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# FOREWORD: The Role of the Departure Power in Reducing Injustice and Unwarranted Disparity Under the Sentencing Guidelines

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# BROOKLYN LAW REVIEW

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## FOREWORD

### THE ROLE OF THE DEPARTURE POWER IN REDUCING INJUSTICE AND UNWARRANTED DISPARITY UNDER THE SENTENCING GUIDELINES\*

*Hon. John S. Martin, Jr.*<sup>†</sup>

Fifteen years ago, the United States Sentencing Commission ("Sentencing Commission" or "Commission") submitted the first set of Sentencing Guidelines to Congress. Although the Sentencing Guidelines became effective on November 1, 1987, they were not implemented in most federal courts until January, 1989,<sup>1</sup> when the Supreme Court upheld their constitutionality in *Mistretta v. United States*.<sup>2</sup>

Since we now have complete data on the workings of the guideline system for its first ten years, it is worthwhile to review that information to see if the guideline system has accomplished its intended purposes and to ask whether changes should be made.<sup>3</sup> The available data demonstrates

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<sup>†</sup> United States District Judge for the Southern District of New York. The author wishes to acknowledge the assistance of Melinda (a/k/a/ Mindy) Eades, an extremely able law student who served as a student intern in my chambers and who suggested this Foreword.

<sup>1</sup> Kay A. Knapp & Denis J. Hauptly, *U.S. Sentencing Guidelines in Perspective: A Theoretical Background and Overview*, in THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE 3, 15-16 (1989).

<sup>2</sup> 488 U.S. 361, 412 (1989).

<sup>3</sup> For an excellent exposition of the background of the Sentencing Reform Act

that there is wide disparity in how the Sentencing Guidelines are applied in each of the twelve circuits.<sup>4</sup> The Second Circuit is a leader in recognizing that the adoption of the Sentencing Guidelines was not intended to strip district court judges of the power to do justice in individual cases and that the exercise of the departure power is important to the proper functioning of the guideline system.<sup>5</sup> This Foreword contends that rigid adherence to guideline sentences has not and cannot end true disparity in sentencing and that the Second Circuit's recognition of the departure power's role in a just sentencing system properly balances the need to end unwarranted disparity while maintaining proportionality in sentencing and doing justice in individual cases.

At the outset, it should be noted that the original Sentencing Commission accomplished a task that many thought could not be done; it developed a workable set of guidelines that could be applied with relative ease to the wide variety of criminal conduct prohibited by federal law. Thus, anything said hereinafter to suggest that other approaches might have been desirable or that changes should be made is not meant to denigrate the significance of the original Sentencing Commission's accomplishments.

Prior to the Sentencing Reform Act,<sup>6</sup> district court judges had practically unlimited discretion in imposing sentences. If the sentence was within the sentencing range established by the relevant statute, the appellate courts would not review the propriety of the sentence.<sup>7</sup> Given the breadth of this unreviewable power in imposing sentences, it is not surprising that there were instances in which substantially different sentences were imposed by different judges in what appeared to be identical circumstances.

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and an analysis of many of the issues raised by guideline sentencing, see generally KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

<sup>4</sup> UNITED STATES SENTENCING COMMISSION, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 53 (1999) [hereinafter 1999 SOURCEBOOK].

<sup>5</sup> See, e.g., *United States v. Merritt*, 988 F.2d 1298, 1306 (2d Cir. 1993).

<sup>6</sup> 18 U.S.C. § 3551 et seq. (2000); 28 U.S.C. § 991-998 (2000).

<sup>7</sup> *Dorszynski v. United States*, 418 U.S. 424, 431 (1974).

Perhaps the seminal work leading to the Sentencing Reform Act was *CRIMINAL SENTENCES: LAW WITHOUT ORDER*,<sup>8</sup> published in 1973 and authored by then United States District Judge Marvin E. Frankel. Judge Frankel detailed instances of unfairness and disparity in sentencing that resulted from the exercise of unguided and unreviewable discretion in imposing sentences.<sup>9</sup> Among the alternative solutions he suggested was a sentencing commission.<sup>10</sup>

No one familiar with the history of the Sentencing Reform Act would disagree with the Sentencing Commission's conclusion that, in enacting the Sentencing Reform Act, "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."<sup>11</sup> Since ending unwarranted disparity in sentencing was a principal reason for establishing the guideline system, the first question to be asked is whether experience has shown that this goal has been accomplished. A look at the most recent statistics from the Commission's 1999 Annual Report suggests that the answer to that question is a resounding "no."

In fiscal year 1999, only 64.9% of all sentences imposed were within the prescribed guideline range.<sup>12</sup> In 18.7% of the cases, downward departures from the guideline range were made as a result of a motion by the prosecutor under Section 5K1.1 because of the defendant's substantial assistance in the investigation or prosecution of another person.<sup>13</sup> In 15.8% of the cases, judges departed below the guideline range under Section 5K2.0,<sup>14</sup> finding that "there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."<sup>15</sup>

<sup>8</sup> MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

<sup>9</sup> *Id.* at 3-11.

<sup>10</sup> *Id.* at 118.

<sup>11</sup> UNITED STATES SENTENCING COMMISSION, *UNITED STATES SENTENCING GUIDELINES MANUAL* ch. 1, pt. A, § 3 (Nov. 1998) [hereinafter 1998 MANUAL].

<sup>12</sup> 1999 SOURCEBOOK, *supra* note 4, at 53.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 1998 MANUAL, *supra* note 11, at § 5K2.0 (quoting 18 U.S.C. § 3553(b) (2000)).

Departures from the Sentencing Guidelines in 35.1% of the cases does not, in itself, suggest that these departures give rise to disparity. Indeed, in many of these instances, prosecutors and judges are correctly identifying cases where departure is appropriate under the standards established by Congress and the Commission. However, even if we assume that the Sentencing Guidelines were consistently applied in those cases in which the courts departed under Sections 5K1.1 and 5K2.0, the same risk of disparity that existed under the pre-guideline regime exists today because those two provisions give judges as much discretion in imposing sentences as they had before the Sentencing Guidelines.

More importantly, however, the available data suggests that there is a wide disparity in the exercise of the departure power under Sections 5K1.1 and 5K2.0. Looking at the extremes in substantial assistance departures: In the Western District of North Carolina, 52.3% of the defendants received substantial assistance departures,<sup>16</sup> while in the District of South Dakota, only 5.3% of the defendants received such a departure.<sup>17</sup> Making the same comparison by circuit reveals that in the Third Circuit, 32.2% of all defendants received substantial assistance departures,<sup>18</sup> while in the Ninth Circuit, only 10.4% of the defendants received such departures.<sup>19</sup> There is no reason to believe that the nature of the crimes prosecuted in various parts of the country is so different that the need for cooperating defendants would vary substantially. Thus, these statistics suggest that there is great disparity in the criteria used by individual United States Attorneys in moving for Section 5K1.1 departures.

Similarly, there is disparity in the way individual judges grant downward departures in cases where there is no motion by the prosecutor for a substantial assistance departure. For example, in the Eastern District of Arkansas, only 2.3% of all defendants received downward departures for reasons other than substantial assistance,<sup>20</sup> whereas in the District of Massachusetts, 22.6% of the defendants received such

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<sup>16</sup> 1999 SOURCEBOOK, *supra* note 4, at 53.

<sup>17</sup> *Id.* at 54.

<sup>18</sup> *Id.* at 53.

<sup>19</sup> *Id.* at 55.

<sup>20</sup> *Id.* at 54.

departures.<sup>21</sup> A similar comparison by circuit shows that in the Ninth Circuit, 36.4% of all defendants received such departures,<sup>22</sup> while in the Fourth Circuit, the departure rate was 4.6%.<sup>23</sup>

Disparity in the application of the departure power by prosecutors and judges is relatively easy to detect. What is not as easy to detect, however, is the extent of the disparity that no doubt exists even in the 64.9% of the 1999 cases in which the defendants were sentenced within the guideline range. Before examining the factors that may lead to disparity among sentences imposed within the guideline range, it is important to note that disparity in sentences can occur in one of two ways. First, individuals who commit similar crimes in similar circumstances may receive different sentences. Second, individuals who commit different crimes in different circumstances may receive the same sentence even though the conduct of one is more culpable than that of the other. In enacting the Sentencing Reform Act, Congress intended to end such disparities.<sup>24</sup> Unfortunately, experience suggests that the emphasis on ending the first type of disparity has resulted in an increase in the second type of disparity.

There are a variety of factors that result in disparities in sentences imposed within the Sentencing Guidelines that are not as easy to measure as those found with respect to 5K1.1 and 5K2.0 departures. First, the Sentencing Guidelines do not impose any meaningful limits on the prosecutors' discretion in selecting the crimes with which the defendants will be charged.<sup>25</sup> Anyone who has been active in the criminal justice system since the inception of the Sentencing Guidelines knows

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<sup>21</sup> 1999 SOURCEBOOK, *supra* note 4, at 53. The rate of such departures is even greater in some border districts where the volume of immigration cases presents special problems. For example, in the District of Arizona, there are downward departures for reasons other than substantial assistance in 57.9% of all criminal cases. *Id.* at 55.

<sup>22</sup> *Id.* at 55.

<sup>23</sup> *Id.* at 53.

<sup>24</sup> 1998 MANUAL, *supra* note 11, at ch. 1, pt. A, § 3.

<sup>25</sup> STITH & CABRANES, *supra* note 3, at 130. For an in-depth analysis of prosecutorial charging and plea bargaining practices, see generally Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study on Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992).

that there are instances when the prosecutor will file a less serious charge to induce a defendant to plead guilty and thereby avoid being sentenced under a more severe guideline.

Second, in negotiating a plea, prosecutors may agree to forego a sentencing enhancement that they would seek after a trial, such as an increase for the defendant's role in the offense, or agree to limit the scope of the defendant's criminal conduct, which is used to calculate his guideline range, to less than that which might be proved at trial.<sup>26</sup> These decisions to seek less in a plea than might be obtained after trial may be totally appropriate given the risks inherent in litigation, but there is no reason to believe that all prosecutors are applying uniform standards in making these choices. While the Sentencing Guidelines do provide that, before accepting a plea, the judge must be satisfied "either that (1) the agreed sentence is within the applicable guideline range; or (2) the agreed sentence departs from the applicable guideline range for justifiable reasons,"<sup>27</sup> district court judges and probation officers often lack sufficient information to challenge the parties' stipulation as to the applicable facts. Indeed, a district judge who believes that the guideline sentence is too harsh is unlikely to look for ways to increase the defendant's sentence.

Third, even where judges and prosecutors are attempting to apply the Sentencing Guidelines in total good faith, some of the factors that may enhance or decrease an offense level lack sufficient precision to insure completely uniform application. For example, the Sentencing Guidelines provide for decreases in the offense level if the defendant was a "minimal" or "minor" participant in the crime.<sup>28</sup> Similarly, both the bribery and fraud guidelines provide for a sentence enhancement if the criminal conduct "substantially jeopardized the safety and soundness of a financial institution."<sup>29</sup>

The most significant factor that can give rise to disparity in applying the Sentencing Guidelines is the differences in the available proof of criminal activity. Does the prosecutor have merely a snapshot of the defendant's criminal activity or is her

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<sup>26</sup> 1998 MANUAL, *supra* note 11, at § 6B1.2(a).

<sup>27</sup> *Id.* at § 6B1.2(c).

<sup>28</sup> *Id.* at § 3B1.2.

<sup>29</sup> *Id.* at §§ 2B4.1(b)(2)(A), 2F1.1(b)(6).

proof more like a videotape of a year in the defendant's criminal life? The answer to that question will result in substantially different sentences.

For example, let us assume that two brothers with identical backgrounds and criminal histories are selling crack on two different street corners and that they have been doing so for three months. Both are arrested after making sales of one gram of crack each to an undercover agent. After his arrest, one brother tells the agent that he has been making about thirty such sales at that location six days a week for the last three months. His brother, however, exercises his constitutional right to remain silent, and he answers no questions. If both plead guilty and do not cooperate with the prosecution, the first brother will face a guideline range of 168-210 months because the criminal conduct that he admitted when he was arrested will be considered in calculating his guideline range.<sup>30</sup> However, his equally culpable brother will face only 18-24 months.<sup>31</sup> The same disparity in sentencing would result if the police have been surveilling the first brother's corner for three months as part of an investigation of those higher up in the distribution chain, but there had been no similar surveillance of the second brother.<sup>32</sup>

While the preceding example is extreme, the problem is common. Every day, judges read presentence reports of people involved in criminal activity who have prior criminal records and no legitimate means of supporting themselves. The defendant may have been charged with a single offense resulting from a single transaction, but there is no reason to doubt that the defendant has been engaged in that same criminal conduct on a regular basis. For example, no judge or prosecutor sentencing the second brother would doubt that he had made numerous sales of similar quantities prior to his

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<sup>30</sup> This brother's base offense level is 38. *Id.* at §§ 2D1.1(a)(3), 2D1.1 (c)(1). He then receives a three point downward departure for acceptance of responsibility. 1998 MANUAL, *supra* note 11, at § 3E1.1. The sentence for an offense level 35 is 168-210 months. *Id.* at ch. 5, pt. A (Sentencing Table).

<sup>31</sup> The base offense level for this range is 18. *Id.* at §§ 2D1.1(a)(3), 2D1.1 (c)(11). After the same three point departure for acceptance of responsibility, this brother has an offense level of 15. *Id.* at § 3E1.1. Therefore, his sentence is 18-24 months. *Id.* at ch. 5, pt. A (Sentencing Table).

<sup>32</sup> *See, e.g.,* United States v. Genao, 831 F. Supp. 246, 248 (S.D.N.Y. 1993).



arrest. Yet because he, unlike the first brother, did not confess to such prior drug sales, his sentence would be fixed only by the amount sold to the undercover agent.

One of the problems that guideline sentencing was designed to cure was the sense of injustice that an incarcerated defendant would feel when he finds himself sharing a jail cell with someone who engaged in the exact same conduct but who received a substantially different sentence.<sup>33</sup> In the example above, if we assume that the two drug sellers were not related and did not meet until they found themselves sharing a jail cell, there is no question that the first would feel that he was treated very unjustly, particularly because his enhanced sentence resulted from his willingness to cooperate with the agents after his arrest.<sup>34</sup>

Disparity in sentencing resulting from differences in proof is far from unusual. In addition to differences that result from post-arrest statements or the length of the investigation, there are a wide variety of situations where differences in the availability of proof result in disparate sentences. A good example is *United States v. Chau*,<sup>35</sup> which arose from a

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<sup>33</sup> 131 CONG. REC. S 4083 (1985) (statement of Sen. Kennedy); 1998 MANUAL, *supra* note 11, at ch. 1, pt. A, § 3.

<sup>34</sup> Furthermore, even if these two were co-defendants in the same criminal action, the judge would most likely not be able to depart from the Sentencing Guidelines in light of this disparity. Disparity among co-defendants is not permissible grounds for departure under Section 5K2.0 in the circuits that have considered the issue. *See, e.g.*, *United States v. McMutuary*, 217 F.3d 477, 490 (7th Cir. 2000); *United States v. Blackwell*, 127 F.3d 947, 951 (10th Cir. 1997); *United States v. Polanco*, 53 F.3d 893, 897-98 (8th Cir. 1995); *United States v. Ives*, 984 F.2d 649, 650 (5th Cir. 1993); *United States v. Ellis*, 975 F.2d 1061, 1066 (4th Cir. 1992); *United States v. Gessa*, 971 F.2d 1257, 1282 (6th Cir. 1992); *United States v. Seligsohn*, 981 F.2d 1418, 1428 (3d Cir. 1992); *United States v. Williams*, 980 F.2d 1463, 1467 (D.C. Cir. 1992); *United States v. Joyner*, 924 F.2d 454, 459-61 (2d Cir. 1991); *United States v. Meija*, 953 F.2d 461, 467-68 (9th Cir. 1991); *United States v. Wogan*, 938 F.2d 1446, 1448 (1st Cir. 1991). The reason these courts have so held is generally claimed to be because the Sentencing Guidelines were drafted to end disparity nationwide, in the abstract, and so, "the greater uniformity trumps the lesser disparity." *Meija*, 953 F.2d at 468. As we have seen, the available data indicates that this "greater uniformity" may be illusory. In light of the fact that ending disparity in sentencing was the main purpose of the Sentencing Guidelines, it is ironic now that those same Guidelines preclude judges confronted with concrete examples of exactly that disparity from using their discretion towards the same end.

<sup>35</sup> No. 95 Cr. 15, slip op. (S.D.N.Y. Oct. 13, 1995), *rev'd*, 101 F.3d 684 (2d Cir. 1996).

lengthy investigation of fraud in connection with the food stamp program. Many people who qualify for food stamps would prefer to have cash. However, they cannot sell food stamps for cash or use them to purchase food in a restaurant; they may only use them to purchase food in a grocery store or supermarket. In *Chau*, the owner of a Chinese restaurant purchased food stamps for cash, giving the seller 50-60% of the face value of the stamps. Since restaurant owners could not deposit food stamps in the bank, they passed them along a chain of suppliers and wholesalers, each receiving a greater percentage of the face value than he had paid. Ultimately, those higher up on the chain persuaded others, generally poorer members of the Chinese community, to open sham grocery stores and obtain the necessary license to deal in food stamps. While these food store owners may have purchased and deposited \$1 million of food stamps to their accounts, their gross profit was only \$30,000 because they had paid \$.97 on the dollar for the stamps.<sup>36</sup> Since the store owners' sentencing guideline was based on the amount of the fraud, not their profit, these members of the illegal chain received sentences of 18-24 months.<sup>37</sup> In contrast, the proof against the restaurant owner, who had no doubt been purchasing food stamps several times a day for a substantial period of time, was his purchase of \$1,600 in food stamps from an undercover agent on four occasions. Thus, his guideline range was only 0-6 months.<sup>38</sup> No one with a sense of proportionality in sentencing could conclude that there was a rational reason for the difference in the sentencing of the store owner and the restaurant owner.

Differences in available proof will impact the sentencing process regardless of whether there are sentencing guidelines.<sup>39</sup> However, the difficulties discussed above have a much more dramatic impact in a guideline system in which courts are required to make highly specific factual findings that can have a dramatic impact on the sentence imposed. In the above example of the two drug selling brothers, an experienced judge in the pre-guideline era, familiar with the

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<sup>36</sup> *Id.* at 6 n.3.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.* at 3.

<sup>39</sup> STITH & CABRANES, *supra* note 3, at 131.

vagaries of proof, would no doubt impose sentences on the brothers that were much closer in length than those required by the Sentencing Guidelines.

Another factor that leads to a lack of proportionality in sentencing is the breadth of criminal conduct that may be encompassed within a single guideline. A good example of this problem is found in the fraud guideline. In each of the following fraud cases, a defendant who pleads guilty will face a guideline sentence of 21-27 months<sup>40</sup>: (1) the defendant, in an attempt to save his failing company that employs twenty-five people, obtains a \$1 million loan from his supplier, a Fortune 500 company, using false financial statements;<sup>41</sup> (2) the defendant provides inside information to twenty friends, each of whom makes \$50,000 by trading in the subject stock;<sup>42</sup> (3) the defendant contracts with a third world country, whose people are starving, to sell \$1 million of powdered milk, but actually ships animal feed;<sup>43</sup> (4) the defendant fraudulently induces each of ten retired couples to turn over to him their life's savings of \$100,000.<sup>44</sup> Moreover, the guideline range for each of them would be six months less than that for a defendant who obtains \$20 from each of 50,000 men through ads falsely stating that his product will cure baldness.<sup>45</sup> It is doubtful that anyone would reasonably suggest that these sentences reflect the different levels of culpability among the defendants.

The above examples represent some, but not all, of the ways in which guideline sentencing can result in disparities. Since under the pre-guideline regime there was no meaningful way to measure the extent of disparity in sentencing, it is not possible to determine whether there is more or less disparity under the present system. Nevertheless, there is very little likelihood that Congress will repeal the Sentencing Reform Act. Therefore, the important question is not whether there was more or less disparity in the pre-guideline era but whether we can do anything to improve the present system so that the

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<sup>40</sup> 1998 MANUAL, *supra* note 11, at §§ 2F1.1(b)(1)(S), 2F1.1(b)(2)(A), 3E1.1.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at § 2F1.2(b)(1).

<sup>43</sup> *Id.* at §§ 2F1.1(b)(1)(S), 2F1.1(b)(2)(A), 3E1.1.

<sup>44</sup> *Id.*

<sup>45</sup> 1998 MANUAL, *supra* note 11, at § 2F1.1(b)(3).

effort to avoid disparity does not result in the imposition of sentences that are disproportionate to the culpability of the defendant.

First, and most importantly, Congress and the appellate courts must recognize that we cannot achieve perfection in any system devised and applied by fallible human beings. If the system is going to err, let it be on the side of doing justice in the individual case, rather than imposing uniform sentences that treat many defendants unfairly. It is of little consolation to the family of a defendant who is serving a lengthy sentence that is too severe to know that another defendant has been treated equally unfairly.

Second, it is important to remember that ours is a common law tradition. Justice Holmes observed, "It is the merit of the common law that it decides the case first and determines the principle afterwards."<sup>46</sup> This tradition of having our rules of law evolve out of the decision of individual disputes has served us well over hundreds of years. It is a mistake to abandon our tradition of first seeking a just result in the individual case in favor of a strict guideline system that attempts to determine in advance what the appropriate result is in a hypothetical case and then requires that result in every case that falls within the same general category.

This is not to say, however, that we must abandon the Sentencing Guidelines system. To the extent that the Sentencing Guidelines provide district court judges with a benchmark for the appropriate sentence in certain cases, they represent a vast improvement over the prior regime, in which the district court judges had absolutely no guidance in determining where, within the statutory range, sentences should be imposed. A guideline system that provides reasonable flexibility to the sentencing judge should result in less disparity than a system without guidelines. Having some benchmark is better than having over 650 district court judges deciding for themselves what the appropriate sentence is for a particular violation of federal law. For example, there should be a general understanding as to the appropriate sentence for

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<sup>46</sup> G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 124 (1993).

a defendant without a criminal record who sells a kilogram of heroin; there should not be 650 different answers.

The basic problem with the present Sentencing Guidelines system is that most of the circuit courts have placed overly strict limits on the power of district court judges to depart from the guideline range in appropriate circumstances. Fortunately, this is not true in the Second Circuit, which has one of the highest departure rates in the country and the lowest reversal rates when district court judges do depart.<sup>47</sup>

In large part, the restrictions on the departure power in other circuits result from the fact that all guideline manuals state that "the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often."<sup>48</sup> However, this prediction is true only because it has been a self-fulfilling prophesy. Circuit courts have seized upon this and similar language in the UNITED STATES SENTENCING GUIDELINES MANUAL to reverse district court judges who have exercised the departure power, thereby chilling the exercise of that power.<sup>49</sup>

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<sup>47</sup> The data available shows that there is no case involving a downward departure that was reversed outright. There are, however, some sentencing appeals that were affirmed in part and reversed in part, but one cannot easily determine whether the partial reversals resulted from a departure or a refusal to depart. FEDERAL JUDICIAL CENTER, 2000 NATIONAL SENTENCING POLICY INSTITUTE 35 (2000). By comparison, the Fourth Circuit reversed 10.1% of the downward departures granted in the district courts in fiscal year 1999. *Id.*

<sup>48</sup> *E.g.*, 1998 MANUAL, *supra* note 11, at ch. 1, pt. 4(b).

<sup>49</sup> *See, e.g.*, United States v. Benally, 215 F.3d 1068, 1078 (10th Cir. 2000); United States v. Sentamu, 212 F.3d 127, 135 (2d Cir. 2000); United States v. Sweeting, 213 F.3d 95, 100 (3d Cir. 2000); United States v. Tocco, 200 F.3d 401, 436 (6th Cir. 2000); United States v. Contreras, 180 F.3d 1204, 1213 (10th Cir. 1999); United States v. DeBeir, 186 F.3d 561, 567-68 (4th Cir. 1999); United States v. Steele, 178 F.3d 1230, 1238 (11th Cir. 1999); United States v. Stevens, 197 F.3d 1263, 1266 (9th Cir. 1999); United States v. Winters, 174 F.3d 478, 485 (5th Cir. 1999); United States v. Miller, 78 F.3d 507, 511 (11th Cir. 1996); United States v. Olbres, 99 F.3d 28, 35 (1st Cir. 1996); United States v. Rybicki, 96 F.3d 754, 758 (4th Cir. 1996); United States v. Godfrey, 22 F.3d 1048, 1053 (11th Cir. 1994); United States v. Williams, 37 F.3d 82, 85 (2d Cir. 1994). Similarly, circuit courts have seized on the same language and variants to affirm district court judges' assertions that they have no authority to depart. *See, e.g.*, United States v. Caron, 208 F.3d 321, 323 (1st Cir. 2000) (noting that there is no magic to particular terms like "most rare," "exceptional," and "highly infrequent"); United States v. Bonnet-Grullon, 212 F.3d 692, 699 (2d Cir. 2000); United States v. Corry, 206 F.3d 748, 750 (7th Cir. 2000).

The experience in the Second Circuit, where district court judges have been given a substantial degree of freedom to depart from guideline sentences, suggests that the Sentencing Commission's prediction that judges would not find it appropriate to depart "very often" was wrong. In 1999, district court judges within the Second Circuit departed below the applicable guideline range in 25% of the cases that required a guideline sentence.<sup>50</sup> In order to depart, they had to find that the case before them was not within the "heartland" of cases to which the guideline was intended to apply.<sup>51</sup> The fact that these judges found that 25% of their cases were outside the "heartland" covered by the Sentencing Guidelines, and that, therefore, a lower sentence was necessary to do justice in the cases before them, strongly suggests that similar findings would be made by district court judges throughout the country if they felt that they had the power to do so. Thus, the Commission's prediction that judges would not "very often" find a need to depart should no longer be accepted as a guiding rule.<sup>52</sup>

Indeed, the current Sentencing Commission has apparently recognized that experience has shown the need for an expanded use of the departure power. The most recent Annual Report of the Sentencing Commission (the current Commission's first such report) states:

Under section 5K2.0 (Grounds for Departure), the Commission granted broad departure authority to district courts by adopting the language of 18 U.S.C. § 3553(b), which provides that a court is permitted to depart from a guideline sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not

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<sup>50</sup> In 1999, there were 4,119 sentences imposed. Out of that many, there were 953 substantial assistance departures. In the remaining 3,166 cases there were downward departures in 802. FEDERAL JUDICIAL CENTER, 2000 NATIONAL SENTENCING POLICY INSTITUTE 35 (2000).

<sup>51</sup> The 1995 GUIDELINES state:

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.

UNITED STATES SENTENCING COMMISSION, UNITED STATES SENTENCING GUIDELINES MANUAL ch. 1, pt. A (Nov. 1995).

<sup>52</sup> 1999 SOURCEBOOK, *supra* note 4, at 53.

adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The discretionary power of district courts was broadened by the 1996 decision in *Koon v. United States*, 116 S. Ct. 2035 (1996).<sup>53</sup>

The Commission could take a substantial step to foster a greater use of the departure power by incorporating these sentiments into the official commentary to the Sentencing Guidelines. Under the Sentencing Reform Act, the only authoritative pronouncements of the Sentencing Commission that may be considered in imposing sentences are "the Sentencing Guidelines, policy statements, and official commentary of the Sentencing Commission."<sup>54</sup> Thus, until the Sentencing Commission puts its views on the breadth of the departure power into the official commentary, it is likely that circuit courts will continue to use the official commentary's statement that "despite the . . . legal freedom to depart . . . [district judges] will not do so very often"<sup>55</sup> as a basis for limiting the departure power of district court judges.

In *Koon v. United States*,<sup>56</sup> Justice Kennedy eloquently expressed the importance of departures in our guideline sentencing system:

The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge.<sup>57</sup>

If federal judges throughout the country recognize that the "exercise of the departure power, in appropriate circumstances,

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<sup>53</sup> UNITED STATES SENTENCING COMMISSION, 1999 ANNUAL REPORT 25-26 (1999).

<sup>54</sup> 18 U.S.C.A. § 3553(b) (2000).

<sup>55</sup> 1998 MANUAL, *supra* note 11, at ch. 1, pt. 4(b); *see also supra* text accompanying note 48.

<sup>56</sup> 518 U.S. 113 (1996).

<sup>57</sup> *Id.* at 113.

is an essential ingredient of the sentencing system[,]”<sup>58</sup> we will be well on our way to developing a more just and rational sentencing system. There will still be instances in which the sentencing judges disagree with the sentencing range selected by the Commission for the prototypical case. That is the price we should and must pay to end unwarranted disparity. However, having the power to depart in appropriate circumstances should eliminate instances in which judges find themselves imposing sentences which they consider totally unjust.

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<sup>58</sup> *United States v. Merritt*, 988 F.2d 1298, 1306 (2d Cir. 1993); *see, e.g.*, *United States v. Lara*, 905 F.2d 599, 604 (2d Cir. 1990) (“The legislative history reflects that it was not Congress’ aim to straightjacket a sentencing court, compelling it to impose sentences like a robot inside a Guidelines’ glass bubble, and preventing it from exercising discretion, flexibility or independent judgment.”); *United States v. Livoti*, 196 F.3d 322, 328-30 (2d Cir. 1999); *United States v. Galante*, 111 F.3d 1029, 1032-33 (2d Cir. 1997); *United States v. Rioux*, 97 F.3d 648, 663 (2d Cir. 1996).



