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2826 (1991).

71. United States v. Feekes, 929 F.2d 334, 335-37 (7th Cir. 1991). A "telephone count" involves a violation of 21 U.S.C. § 843(b), which prohibits the use of a communication facility in committing a drug offense.

usually support a departure, because the Sentencing Commission has already considered the "seriousness" of different kinds of crimes and the harms that they usually engender in fashioning the offense level. In *United States v. Ferra*, the court explained this aspect of the heartland as follows:

> [t]hat fences make burglary more profitable (and burglary makes fencing more profitable; which is responsible?) and so leads to more burglaries, is not a reason to enhance a sentence beyond what would be appropriate for the fencing alone. Again this is because the characteristic is part of the heartland of the offense. All persons who buy stolen goods create this kind of injury. So too with sellers of drugs. Many people believe that in order to raise money to pay for cocaine, users commit additional crimes such as burglary. Yet this would not be a good reason to depart from the cocaine guidelines. Because it is true of the cocaine business as a whole, it does not distinguish one defendant's crime from another's and so does not justify departing from the ranges that apply to the bulk of crimes.[72]

Also, a judge's determination that greater punishment is called for in a given case, because the judge perceives a need for the sentence to act as a "general deterrent" or to address purely local concerns, will not justify departure. In *United States v. Thomas*,[73] the Seventh Circuit reversed the district court's substantial departures in three cases, based in great part on these kinds of reasons. The court noted that this kind of departure reflects the judge's "personalized sentencing agenda" and a "distressing" example of a decision to reject the guidelines outright.[74] Departures, the court explained, must be based on specifically articulated factors particular to this offense or offender.[75]

The process can require a more rigorous analysis of the guideline in question, as illustrated by the court's decision in *United States v. Boula*, a fraud case in which the district court departed upward to a sentence more than double the applicable guideline range.[76] The district court had based the departure, in part, on the number of victims involved in the fraud scheme—over 3000 victims total. The trial court used this number to calculate with "vectors" the proper extent of upward departure. The Seventh Circuit reversed, holding that the number of victims could not be a basis of an upward departure because a large number of victims was already part of the heartland of the fraud guideline.

The court reached this conclusion by closely examining the fraud

72. 900 F.2d at 1064 (citations omitted).
73. 906 F.2d 323 (7th Cir. 1990).
74. *Id.* at 329.
75. *Id.* at 328.
76. 932 F.2d 651 (7th Cir. 1991).

guideline itself and, in particular, the Commission's decision to include in the loss table amounts up to $5 million, amounts that the court concluded necessarily anticipated a large number of victims.[77] In addition, the court in *Boula* ventured into the murkier area of exploring the heartland—trying to determine what the Commission considered as a "typical" fraud case when it fashioned the guideline. Noting that Boula's was a classic "Ponzi Scheme" that, like the original Ponzi in 1919, involved thousands of investors and millions of dollars, the Court concluded that "it is highly likely that when formulating the fraud provisions in the Guidelines the Commission anticipated that such major schemes could occur again."[78] Thus, the court in *Boula*, viewed the heartland as having an historical aspect, one which assumes that the Commission's idea of the "usual" offense parallels what most judges' previous experiences would suggest.

B. Departures and Offender Characteristics—Abandoning the Heartland

Although the Seventh Circuit has clearly embraced the heartland approach for offense characteristics, it has abandoned it when compelling offender characteristics such as age, economic duress, drug or alcohol addiction, or family responsibilities are at issue. In this area of departures, the Seventh Circuit has taken the extreme position that, for the most part, the guidelines leave the district courts no room for compassion. The court has done so by reading the Commission's policy statements regarding offender characteristics more narrowly than perhaps any other court in the country.[79]

While the court has been restricting downward departures based on mitigating offender characteristics, it has given a singularly expansive reading to the policy statement regarding aggravating offender characteristics, which permits upward departure when the district court finds that a defendant's criminal history inadequately reflects his past. As a result, courts need only identify some arguably inadequate aspect of a defendant's criminal history in order to sentence above the guideline range. By contrast, those trial judges seeking to depart downward on the basis of any number of mitigating circumstances have been all but absolutely barred by the Seventh Circuit from doing so. The result is a disturbingly uneven application of departures in this circuit.

77. *Id.* at 656.
78. *Id.*
79. *See infra* notes 113-15.

1. Downward Departures—Mitigating Offender Characteristics

If ever there was a Court of Appeals reflecting the attitude that the "guidelines are set in stone," it is the Seventh Circuit. Two decisions in particular erect monumental barriers against defendants seeking downward departures based on personal circumstances. This position was not reached without some internal struggle, however, as the court's 6-5 decision in *United States v. Poff*[80] amply illustrates. In *Poff*, the Seventh Circuit, sitting *en banc*, addressed the question of whether the district court was correct in its belief that the guidelines, and more specifically, the Sentencing Commission's policy statement on diminished capacity, absolutely prevented it from departing below the guideline range in Poff's case. A divided Seventh Circuit held that the district court was correct in its assumption that the guidelines barred departure in Poff's case.

The facts in *Poff* lend themselves well to debate over the guidelines' treatment of special characteristics of the defendant. Carolyn Poff was a forty-four year old woman who was sexually abused by her father until she was twenty years old. As a result of this extended abuse, Poff suffered mental illness, which caused her to threaten public officials, on orders she claimed of her deceased father. She was charged with writing six threatening letters to President Reagan in 1988. Poff had prior convictions for making bomb threats, threatening a county prosecutor, and arson. She had also once had her probation revoked for writing five threatening letters to President Carter.[81]

Following her trial on the 1988 charges, the jury rejected her defense of insanity. Because of her prior convictions, and because mailing threatening communications is considered a "crime of violence" under the career offender provision of the guidelines,[82] Poff was classified as a "career offender." This called for a minimum guideline sentence of 51 months.[83] Poff moved for a downward departure on the basis of her mental illness. The district court refused to depart holding that section 5K2.13[84] of the guidelines precluded departure on the basis of Poff's di-

80. 926 F.2d 588 (7th Cir.)(en banc), *cert. denied*, 112 S. Ct. 96 (1991).

81. *Id.* at 590.

82. MANUAL, *supra* note 10, at § 4B1.1. The term "crime of violence" is defined at § 4B1.2, and includes "any offense under federal or state law punishable by imprisonment for a term exceeding one year that has as an element of use, attempted use, or threatened use of force against the person of another . . . ."

83. *Poff*, 926 F.2d at 590.

84. If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

minished capacity. Because mailing threatening communications is a "crime of violence" for career offender purposes, the trial judge concluded that departure on the basis of section 5K2.13 was forbidden since section 5K2.13 is limited to "non-violent" offenses.[85]

The majority in *Poff* frames the issue as one of simple statutory construction. "Can a 'crime of violence' also be a 'non-violent offense'?" The Court focused on the Commission's use of the common word "violence" in the two provisions at issue. Invoking the canon of statutory construction which states that, " 'a rather heavy load rests on him who would give different meanings to the same word or the same phrase when used a plurality of times in the same Act . . . ,' " the majority concludes that a crime of violence cannot simultaneously be a non-violent offense. Accordingly, the majority holds that, under section 5K2.13, the district court lacked the authority to depart based on Poff's diminished capacity.[86]

Furthermore, the majority notes, even if it read "non-violent" offense as something other than a "crime of violence," the requirement in section 5K2.13 that "the defendant's criminal history . . . not indicate a need for incarceration to protect the public" would preclude departure in Poff's case.[87] The majority concludes that because Poff meets the statutory definition of a career offender, she "by definition," fails to satisfy this additional requirement. In upholding the court's refusal to depart, the majority in *Poff* does express some hesitation about the ultimate fairness and wisdom of its ruling. It concludes, however, that it has no other choice:

> All this is not to say that there is not an argument in favor of permitting downward departures for those with diminished mental capacity when the prospect that they will carry through with threats seems nil . . . . Certainly in this case, the utility of a fifty-one month sentence can be debated . . . . But this is a debate for Congress and the Sentencing Commission . . . . Regardless of our views about its merit, we cannot limit a categorical rule by giving terms less than their obvious meaning, . . . , even where, as here, the result has harsh consequences.[88]

The five dissenting judges recognized that, despite Poff's past convictions, no one, including the Secret Service, believed that Carolyn Poff was dangerous. In spite of this simple observation, the dissent remarks, the majority believes that the guidelines forbid the district judge from

"Diminished Capacity" Policy Statement.

85. 926 F.2d at 590.

86. *Id.* at 591.

87. *Id.* at 592.

88. *Id.* at 593 (citation omitted).

considering the mental condition that impelled Poff to send these letters in passing sentence. The dissent observes that, although a textual argument supports this conclusion, "we should not attribute this heartlessness to the Sentencing Commission unless we must—and we needn't."[89]

The dissent chose not to construe the terms "crime of violence" and "non-violent offense" as mutually exclusive because "different language in different places conveys different meanings." It argued that this was especially true with detailed guidelines which were written as a unit and had undergone numerous instances of fine tuning and amendment.[90] The term "crime of violence," the dissent explains, is a legal term of art. It includes offenses such as Poff's only by virtue of a detailed definition given that term by the Sentencing Commission. In the absence of a similar explicit direction by the Commission to give "non-violent offense" such an abnormal reading, it is best to give this term its ordinary legal and lay meaning—as an offense "in which mayhem did not occur."[91] In other words, the dissent explains, "[t]he prospect of violence (the 'heartland' of the offense, in the guidelines' argot) sets the presumptive range; when things turn out better than they might, departure is permissible."[92]

The dissent went on to explore the heartland of the diminished capacity policy statement. Recognizing that the Sentencing Commission based the guidelines on the past practices of judges, the dissenting opinion observed that "[t]he criminal justice system long has meted out lower sentences to persons who, although not technically insane, are not in full command of their actions."[93] Furthermore, it concluded that when a mentally ill person's conduct is non-violent, imprisonment is not necessary for the protection of the public. In light of these heartland considerations, the dissent elected to read section 5K2.13 "as a whole," concluding that a defendant's mental condition can be the basis for a departure whenever prison is not justified because there is no need to incapacitate the defendant.[94] Thus, the dissenters' reasoning would authorize the district court to depart downward in Poff's case.

Although the majority and dissent in *Poff* appear to disagree over the choice between canons of statutory construction, a closer look at the opinion reveals a much deeper Seventh Circuit division over the extent of the district courts' power to depart. Although there may have been a

89. *Id.* at 593 (Easterbrook, J., dissenting) (emphasis in original).
90. *Id.* at 594.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

legitimate question as to whether Poff's offense was genuinely a violent one, the majority opts for a narrow and overly literal interpretation of section 5K2.13[95] ultimately discouraging departure in cases where there may be any ambiguity. It then treats section 5K2.13 as if it were an unambiguous and unmovable obstacle to any possible departure based on diminished capacity. The majority considers any resulting injustice from applying this view of the policy statement to Poff as a problem for Congress or the Sentencing Commission, not the courts.

By contrast, the dissent in *Poff* gives the policy statement at section 5K2.13 the weight it deserves. It recognizes that the statement carves out the heartland circumstances under which the Commission believes that a departure based on diminished capacity should normally occur, giving full consideration to the Commission's policy decision that regardless of the offender's culpability the public should be protected from dangerous or violent offenders with mental or emotional problems. However, the dissent sensibly concludes that where, as in Poff's case, the defendant poses no threat to society, a departure based on diminished capacity is permissible. The dissent recognizes that when a policy statement calls for an otherwise unjust result, the district court has the authority to address the problem through the departure power.

Notwithstanding, the prevailing view was one of extremely limited power to depart, a view that gained more momentum in the Seventh Circuit's decision in *United States v. Thomas*.[96] Mattie Lou Thomas pleaded guilty to possession of over 4 kilograms of heroin, an amount of drugs that automatically mandated a minimum sentence of 10 years imprisonment.[97] The government made a motion which permitted the sentencing court to impose a sentence of less than 10 years because Thomas had cooperated with the government in investigating her associates.[98] The government asked for a 6 year sentence. The district court, however, sentenced her to probation because she cooperated with the government and because she had "extremely burdensome family responsibilities" as the sole caretaker of two of her three mentally disabled adult children, as

95. *See, e.g.*, United States v. Kikumura, 918 F.2d 1084, 1116 (3d Cir. 1990)(rejecting literal reading of § 5K2 departure provisions, stating that "fitting a case within the literal language of a § 5K2 provision is neither a necessary nor a sufficient condition for making an offense-related departure").

96. 930 F.2d 526 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991).

97. *Id.* at 527.

98. *Id.* Pursuant to 18 U.S.C. § 3553(e), the court may, "upon motion of the government," sentence a defendant below the minimum otherwise required by law if the defendant has substantially assisted in the investigation or prosecution of another person. The guidelines contain a similar provision at § 5K1.1.

well as legal guardian of a four year-old grandson.[99]

The government appealed the sentence and the Seventh Circuit vacated it. The court held, in relevant part,[100] that the district court erred in basing any part of its departure decision on Thomas' family circumstances. The panel, referring to the Commission's policy statement at section 5H1.6 that "[f]amily ties and responsibilities are not ordinarily relevant in determining whether a sentence should be outside the guidelines," concluded that section 5H1.6 precludes downward departure even for "*extraordinary*" family considerations.[101] The panel voiced agreement with those courts it believed read section 5H1.6 "narrowly," holding that the policy statement expressly makes family circumstances relevant in only two situations: first, where probation is an option within the guidelines, and second, where a court is deciding on the appropriate amount for a fine or a restitution order.[102]

The panel opined that this reading of section 5H1.6 is consistent with Congress' desire to base criminal punishment on the "offense committed rather than on the defendant's characteristics."[103] It observed that while the guidelines do not treat the personal characteristics of defendants as completely irrelevant, their relevance is clearly limited.[104] Finally, the court sought support for its narrow interpretation of section 5H1.6 in Congress' allusion to "the general inappropriateness of considering, among other things, family ties and responsibilities."[105] Accordingly, the panel in *Thomas* concluded that *all* of the policy statements within Chapter 5H should be read as "establishing the limited parameters within which certain offender characteristics . . . are relevant."[106]

The court's extremely limited view regarding the relevance of offender characteristics is founded on a serious misunderstanding of Congressional intent. As discussed earlier, Congress envisioned a sentencing scheme that preserved sufficient flexibility for individualized sentences. That is why it provided for departures from the guidelines.[107] That is also why it cautioned appellate courts not to lightly disturb a district court's

99. *Id.* at 529.

100. Apart from its holding regarding the validity of a departure based on family circumstances, the court also held that according to the statute of conviction, she could not receive a sentence of probation, *id.* at 528, and that § 5K1.1 of the sentencing guidelines permits departure only on the basis of the quality of the assistance rendered, *id.* at 529.

101. *Id.* at 530.

102. *Id.*

103. *Id.*

104. *Id.* (citation omitted).

105. *Id.*, referring to 28 U.S.C. § 994(e) (1988).

106. *Id.*

107. *See supra* notes 8-9 and accompanying text.

departure from the guidelines, recognizing that "each offender stands before the court as an individual."[108] In fact, the *Thomas* court stands Congressional intent on its head by relying on the part of the statute which refers to "the general inappropriateness" of considering such things as education, family circumstances and community ties as a basis for denying those factors mitigating effect. The legislative history indicates that, contrary to the Seventh Circuit's view in *Thomas*, Congress did not intend to *bar* these factors as *mitigating* considerations, but rather only to ensure that defendants with less than fortunate backgrounds never have those backgrounds used *against* them.[109]

In addition to this basic misunderstanding regarding Congressional intent, the holding in *Thomas* also ignores the Sentencing Commission's basic philosophy that its provisions merely carve out a heartland. With few specific exceptions, none of which are relevant to *Thomas*, the Commission intended *no limit* to the kinds of factors, "whether or not mentioned anywhere else in the guidelines," that might call for departure in an unusual case.[110] The *Thomas* ruling also glosses over the fact that section 5H1.6 expressly states that family circumstances are not "*ordinarily*" relevant. By holding that even "extraordinary" family considerations can never be the basis for departure, the court has effectively read a key word out of the policy statement. Finally, the court in *Thomas* fails to deal with the fact that section 5H1.6 is a policy statement, not a guideline, and as such is not absolutely binding.[111]

In light of these considerations, it is not surprising that no other circuit has given the policy statements at sections 5H1.1-1.6 as preclusive an effect on departures as the Seventh Circuit in *Thomas*.[112] Most of the

108. *See supra* notes 56-57 and accompanying text.

109. S. REP. No. 225, *supra* note 8, at 74-75, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3357-58 (explaining that the "purpose of this section is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties").

110. *See supra* notes 13-15, 21-22 and accompanying text.

111. *See supra* note 43 and accompanying text.

112. Contrary to the Court's statement in *Thomas*, 930 F.2d at 529, there is no court that has definitively read any of the 5H policy statements so narrowly as it does. In United States v. Brady, 895 F.2d 538, 543 (9th Cir. 1990), the Ninth Circuit, addressing a facial due process challenge to the guidelines (not a challenge to a departure or failure to depart), observed in *dicta* that the guidelines permit consideration of factors such as family circumstances for deciding where within the guideline range to sentence. This should not be read as a holding that such factors cannot ever be the basis for departure, as later Ninth Circuit decisions clearly hold that they do justify departure under extraordinary circumstances. *See* United States v. Doering, 909 F.2d 392, 394 (9th Cir. 1990)(§ 5H1.3 makes mental condition relevant in extraordinary case); United States v. Mondello, 927 F.2d 1463, 1470 (9th Cir. 1991)(in extraordinary circumstances, a court may rely on one of the six factors listed in § 5H1.1-.6 to depart from the guideline range). And, as the opinion in *Thomas* admits, authority in the Fourth and Eighth circuits that would tend to support its interpretation of the 5H policy statements is contradicted by other cases in those circuits. In United States v. McHan, 920 F.2d 244, 248 (4th Cir. 1990), the Fourth Circuit stated that under § 5H1.6, community ties are not ordinarily

circuits have held that although the Commission has rendered many personal characteristics "not ordinarily relevant," those factors may nonetheless support departure in an extraordinary case.[113] In fact, two cases from the Second and Tenth Circuits expressly hold that extraordinary family circumstances are a legitimate basis for downward departure and uphold downward departures based on family considerations.[114]

2. Upward Departures—Adequacy of Criminal History

After *Thomas*, it would appear that all that is left of a defendant as an individual is his or her criminal history. As indicated earlier, the Sentencing Commission's policy statement regarding inadequacy of criminal history has proved to be the most frequently used basis for upward departure from the guidelines,[115] lending credence to one commentator's early prediction that this would be the area where judges looking to impose longer sentences could turn to justify upward departures.[116] In fact, over half of the published upward departure cases in the Seventh Circuit involved departure based, at least in part, on findings that the defendant's criminal history score did not adequately represent the seriousness of the defendant's past criminal conduct.

The Seventh Circuit's reading of the adequacy of criminal history policy statement, section 4A1.3, has been as broad as its reading of mitigating departure provisions has been narrow. In *United States v. Williams*,[117] the court gave section 4A1.3 an extremely expansive reading. It permitted upward departure based on two prior convictions that the

relevant but may be considered where probation is an option. That one line pronouncement in *McHan*, however, is directly contradicted by another Fourth Circuit case, United States v. Deigert, 916 F.2d 916, 918 (4th Cir. 1990), where the court specifically held that the factors at § 5H1.1-1.6 permit departure when the circumstances are extraordinary. A similar one-line pronouncement by the Eighth Circuit in United States v. Sutherland, 890 F.2d 1042, 1043 (8th Cir. 1989), is belied by subsequent decisions recognizing that extraordinary circumstances may permit departure, United States v. Shortt, 919 F.2d 1325, 1328 (8th Cir. 1990), and in fact have supported a downward departure in an unusual case, United States v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990)(upholding downward departure based on defendant's excellent employment history and solid community ties, which were unusual in terms of the difficult environment of the Indian reservation on which he lived).

113. In addition to those cases cited *supra* note 113, *see, e.g.*, United States v. Headley, 923 F.2d 1079, 1082 (3d Cir. 1991); United States v. Burch, 873 F.2d 765, 768 (5th Cir. 1989); United States v. Brewer, 899 F.2d 503, 508 (6th Cir.), *cert. denied*, 111 S. Ct. 127 (1990).

114. United States v. Alba, 933 F.2d 1117, 1122 (2d Cir. 1991)(upholding departure based on fact that defendant lived with wife, two children and a disabled father who depended upon him to help him in and out of a wheelchair); United States v. Pena, 930 F.2d 1486, 1494 (10th Cir. 1991)(defendant's status as single parent of two month-old infant and financial support for another sixteen year-old daughter with infant, combined with aberrational nature of the offense, justified downward departure).

115. *See supra* note 20 and accompanying text.

116. *See* von Hirsch, *supra* note 64, at 378 and n.6.

117. 910 F.2d 1574 (7th Cir. 1990), *vacated*, 112 S. Ct. 1112 (1992).

Commission had expressly excluded from consideration in the criminal history score because of their remoteness. The guideline calculations for possession of a firearm by a felon placed the defendant at offense level 9. After application of the criminal history rules, he was determined to fall into a criminal history category V. The district court, however, determined that his criminal history score did not reflect adequately his prior offenses or his propensity to commit crimes in the future. One of the reasons for this perceived inadequacy was that two of Williams' prior convictions were not included in the calculation of his score. Under the Commission's rules, those convictions were too old to be counted.[118] The district court nonetheless chose to rely on them and, accordingly, raised his criminal history category from V to VI and sentenced him within that range.[119]

The Seventh Circuit upheld the departure, and in particular the court's reliance on the stale convictions, even though the Commission had expressly excluded them from his criminal history score, and even though it had not excepted them from being too stale by the provision permitting consideration of old convictions that are evidence of "similar misconduct."[120] The court discovered an even broader exception to the Commission's time limits in the prefatory language of section 4A1.3, "if reliable information indicates" a more serious criminal history score. Focusing on that isolated phrase, the court held that "in appropriate circumstances" (circumstances not otherwise explained in the decision), old convictions may be "reliable information" of more extensive criminal conduct and therefore may be the basis for upward departure.[121]

In coming to this conclusion, *Williams* never once referred to the statutory standard for departure—whether the prior convictions had been "adequately considered" by the Sentencing Commission. Nor did the court refer to the Commission's own approach to departures—which considers whether Williams' record, including old convictions, was outside of the heartland of criminal records with old convictions. Instead, *Williams* used the criminal history policy statement as an independent basis for departure seemingly unlimited by the statute or the guidelines. For all practical purposes, *Williams'* extremely broad reading of section 4A1.3 gutted the criminal history guideline's restrictions on

118. 910 F.2d at 1578. Under § 4A1.2(e)(1), Williams had two convictions, unlawful taking of a motor vehicle and forgery, which were not counted because they were more than fifteen years old.

119. *Id.* at 1577.

120. *Id.* Section 4A1.2 n.8 allows courts to consider old convictions if the government demonstrates that they are evidence of similar misconduct or a receipt of substantial income from criminal livelihood.

121. *Id.* at 1579.

the use of old convictions by making them all fair game for upward departure.

3. Reining in Criminal History Departures—a Partial Return to the Heartland

If *Williams* were the final word on upward departures based on a defendant's criminal history, it would reveal a disturbingly uneven use of offender characteristics as a basis for departure. Whereas policy statements permitting downward departures are read narrowly, those permitting upward departures for criminal history are read so broadly as to take on a life of their own. The validity of the *Williams* decision is also highly questionable in light of the Supreme Court's grant of certiorari on precisely this question,[122] as well at the Seventh Circuit's later decision in *United States v. Fonner*.[123]

In *Fonner*, the district court departed upward from the defendant's guideline range in part by considering a number of prior convictions that the guidelines specifically excluded as too old.[124] The district court ruled that the old convictions caused Fonner's criminal history score to understate the seriousness of his record. The Seventh Circuit disagreed explaining that Fonner's case:

> is not, however, a case in which the defendant's record was of the sort the Sentencing Commission did not contemplate. The Commission concluded that offenses long ago, ending in small sentences, should not be counted. Fonner's eight convictions are not unprovided-for cases; they were considered and provided for expressly. Congress limited departures from the guidelines to circumstances 'not adequately taken into consideration' by the Commission. The Commission's *consideration* of old convictions that produced sentences less than 13 months cannot be called 'inadequate.' A judge might believe that Fonner's case shows that the Commission erred, but disagreement with the guidelines is not the same thing as inadequate 'consideration' by the Commission.[125]

The court in *Fonner* appears to directly contradict the earlier holding in *Williams*. It held that the policy statement at section 4A1.3, "giving sentencing judges latitude to depart when they conclude that the computation 'significantly under-represents the seriousness of the defend-

122. The Question Presented by the Petition for Certiorari in Williams is: "When Sentencing Commission has determined that arrests not resulting in convictions, and convictions more than 15 years old, should not be considered in determining defendant's criminal history category, should this court permit district judge to use such information in departing upward to harsher sentence than that called for by Sentencing Guidelines?" 59 U.S.L.W. 3664 (Mar. 26, 1991).

123. 920 F.2d 1330 (7th Cir. 1990).

124. *Id.* at 1333-34.

125. *Id.* at 1334 (emphasis in original)(citations omitted).

ant's criminal history', does *not* grant latitude to disregard rules specifically laid down."[126] Accordingly, the court held that old convictions excluded by the guidelines could not be the basis of an upward departure based on inadequacy of criminal history.[127] Although *Fonner* does not expressly overrule *Williams*, in yet a later opinion where the district court sought to use section 4A1.3 to avoid the guidelines' time limits, the court followed *Fonner* without mentioning the contrary holding in *Williams*.[128]

The *Fonner* decision properly analyzes the departure decision by referring to the Act's standard regarding the Sentencing Commission's "adequate consideration" of a given factor, as well as to the Commission's own heartland approach. Where the Commission has expressly considered a factor like old convictions, and has excluded them from a defendant's criminal history score, a district court cannot conclude that those convictions should nonetheless count simply because they are "reliable information" of past criminal conduct. Instead, criminal history departures must be analyzed, like any other departures, in terms of the Commission's heartland of criminal records, which can be determined by examining the criminal history rules themselves. *Fonner* demonstrates that the heartland approach works in the context of criminal history departures.

III. CONCLUSION

The subject of departures from the Sentencing Guidelines is critical. The extent of the district courts' departure authority ultimately determines how much room for individualized justice—for imagination and common sense—remains in what is otherwise an exercise in "sentencing by numbers." Both the language and legislative history of the Sentencing Reform Act clearly indicate that although Congress sought to decrease unjustified disparity in sentencing, it just as clearly sought to preserve individualized consideration of the offender through departures. The Sentencing Commission's adoption of the "heartland approach" gives the district courts the necessary discretion to dispense individualized justice.

For the most part, the Seventh Circuit's departure decisions show that the Commission's heartland approach to departures can work despite the fact that the Commission has more often than not offered no explicit explanation of what it considers to be the "usual" offense in a

126. *Id.* (emphasis added).
127. *Id.*
128. *See* United States v. Terry, 930 F.2d 542, 545 (7th Cir. 1991).

given case. Basically, courts can get a feel for the heartland by examining the individual guidelines provisions and what they *do* consider as relevant. In addition, some of the Seventh Circuit's departure decisions show that the search for the heartland of a given offense can be and is informed by the use of common sense.[129]

In spite of the Seventh Circuit's success in applying the heartland approach to cases involving offense characteristics, it has abandoned that approach in cases involving departures based on mitigating offender characteristics. In this area alone, non-binding policy statements become "categorical rules"[130] that must be enforced to the letter. The court takes this position because it mistakenly concludes that both Congress and the Sentencing Commission have deliberately factored individual characteristics out of the sentencing equation. According to the Seventh Circuit, the courts have no authority to put the individual back in.

That the Sentencing Commission's consideration of mitigating offender characteristics was woefully inadequate seems obvious. The court's one-line pronouncements that an individual's personal history and characteristics are "not ordinarily relevant" are unsupported by research or even minimal explanation. The reason for the Commission's failure to deal with these factors in a comprehensive way is understandable, however, given the difficulty it must have experienced trying to objectively assess factors that enter into a sentencing decision and reduce each of them to a known quantity. No scientific method yet exists to objectively assess and quantify an individual's unique characteristics and history, for the simple reason that these factors defy standardization. If the guidelines were to expressly consider them, how would they do so? How many levels should a tragic, poverty ridden childhood reduce a sentence? How about an exceptionally tragic one?

The impossibility of this task should have forced the Commission to admit that it was simply incapable of dealing with this critical aspect of sentencing. It should have left this aspect of sentencing to the courts, since they are institutionally best suited to handle it. Instead, the Commission ducked the issue and proclaimed, without explanation, that offender characteristics should "not ordinarily" be a factor. Most courts

129. *See* MANUAL, *supra* note 10, ch. 1, pt. A. 3, *The Basic Approach* (Policy Statement) at 1.3-1.4 (explaining Sentencing Commission's empirical approach to formulating the initial set of guidelines using, among other sources, data from 10,000 cases sentenced under the old federal system, while departing from pre-guidelines practice in certain specific areas such as drug offenses and white collar crime); *see also Poff*, 926 F. 2d. at 595 (Easterbrook, J., dissenting)("The Sentencing Commission based its guidelines on the common practices of judges, which it attempted to make more uniform without fundamentally altering the criteria influencing sentences.").

130. *Poff*, 926 F.2d at 593.

have been able to recognize this decree for what it is—recognition, however grudging, by the Commission that it could not and did not consider the effect that extraordinary personal circumstances should have on an individual's sentence. But the Seventh Circuit held that the Sentencing Commission's pronouncements absolutely preclude a court from considering such matters. In doing so, the court, contrary to the Sentencing Reform Act and the guidelines themselves, has unilaterally removed common sense and imagination from the process of criminal sentencing, and reduced it to little more than sentencing by numbers.

POSTSCRIPT

While this article was in publication the Supreme Court decided *United States v. Williams*,[131] which we discussed in connection with the Seventh Circuit's approach to upward departures based on a defendant's criminal history.[132] Unfortunately, the Supreme Court's decision did not address the issue of whether the district court improperly relied on convictions expressly excluded by the guidelines as a basis for departure.[133] In the meantime, the Seventh Circuit apparently retreated from the position it took on criminal history departures based on old convictions in *United States v. Fonner*.[134] Without expressly overruling *Fonner*, the court has reembraced *Williams* and on two separate occasions upheld departures based on outdated convictions.[135]

131. 112 S. Ct. 1112 (1992).

132. *See supra* notes 117-23 and accompanying text.

133. 112 S. Ct. at 1122 (declining to address the issue as it was not clearly presented in the petition for certiorari or briefed by either party).

134. 920 F. 2d 1130 (7th Cir. 1990) discussed *supra* at notes 123-28 and accompanying text.

135. United States v. Connor, 950 F.2d 1267, 1273-75 (7th Cir. 1991); United States v. Gammon, 961 F.2d 103, 107-08 (7th Cir. 1992).