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Bruce M. Selya

John C. Massaro

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THE ILLUSTRATIVE ROLE OF SUBSTANTIAL ASSISTANCE DEPARTURES IN COMBATTING ULTRA-UNIFORMITY†

Hon. Bruce M. Selya*
John C. Massaro**

THE CRITICISM

The United States Sentencing Guidelines are regularly attacked by critics, many of whom wear the robes of the federal judiciary, on the ground that they too severely constrict the discretion of district judges and, therefore, result in sentences which do not adequately reflect the particular circumstances of individual offenders. Put another way, the complaint is that the guidelines create an undesirable "ultra-uniformity" in which equal sentences are frequently imposed on criminals with importantly different backgrounds and circumstances.[1]

We attempt to test the validity of this oft-voiced criticism by re-examining it through the lens of an underrated guideline provision, one dealing with departures to reflect substantial assistance rendered in the investigation or prosecution of another person. Part I briefly describes the origin and operation of the guidelines and indicates, in a general

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* Judge, United States Court of Appeals for the First Circuit; Adjunct Professor of Law, Boston College Law School; Adjunct Professor of Law, Boston University School of Law. B.A. 1955, Harvard College, J.D. 1958, Harvard Law School.

** Associate, Arnold & Porter, Washington, DC. B.A. 1989, Williams College, J.D. 1992, Harvard Law School.

[1] A full catalogue of those who embrace this view would exhaust the patience of readers and writers alike. For some exemplars, see Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Charles Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992); Gerald F. Uelmen, *Federal Sentencing Guidelines: A Cure Worse than the Disease*, 29 AM. CRIM. L. REV. 899 (1992); Joseph Weis, *The Federal Sentencing Guidelines—It's Time for A Reappraisal*, 29 AM. CRIM. L. REV. 823 (1992). Guidelines criticism, while widespread (and frequently justified), is not invariably a way of life. In a recent survey, 41% of federal judges responding stated that they thought the guidelines were working either very well, well or somewhat well; 51% responded that the system was working either somewhat poorly, very poorly or not at all. *See* Don J. DeBenedictis, *The Verdict Is In*, A.B.A. J., Oct. 1993, at 78–79.

way, some areas where the discretion of sentencing courts remains intact. Part II turns to the substantial assistance provision, elucidating its important, and frequently relied upon, role in the guidelines praxis. Turning from the hors d'oeuvres to meat and potatoes, Part III examines the mechanics of the provision's implementation, and notes possible areas of flexibility. Part IV singles out four of the lessons learned in the crucible of the substantial assistance provision and argues that they have more general applicability to the guidelines as a whole. Finally, Part V concludes that the ultra-uniformity criticism, while conceived of humble truth, may have acquired, through its near-mantric repetition, an undeserved status as dogma.

I. THE ORIGIN AND OPERATION OF THE GUIDELINES

Before turning to a more detailed investigation of substantial assistance departures and their illustrative role in combatting ultra-uniformity, we place section 5K1.1 in its natural habitat.

A. *Origin*

For many years, federal district judges enjoyed virtual free rein when sentencing defendants; there was no requirement that a judge state the reasons for the sentence imposed and little oversight by the courts of appeals.[2] As one might expect, this system of broad discretion, in which judges might mull many factors in implementing their own notions of justice, resulted in demonstrably disparate treatment of similarly situated defendants.[3]

The Sentencing Reform Act of 1984 brought about a sea of change.[4] Among other things, that Act created the United States Sentencing

[2] *See* United States v. Tucker, 404 U.S. 443, 447 (1972) ("a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review"); United States v. Ruiz-Garcia, 886 F.2d 474, 477 (1st Cir. 1989) ("By and large, sentencing decisions were the district courts' prerogative. Sentences were infrequently appealed. When appeals were taken, success was hen's-teeth rare."); *cf.* Williams v. Illinois, 399 U.S. 235, 243 (1969) ("Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear."); *see also* Ogletree, *supra* note 1, at 1940–44 (discussing history of federal sentencing).

[3] *See generally* Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 3–4 (1991) (collecting criticisms of pre-guidelines system).

[4] 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988); 28 U.S.C. §§ 991-998 (1988). An analysis of how the Act came into existence is beyond the scope of this article. Other sources are available to slake this particular thirst. *See, e.g.*, Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

Commission and charged it with promulgating a set of sentencing guidelines designed to "provide certainty and fairness in meeting the purposes of sentencing, *i.e.*, 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."[5] In the words of the Sentencing Commission, Congress "sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders" but also "sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity."[6] This thinking produced the sentencing guidelines, which became law on November 1, 1987.[7]

B. *Operation*

The guidelines revolve around a grid which contains forty-three offense levels on its vertical axis and six criminal history categories on its horizontal axis.[8] Occupying the body of the grid are 258 sentencing ranges—one for each possible combination of offense level and criminal history category.[9] In order to determine the applicable range, a judge need only follow the user-friendly application instructions that the Sentencing Commission has provided.[10] First, the judge turns to Appendix A of the guidelines which identifies, for a large number of criminal statutes, the relevant Chapter Two provision for the crime at issue.[11] That provision assigns the defendant's conduct a base offense

[5] 28 U.S.C. § 991(b)(1)(B) (1988).

[6] United States Sentencing Commission, *Guidelines Manual*, Ch.1, Pt.A, intro. comment, at 1-2 (Nov. 1993) [hereinafter "U.S.S.G."; all references will be to the November 1993 version unless otherwise indicated]. In overhauling the sentencing system Congress also sought to achieve "honesty" in sentencing. This was accomplished largely through the abolition of parole. *See* 18 U.S.C. § 3624(b) (1988) (instituting a system based on "good time" credits in which, at most, offenders receive reductions of fifty-four days for every year of good behavior in prison); Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 2027 (1984) (repealing Parole Commission's broad authority to reduce sentences by up to two-thirds).

[7] *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

[8] U.S.S.G. Ch.5, Pt.A.

[9] Congress dictated that the high point of each range not exceed the low point by more than twenty-five percent or 6 months, whichever is greater. 28 U.S.C. § 994(b)(2) (1988).

[10] U.S.S.G. § 1B1.1.

[11] When there is no guideline expressly promulgated for a particular felony or Class A misdemeanor, the guidelines require that the sentencing judge "apply the most analogous offense guideline." U.S.S.G. § 2X5.1; *see also* 18 U.S.C. § 3553(b) (1988) (setting out similar requirement); United States v. Mariano, 983 F.2d 1150, 1157–59 (1st Cir. 1993) (reviewing district court's

level and may also require adjustments in this level to reflect the specific characteristics of the offense (*e.g.*, the amount of money involved in a fraud or the use of a firearm in robbery). Next, the judge looks to Chapter Three which, in appropriate instances, requires additional adjustments in the offense level to reflect more general aspects of the offense and the offender (*e.g.*, the victim's characteristics, whether multiple counts exist, or whether the defendant has accepted responsibility for his acts). At this stage, the offense level is set, and the judge must turn to the task of determining the defendant's criminal history category. Chapter Four guides this process by assigning points to each aspect of a defendant's past conviction record. The total of points assigned determines which of the six criminal history categories is appropriate.

Knowing the offense level and the criminal history category, the judge may easily determine the applicable sentencing range by referring to the grid. The grid-range, however, is neither the be-all nor the end-all. Recognizing that the numerical calculations mandated by any set of guidelines might not capture all factors relevant to sentencing, Congress left the door open for what have come to be known as "departures"—*i.e.*, instances in which courts, in their discretion, impose sentences outside the range specified by the guidelines.[12] The Commission responded by promulgating several policy statements[13] dictating the conditions under which sentencing courts might depart.[14] The guidelines, in other words, recognize their own fallibility. Frequently, the judge must not only calculate the proper guideline sentencing range but must also decide whether or not that range is appropriate in light of the various departure provisions.[15]

decision in this regard). If there is no sufficiently analogous guideline the judge must "impose an appropriate sentence having due regard for the purposes" of sentencing. 18 U.S.C. § 3553(b); U.S.S.G. § 2X5.1; *see also infra* note 16 (discussing purposes of sentencing).

[12] *See, e.g.*, 18 U.S.C. § 3553(b) (1988) ("The court shall impose a sentence of a kind and within the range [promulgated by the Sentencing Commission] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . .").

[13] 28 U.S.C. § 994(a)(2) (1988) (authorizing issuance of policy statements). Courts have rebuffed attempts to suggest that these policy statements lack force. *See infra* notes 53–55 and accompanying text.

[14] *See infra* notes 21–50 and accompanying text (discussing the three major departure provisions and their respective roles in the guidelines' praxis); *see also* THOMAS W. HUTCHINSON ET AL., FEDERAL SENTENCING LAW AND PRACTICE 752-801 (2d ed. 1994).

[15] If the judge elects to depart from the sentencing range, she must provide the reasons for that decision. If, on the other hand, the judge decides to sentence the defendant within the range prescribed by the grid, the statute does not require any particularized explanation *unless* the guideline range encompasses a span of more than twenty-four months. *See* 18 U.S.C. § 3553(c) (1988).

The last step is determining the *particular* sentence to be imposed. In so doing, the judge considers a slew of factors prescribed by Congress including the seriousness of the offense, the need for deterrence, and the avoidance of unwarranted disparities in sentencing.[16] Only after this largely discretionary decision has been made is sentencing complete.

As this description makes clear, the guidelines significantly curtail the previously unfettered discretion enjoyed by the district courts in sentencing federal defendants. But the description also indicates that sentencing is not a matter of mere mechanics.[17] The various adjustments to the base offense level for specific offense characteristics and other factors depend upon a district court's determination of what conduct is relevant to the offense at issue—a matter inviting district court discretion and necessitating appellate court deference to this front-line assessment.[18] Similarly, district court discretion is summoned, like a genie from a bottle, by the long list of factors to be considered in imposing a particular sentence, and by the somewhat elastic contours of those factors. Finally, the departure provisions introduce play in the joints of the guidelines structure.

II. THE UNDERRATED ROLE OF SUBSTANTIAL ASSISTANCE DEPARTURES

Congress specifically directed the Sentencing Commission to "assure that the guidelines reflect the general appropriateness of impos-

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[16] Congress has stated that:

The court, in determining the particular sentence to be imposed, shall consider:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed-

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

. . . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (1988).

[17] *See, e.g.*, United States v. Britunan, 872 F.2d 827, 828 (8th Cir. 1989) (specifically listing areas in which district court discretion survives advent of the guidelines).

[18] *See* U.S.S.G. § 1B1.3. *See generally* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

ing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."[19] Section 5K1.1 sprang from this Congressional mandate. It provides, *inter alia*, that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."[20] While the departure provision dealing with aggravating or mitigating circumstances (section 5K2.0) has been the subject of much critical discussion and is widely assumed to be the primary mechanism for introducing flexibility into a rigid guidelines structure, the substantial assistance provision has received relatively little attention. This Part explains why section 5K1.1 has fallen into this rut of anonymity and why the section can be expected to move to center stage in the coming years.

A. *Looking Behind the Deceptive Pattern of Appellate Decisions*

One reason for the relative anonymity of section 5K1.1, and for the failure of commentators to trumpet its capacity for combatting ultra-uniformity, is the case law—or lack of it—addressing substantial assistance departures. Circuit level opinions invoking section 5K1.1 are scattered and their numbers are paltry in comparison to the avalanche of opinions precipitated by many of the other guidelines.[21] More to the point, even when courts have turned their gaze toward section 5K1.1, blinders necessarily imposed by the particular legal arguments under consideration have limited the field of vision. The result has been that a few oft-iterated issues dominate the section discourse, leaving a skewed impression of the provision's potential.

The lion's share of opinions devoting any real consideration to substantial assistance departures centers around the "government motion" problem, that is, whether a defendant's opportunity to benefit from section 5K1.1 is dependent on the filing of a government motion for downward departure. But the provision itself deals clearly and curtly

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[19] 28 U.S.C. § 994(n) (1988). Separate provisions authorize district courts to depart below the statutory minimum in certain instances, *see* 18 U.S.C. § 3553(e) (1988), and to depart in order to reflect substantial assistance rendered after sentencing. *See* FED. R. CRIM. P. 35(b).

[20] U.S.S.G. § 5K1.1, p.s.

[21] As a rough example, a computerized search of legal databases reveals that, from the onset of the guidelines to January 10, 1994, 909 published and unpublished opinions mentioned enhancements for obstruction of justice under U.S.S.G. § 3C1.1, while only 567 opinions referred to substantial assistance and section 5K1.1. Results of search are on file with the *Boston College Law Review*.

with this topic, authorizing a district court to depart only "[u]pon motion of the government."[22] As we shall see, courts have faithfully followed this crystalline command and consistently barred substantial assistance departures absent a government motion.[23] Corollarially, courts have been wary, although not overly diffident, when confronted with requests to review a prosecutor's decision not to file such a motion.[24] The opponents of ultra-uniformity, then, find little to like in the many substantial assistance appeals involving the government motion problem.

Another large contingent of appeals implicating section 5K1.1 concerns situations in which the government has made a motion for downward departure but the district court, nonetheless, has decided not to depart. As is the case with the other departure provisions, when district courts decide *not* to depart from a properly calculated sentencing range pursuant to section 5K1.1, appellate jurisdiction is sharply circumscribed.[25] An appeal may lie if there is a colorable claim that the failure to depart stemmed from the sentencing court's mistaken impression that it lacked the legal authority to do so, or, in a similar vein, from the court's misapprehension of the rules governing departure.[26] When the decision not to depart from a properly calculated guideline sentencing range is made while cognizant of the proper legal framework, however, appellate jurisdiction will not normally attach at all.[27]

The majority of appellate level decisions dealing with section 5K1.1, then, have involved either unsuccessful attempts to skirt the government motion requirement, or, when a government motion has occurred, unsuccessful attempts to compel a district court to grant that

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[22] U.S.S.G. § 5K1.1, p.s.

[23] *See infra* notes 52–57 and accompanying text.

[24] *See id.*

[25] Congress sought 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" and therefore established only "a limited practice of appellate review of sentences in the Federal criminal justice system." S. Rep. No. 225, 98th Cong., 2d Sess. 149–50, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3332–33.

[26] A party may appeal a sentence within the guideline range only if: (1) the sentence was imposed in violation of law under 18 U.S.C. § 3742(a)(1), (b)(1) (1988); or (2) the sentence was based on an incorrect application of the guidelines under 18 U.S.C. § 3742(a)(2), (b)(2) (1988); or (3) the sentence, imposed for an offense that lacked a guideline, was plainly unreasonable under 18 U.S.C. § 3742(a)(4), (b)(4). In terms of departures, a defendant may appeal a sentence which is greater than the maximum specified in the applicable guideline sentencing range, *see* 18 U.S.C. § 3742(a)(3) (1988), and the government may appeal a sentence which is less than the minimum specified by that range, *see* 18 U.S.C. § 3742(b)(3).

[27] *See, e.g.*, United States v. Mariano, 983 F.2d 1150, 1153–54 (1st Cir. 1993) (collecting cases and explaining rationale for the rule); United States v. Munoz, 946 F.2d 729, 730–31 (10th Cir. 1991); United States v. Richardson, 939 F.2d 135, 139–40 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 942 (1992); United States v. Castellanos, 904 F.2d 1490, 1497 (11th Cir. 1990).

motion. The common thread, of course, is that in both sorts of cases the criminal defendant enters the court of appeals without the benefit of a substantial assistance departure and leaves in the same condition. What scholarly commentary there has been concerning section 5K1.1 understandably draws its lifeblood from this happenstance, and authors, like appellate advocates, have mainly concentrated their efforts on devising a gallimaufry of normative and black letter arguments against the government motion requirement.[28] Put the pattern of appellate decisions together with the steady barrage of critical commentary and one can begin to understand how there might be a nagging suspicion that section 5K1.1 is a senseless straightjacket permitting little opportunity for escape from the strict regime of the sentencing guidelines.

It is a hard-to-swallow truth—but a truth, nonetheless—that the pages of law reviews and West's reporters do not always reflect perfectly the activity occurring at the trial level.[29] This phenomenon is particularly marked when it comes to substantial assistance departures. Precisely because courts in the section 5K1.1 milieu have been so unbending in demanding a government motion as a departure prerequisite, when a district court does depart, neither the prosecution nor the defense will often have reason to challenge the action.[30] After all, the defendant is not likely to challenge a district court's decision to impose a lesser sentence, assuming it were jurisdictionally possible for her to do so. Similarly, the government has little incentive to complain when its motion to depart is granted. Thus, neither the infrequent appearance of section 5K1.1 on the appellate stage, nor the restrictive tone of the interpretive opinions, says very much about the potency of substantial assistance departures as weapons in the fight against ultra-

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[28] *See, e.g.*, Freed, *supra* note 1, at 1731; *see also* Cynthia K.Y. Lee, *The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement*, 23 IND. L. REV. 681 (1990); Philip T. Masterson, *Eliminating The Government Motion Requirement of Section 5K1.1 of the Federal Sentencing Guidelines: A Substantial Response to Substantial Assistance:* United States v. Gutierrez, 24 CREIGHTON L. REV. 929 (1991); Jonathan D. Lupkin, Note, *§ 5K1.1 and Substantial Assistance Departures: The Illusory Carrot of the Federal Sentencing Guidelines*, 91 COLUM. L. REV. 1519 (1991); Melissa M. McGrath, Comment, *Federal Sentencing Law: Prosecutorial Discretion in Determining Departures Based on a Defendant's Cooperation Violates Due Process*, 15 S. ILL. U. L.J. 321 (1991).

[29] While the filing of sentence-related appeals has escalated rapidly since the guidelines went into effect, only a small percentage of all sentences imposed are appealed. *See* United States v. Rivera, 994 F.2d 942, 951 (1st Cir. 1993) (85% of guidelines sentences not appealed); Daniel J. Freed and Marc Miller, *Contrasting Approaches Toward Guidelines and Departures in Six Circuits*, 5 FED. SENT. REP. 243, 245 & n.2 (1993) (similar).

[30] Parties might, of course, challenge the degree of the departure, but district courts retain wide discretion with respect to such matters. *See infra* notes 125–49 and accompanying text.

uniformity. To gauge this potency, one must look to the front lines where flesh-and-blood defendants are being sentenced by flesh-and-blood federal district judges.

Substantial assistance departures occupy a much more prominent position on this new stage. Of all the sentences imposed under the guidelines in 1993, 16.9 percent, or approximately one in six, involved downward departures for substantial assistance.[31] This record easily suffices to crown section 5K1.1 king of the departure mountain, as it amounts to more than twice the percentage garnered by all other upward and downward departures combined.[32] Nor do these numbers reflect some passing predilection. Substantial assistance departures have exhibited a steady and consistent uptrend, occurring with respect to 5.8 percent of all sentences in 1989, 7.5 percent in 1990, 11.9 percent in 1991, 15.1 percent in 1992, and, as we have indicated, 16.9 percent in 1993.[33] Moreover, such departures occur with greater frequency in what many correctly consider to be the guidelines' mine-run; namely, instances involving convictions for drug trafficking. In this arena, which represents approximately thirty-four percent of all guidelines cases,[34] substantial assistance departures occurred more than one-third of the time.[35]

In short, the crop of appellate decisions and the commentary spawned by them simply do not reflect the extensive activity occurring at the grass-roots level. In both absolute and relative terms, substantial assistance departures occur with great frequency in the typical guidelines case.

B. *Substantial Assistance on the Rise*

In relative, if not absolute, terms one can expect to see substantial assistance departures assume greater prominence in the coming years. This is because section 5K1.1 has a built-in tendency to be fruitful and

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[31] *See* 1993 UNITED STATES SENTENCING COMM'N ANN. REP. 155–65. Reporting year 1993 covers the period from October 1, 1992 through September 30, 1993.

[32] *Id.*

[33] *Id.*; *see* Daniel J. Freed and Marc Miller, *Departures Visible and Invisible: Perpetuating Variation in Federal Sentences*, 5 FED. SENT. REP. 3 (1992). In 1989 and 1990 the Commission derived its figures from a random sample of 25 percent of all cases. In 1991, 1992 and 1993 departure information reflects all available guideline cases (for example, 42,107 in 1993).

[34] See 1993 UNITED STATES SENTENCING COMM'N ANN. REP. 165. Nor was 1993 an aberrational year. Drug crimes were the primary offense category in 44.3 percent of all guideline cases in 1992, far outdistancing their nearest competitor. 1992 United States Sentencing Commission Ann. Rep. at 44–45. Drug trafficking cases, in particular, represented 15,142 of the 36,229 cases, or 42 percent. *Id.* at 131.

[35] 1993 UNITED STATES SENTENCING COMM'N ANN. REP. 155–65.

multiply the instances of its invocation—a feature which distinguishes it from other departure provisions whose function in the guidelines machinery presages a contrary tendency. For example, section 5K2.0 empowers a district court to depart from the guideline sentencing range where there "'exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.'"[36] Although some would turn the spotlight on the first part of this language, emphasizing the opportunities for district courts to ignore or override guideline sentencing ranges, courts have given equal weight to the latter part. Accordingly, section 5K2.0 is meant to operate as a safety valve in those less frequent occasions where an important or extraordinary circumstance not duly considered by the Sentencing Commission is present.[37]

In other words, section 5K2.0 is not to be applied as a matter of course by district judges. Rather, it enables judges bound by the guidelines to impose fair and particularized sentences even in unique or unanticipated circumstances. Into the bargain, the section serves as a warning bell alerting the Sentencing Commission and sentencing process participants to areas where the guidelines may require revisions or augmentation. Thus, district courts are obliged to provide the reasons for the departures they make,[38] and the Commission fastidiously keeps track of these reasons.[39] This is done not out of an undiluted love for statistics but, rather, because Congress mandated that the Commission recommend guideline refinements to respond to changing data.[40]

As statistical sources and anecdotal testimony have helped identify and suggest methods of plugging leaks in the guidelines structure, a number of refinements—far too many, some say—have emerged.[41] One primary and intended effect of this leak-plugging process is to diminish over time the number of situations in which section 5K2.0 might legitimately come into play. Thus, departures driven by this section occurred with greater frequency when the guidelines were in

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[36] U.S.S.G. § 5K2.0, p.s. (quoting 18 U.S.C. § 3553(b)).

[37] *See, e.g.*, United States v. Aguilar-Pena, 887 F.2d 347, 350–51 (1st Cir. 1989); United States v. Nuno-Para, 877 F.2d 1409, 1414 (9th Cir. 1989); United States v. Palta, 880 F.2d 636, 639–40 (2d Cir. 1989); United States v. Uca, 867 F.2d 783, 786 (3d Cir. 1989); *see also* United States v. Rivera, 994 F.2d 942, 947–48 (1st Cir. 1993) (explaining when a circumstance can be said not to have been adequately considered by the Commission).

[38] *See* 18 U.S.C. § 3553(c) (1988).

[39] *See* 1992 UNITED STATES SENTENCING COMM'N ANN. REP. 20–24, 124–25.

[40] *See* 28 U.S.C. § 994(o) (1988); *see also* U.S.S.G. Ch.1, Pt.A, intro. comment.

[41] *See* U.S.S.G. App. C (listing all amendments to date and giving reasons for their enactment).

their infancy and have decreased dramatically since that time.[42] Certainly, it is too early to place section 5K2.0 on an endangered species list as the infinite variety of factual situations thrown up by our ever-changing world guarantee the continuing need for a safety valve. However, given that the guidelines are still relatively young, there may be a continued decrease in the applicability of section 5K2.0 as rough spots in the guidelines are smoothed over. Much will depend, of course, on whether courts relax the standards for section 5K2.0 departures to offset the greater specificity that the Commission, year by year, brings to the text.

Similar reasoning applies to the other main departure provision, U.S.S.G. § 4A1.3. This permits district courts to "consider imposing a sentence departing from the otherwise applicable guideline range" when "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes."[43] While section 5K2.0 comes into play most frequently when the offense level, for one reason or another, fails to capture the particularized circumstances surrounding the crime, section 4A1.3 performs a similar function along the other axis of the guidelines grid.[44] And, the track record of the provision has been similar to that of its counterpart. As the Commission has revised the guideline sections dealing with a defendant's criminal history,[45] there has been a corresponding decline in the invocation of this departure provision.[46] We probably can expect more of the same in the future, simply because the role that section 4A1.3 was designed to play in the sentencing process would seem to demand such a result.

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[42] *See generally* 1993 UNITED STATES SENTENCING COMM'N ANN. REP. 157.

[43] U.S.S.G. § 4A1.3, p.s.

[44] Each of the two provisions has been known to operate, to a certain extent, on both axes. Thus, courts have indicated a willingness to uphold departures pursuant to § 5K2.0 to reflect other crimes committed by the defendant (provided they are "related" to the crime at issue), *see* United States v. Dawson, 1 F.3d 457, 465 (7th Cir. 1993), or to reflect, in part, the absence of any criminal record on the part of the defendant. *See* United States v. Big Crow, 898 F.2d 1326, 1329 (8th Cir. 1990). Similarly, when a defendant's criminal history category is the highest on the chart (CHC VI), but is nonetheless underrepresentative, § 4A1.3 recommends that a court departing upward determine the proper sentence "by moving incrementally down the sentencing table to the next higher offense level . . . ." U.S.S.G. § 4A1.3, p.s., comment.

[45] *See* U.S.S.G. §§ 4A1.1, 4A1.2. Amendments in other provisions also affect the availability of § 4A1.3 departures. For example, minimum sentences required by the career offender provisions can moot the need to depart upward because of an inadequacy in the criminal history category. U.S.S.G. Ch. 4, Pt. B (sentences for career offenders).

[46] *Compare* 1992 UNITED STATES SENTENCING COMM'N ANN. REP. 124–25 *with* 1989 United States Sentencing Commission Ann. Rep. at 49–50.

In contrast, the purpose of section 5K1.1 reveals it to be a rising star. Congress singled out substantial assistance as a circumstance meriting lower sentences,[47] and the Sentencing Commission responded by crafting section 5K1.1. As the First Circuit recently noted in *United States v. Mariano*, the guideline serves dual purposes.[48] In addition to permitting *ex post* sentence tailoring to reflect meaningful assistance already rendered by defendants, the section provides defendants, *ex ante*, with an incentive to cooperate in the administration of justice. The first purpose helps to guard against ultra-uniformity in sentencing.[49] The second ensures both the provision's popularity among defendants and its frequency of use. After all, like other incentives, section 5K1.1 was conceived out of a desire to maximize the occurrence of its operative condition (*i.e.*, cooperation with law enforcement authorities) and, as a necessary corollary, to maximize the number of times the section would be invoked.[50] This expansive purpose places it in direct contrast to the more contracting function allocated to other departure provisions.

In short, the quiet predominance of substantial assistance departures is no anomaly. The underlying purposes of sections 5K2.0, 4A1.3 and 5K1.1 reveal that the last will continue to be first, seizing an ever-increasing slice of the departure pie in the near future. Those who abhor ultra-uniformity would do well, then, to look more closely at section 5K1.1.

III. SECTION 5K1.1 AT WORK

Despite the significant role currently played by substantial assistance departures, and the even larger role anticipated, few courts or commentators have essayed systematic explications of the departure process under section 5K1.1. This Part elucidates the emerging framework for substantial assistance departures and identifies areas of uncertainty or flexibility in the section's application.

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[47] 28 U.S.C. § 994(n) (1988).

[48] 983 F.2d 1150, 1155 (1st Cir. 1993).

[49] *See* United States v. Vargas, 925 F.2d 1260, 1265 n.5 (10th Cir. 1991); *see also infra* notes 90–99 and accompanying text.

[50] *See* United States v. Mariano, 983 F.2d 1150, 1155 (1st Cir. 1993); *see also* United States v. Maier, 975 F.2d 944, 948 (2d Cir. 1992) ("Congress and the Commission favor cooperation departures."); United States v. Valdez-Gonzalez, 957 F.2d 643, 651 n.3 (9th Cir. 1992) (Fernandez, J., dissenting on other grounds) (§ 5K1.1 is an incentive provision); *Vargas*, 925 F.2d at 1265 (§ 5K1.1 "designed to *promote* . . . cooperation").

A. *Departing*

A district court considering a substantial assistance departure must be sensitive to the operative conditions that section 5K1.1 identifies. First and foremost, the court must have before it a government motion to depart; then the court, like the government, must determine whether the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.[51]

1. The Government Motion Requirement

Section 5K1.1 requires, as an absolute prerequisite to departure, a government motion.[52] This requirement has, to date, been impervious to attack. The fact that section 5K1.1 is labelled a policy statement has not loosened the requirement, partly because of case law suggesting that policy statements are to be accorded the same weight as guidelines and partly because one simply cannot half-obey a provision—policy statement or not.[53] Attempts to suggest that the requirement is inconsistent with the congressional directive underlying it have repeatedly failed.[54] Courts, while acknowledging that the motion man-

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[51] *See* U.S.S.G. § 5K1.1, p.s.

[52] *See id.* The Supreme Court recently said as much, and, before that, the circuits had been uniform in enforcing the requirement. *See* Wade v. United States, 112 S. Ct. 1840, 1843 (1992) (referring to the "clearly correct" view that § 5K1.1 has this condition limiting the district court's authority); United States v. Spears, 965 F.2d 262, 281 (7th Cir.), *cert. denied*, 113 S. Ct. 502 (1992); United States v. Agu, 949 F.2d 63, 67 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 2279 (1992); United States v. Romolo, 937 F.2d 20, 23 (1st Cir. 1991); United States v. Doe, 934 F.2d 353, 361 (D.C. Cir.), *cert. denied*, 112 S. Ct. 268 (1991); United States v. Brown, 912 F.2d 453, 454 (10th Cir. 1990); United States v. Levy, 904 F.2d 1026, 1034–35 (6th Cir.), *reh'g denied sub nom* United States v. Black, 1990 U.S. App. LEXIS 12858 (6th Cir. June 25, 1990), *cert. denied*, 498 U.S. 1091 (1991); United States v. Ortez, 902 F.2d 61, 64 (D.C. Cir. 1990); United States v. Bruno, 897 F.2d 691, 694–95 (3d Cir. 1990); United States v. Alamin, 895 F.2d 1335, 1337 (11th Cir.), *reh'g denied*, 904 F.2d 712 (11th Cir. 1990), *cert. denied*, 498 U.S. 873 (1990); United States v. Francois, 889 F.2d 1341, 1343–45 (4th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990); United States v. Ayarza, 874 F.2d 647, 653 (9th Cir. 1989), *cert. denied*, 493 U.S. 1047 (1990); United States v. White, 869 F.2d 822, 829 (5th Cir.), *cert. denied*, 490 U.S. 1112 (1989). The Eighth Circuit was, for a time, divided, *see* United States v. Gutierrez, 917 F.2d 379, 379 (8th Cir. 1990) (en banc) (affirming, without opinion and by an equally divided court, district court decision to depart absent government motion), but has since made clear that a government motion is required. *See* United States v. Kelley, 956 F.2d 748, 751–57 (8th Cir. 1992) (en banc).

[53] *See* Stinson v. United States, 113 S. Ct. 1913 (1993); Williams v. United States, 112 S. Ct. 1112, 1119 (1992).

[54] *See Doe*, 934 F.2d at 358–60 (collecting cases and finding statute's requirement that guidelines reflect appropriateness of lower sentences for those providing assistance compatible with the government motion requirement); United States v. Lewis, 896 F.2d 246, 247–49 (7th Cir. 1990) (considering contemporaneously enacted statutes that also require government motion). *But see* United States v. Dawson, 990 F.2d 1314, 1317–1319 (D.C. Cir. 1993) (Edwards, J., concurring)

date may be "of dubious merit," have nonetheless upheld it against a variety of constitutional assaults, finding it to be a valid exercise of congressional control over sentencing:

> Whether or not [the requirement] is wise is not for us to say. What counts is that defendants had no constitutional right to *any* "substantial assistance" departure provision in the guidelines beyond that mandated by the statute—so they cannot rewardingly complain about the provision which emerged. In this context, as so often is true elsewhere in life, half a loaf is better than none.[55]

The final option, amending the provision to eliminate the government motion requirement, has also proved to be unsuccessful.[56] Until it is ushered out by Congress, then, the prerequisite is probably here to stay.[57] This leaves three possible candidates for flexibility.

a. *Implied Motions*

The first possible avenue for greater flexibility deals with defining a government motion. A number of controversies have swirled around a defendant's contention that government actions, remarks or written words are really government motions in disguise. But such asseverations, even if triumphant in the district court, have so far failed to carry the day on appeal. Thus, letters from the government informing the court of the defendant's cooperation, even when held to be the "func-

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(arguing that the question is open "[i]n some future case" whether § 5K1.1, which is a policy statement, "is invalid because the Commission was required to promulgate a *guideline* under 28 U.S.C. § 994(n)") (emphasis added).

[55] United States v. La Guardia, 902 F.2d 1010, 1011, 1015 (1st Cir. 1990) (citations omitted); *see also* United States v. Snell, 922 F.2d 588, 590–91 (10th Cir. 1990) (upholding section on the basis of collected cases which considered a wide variety of constitutional attacks); United States v. Spees, 911 F.2d 126, 127 (8th Cir. 1990) (collecting cases upholding section against separation of powers and due process attacks); *Lewis*, 896 F.2d at 249 (upholding section against due process attack); *Francois*, 889 F.2d at 1344; *Huerta*, 878 F.2d at 93; *Ayarza*, 874 F.2d at 653; United States v. Musser, 856 F.2d 1484, 1487 (11th Cir. 1988) (per curiam), *cert. denied*, 489 U.S. 1022 (1989).

[56] *Compare* 57 Fed. Reg. 62,832–01 (1992) (listing, for public comment, possible proposed amendments 24, 31 and 47 which, in various ways, would alter or delete government motion requirement) *with* 58 Fed. Reg. 27,148 (1993) (not listing any of these among the proposed amendments transmitted by the Commission to Congress).

[57] Congressional involvement in the matter is far from out of the question. *See generally* Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 196–98 (1993) (advocating more active congressional role in guidelines matters). Nor is the Sentencing Commission's opposition to amending the provision in this regard necessarily immutable. *See, e.g.*, Stith & Koh, *supra* note 4, at 290 n.413 (observing that the President will have an opportunity to replace a majority of Commission members).

tional equivalent" of a motion, have not been deemed sufficient to confer an ability to depart on the district court.[58] A wide assortment of statements to like effect, when made by the government at sentencing, have similarly been construed as purely informative, that is, as a means of providing the court with information relevant to the question of where to sentence within the appropriate guideline range. Such statements have not been treated as authorizing the court to depart if it deems the circumstances appropriate.[59] There is tension between this formalistic insistence on an actual motion in the section 5K1.1 context and the more elastic interpretation of the motion requirement in other contexts.[60] That tension may lead some courts to abjure the strictest versions of the "no implied motion" interpretation. In the end, both interpretations, and the concomitant tension between them, are rooted in the text and commentary of section 5K1.1.[61] Thus, most attempts to fashion motions out of stray remarks or actions are likely to meet continued rejection. The upshot: when a defendant wants to cooperate, he had best get it in writing.[62]

b. *Reviewing a Failure to File*

A second, more promising, avenue of potential flexibility is the ability of district courts to review a prosecutor's refusal to file a motion for downward departure under section 5K1.1. In general, there are three grounds upon which such review may be based: (1) a constitu-

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[58] *See, e.g.*, United States v. Brown, 912 F.2d 453 (10th Cir. 1990); United States v. Coleman, 895 F.2d 501, 505 (8th Cir. 1990); *see also* United States v. Baker, 965 F.2d 513, 516 (7th Cir. 1992) (noting that "the government motion requirement cannot be met under any theory of 'implied' or 'implicit' motions").

[59] *See* United States v. Berke, 930 F.2d 1219, 1223–24 (7th Cir.), *reh'g denied*, 1991 U.S. App. LEXIS 11167 (7th Cir. May 22, 1991); United States v. Brick, 905 F.2d 1092, 1098–99 (7th Cir. 1990). Part of the reason for this conclusion is that the government has an obligation to disclose information anent a defendant's cooperation so that the court may consider it in formulating a sentence within the guidelines. *See La Guardia*, 902 F.2d at 1016 (collecting authorities); *see also* 18 U.S.C. § 3661 (1988); U.S.S.G. § 1B1.4; Fed. R. Crim. P. 32(c)(2)(A),(B).

[60] *See infra* notes 150–59 and accompanying text (discussing majority rule in favor of allowing § 5K1.1 motion to do double duty by also serving to permit the court to depart below statutory minima under § 3553(e)); *see also* United States v. Keene, 933 F.2d 711, 722 (9th Cir. 1991) (Alarcon, J., dissenting) (pointing out the tension between these two rules).

[61] *Compare* U.S.S.G. § 5K1.1, p.s. (requiring "government motion") *with infra* notes 160–64 and accompanying text (discussing commentary). The distinction on which courts are likely to resolve this apparent inconsistency is that between the *grounds* for departing and the decision as to a departure's *degree*.

[62] *See* Marcia G. Shein, *Get the Agreement in Writing—First: When Your Client Wants to Cooperate*, 6 S.P.G. Crim. Just. 35 (1991); Bradley L. Williams, *Practice Under the Federal Sentencing Guidelines*, 33 Res Gestae 369, 373 n.20 (1990).

tionally impermissible motive attributable to the government;[63] (2) a government motive unrelated to the furtherance of any legitimate end;[64] or (3) a broken promise to make a motion.[65] Generalized allegations relating to these matters will not suffice to trigger further inquiry as courts have required the defendant to make a threshold showing before concluding that discovery or some form of evidentiary hearing, let alone a remedy, is in order.[66]

When it comes to constitutionally impermissible motives, there are some clear candidates and some not-so-clear candidates. Refusing to file a motion because of a defendant's race or religion surely would subject that refusal to judicial review.[67] But the category of constitutionally impermissible motives also includes less obvious ploys, say, a prosecutor's attempt to penalize a defendant for exercising the right to trial or the right to remain silent.[68] In a global sense, courts have demonstrated a willingness to review prosecutors' decisions not to file section 5K1.1 motions when there is a threshold demonstration of either "vindictiveness or invidious selectivity."[69] As a substantive matter, this formulation augurs some potential for enabling district courts to re-

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[63] *See* Wade v. United States, 112 S. Ct. 1840, 1843–44 (1992) (unanimous Court); *see also* Wayte v. United States, 470 U.S. 598, 608–09 (1985); Bordenkircher v. Hayes, 434 U.S. 357, 364, *reh'g denied*, 435 U.S. 918 (1978).

[64] *See Wade*, 112 S. Ct. at 1844 (citing Chapman v. United States, 500 U.S. 453, *reh'g denied*, 501 U.S. 1270 (1991)); *see also* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

[65] *See generally* Santobello v. New York, 404 U.S. 257, 262 (1971) (holding that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled").

[66] *See Wade*, 112 S. Ct. at 1844 (collecting cases); United States v. Bagnoli, 7 F.3d 90 (6th Cir. 1993), *petition for cert. filed* Mar. 7, 1994. Although the defendant has no right to a hearing absent such a demonstration, district courts are afforded wide discretion in their determination as to whether a hearing is appropriate. *See* United States v. Delgado-Cardenas, 974 F.2d 123, 126 (9th Cir.), *amended* 1992 U.S. App. LEXIS 32423 (9th Cir. Dec. 2, 1992); United States v. Tardiff, 969 F.2d 1283, 1286 (1st Cir. 1992).

[67] *See Wade*, 112 S. Ct. at 1844; United States v. Bayles, 923 F.2d 70, 72 (7th Cir. 1991).

[68] *See* United States v. Paramo, 998 F.2d 1212, 1220 (3d Cir.) (remanding because district court may not have been aware that it had the power to review government's failure to make motion where there was evidence that such failure resulted from government intent to penalize defendant for exercising right to trial), *reh'g denied*, 1993 U.S. App. LEXIS 20322 (3d Cir. Aug. 6, 1993), *cert. denied*, 114 S. Ct. 1076 (1994); United States v. Amparo, 961 F.2d 288, 293 (1st Cir.) (remarking upon vast potential of this review to render government motion requirement nugatory and rejecting claim because there was no evidence of such an infringement in that case), *cert. denied sub nom.* Sanchez v. United States, 113 S. Ct. 224 (1992); *see also* United States v. Doe, 934 F.2d 353, 361 (D.C. Cir.), *cert. denied*, 112 S. Ct. 268 (1991); United States v. Mills, 925 F.2d 455, 461–62, *vacated*, 933 F.2d 1042, *opinion replaced on reh'g*, 964 F.2d 1186 (D.C. Cir.), *cert. denied*, 113 S. Ct. 471 (1992); *cf.* United States v. Drown, 942 F.2d 55, 60 (1st Cir. 1991) (suggesting that infringement of statutory right could also form the basis of district court review).

[69] *Doe*, 934 F.2d at 361.

seize discretion;[70] as a procedural matter, the determination of whether there is sufficient threshold evidence to justify inquiring into a prosecutor's failure to file, as well as the subsequent decision as to how to proceed once the threshold has been met, are left largely to the district judge.[71]

The second ground for challenging a prosecutor's failure to file a section 5K1.1 motion—that the decision is unrelated to any legitimate end—may be more difficult to establish. The United States Supreme Court in *United States v. Wade* suggested that, so long as the government shows it made its decision while cognizant of the defendant's ability to cooperate, challenges to the decision are unlikely to succeed because there will usually be a rational relation between the choice and a government end.[72] *Wade* resolved the circuit split over whether district courts may effectively weigh the underlying costs and benefits of a prosecutor's decision by reviewing it for "arbitrariness."[73] The Court said "no," making it plain that prosecutors are the ones who determine whether a government end is actually furthered by a decision to invoke section 5K1.1, just as prosecutors are the ones to whom the charging decisions are entrusted.

The final grounds for district court review are contractual promises; the government may not induce cooperation from a defendant by holding out the carrot of a substantial assistance departure, and then, having received the cooperation, renege on its promise.[74] When this

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[70] *See generally Amparo*, 961 F.2d at 293.

[71] United States v. McAndrews, 12 F.3d 273, 277 (1st Cir. 1993) (so ruling in the related context of FED. R. CRIM. P. 35(b), employing reasoning equally applicable to the § 5K1.1 context, and looking for guidance to cases in the § 5K1.1 context).

[72] *See Wade*, 112 S. Ct. at 1844 (citing *Doe*, 934 F.2d at 358, and United States v. La Guardia, 902 F.2d 1010, 1016 (1st Cir. 1990)) (government's decision may have reflected "its rational assessment of the cost and benefit that would flow from moving"); *see also* United States v. Doe, 940 F.2d 199, 206 (7th Cir.), *cert. denied*, 112 S. Ct. 201 (1991) (prosecutor's evaluation of deterrence value of not departing held sufficient government end).

[73] *Compare* United States v. Amparo, 961 F.2d 288, 293 (1st Cir. 1992) (arbitrariness review not permitted); United States v. Smith, 953 F.2d 1060, 1064–66 (7th Cir. 1992); *Doe*, 934 F.2d at 361; United States v. Bruno, 897 F.2d 691, 696 (3d Cir. 1990) *with* United States v. Goroza, 941 F.2d 905, 908 (9th Cir. 1991) (arbitrariness review may be permitted); United States v. Raynor, 939 F.2d 191, 195 (4th Cir. 1991); United States v. Levy, 904 F.2d 1026, 1035–36 (6th Cir.), *reh'g denied sub nom.* United States v. Black, 1990 U.S. App. LEXIS 12858 (6th Cir. June 25, 1990), *cert. denied*, 498 U.S. 1091 (1991); United States v. Alamin, 895 F.2d 1335, 1337 (11th Cir. 1990); *and* United States v. Lee, 989 F.2d 377, 379–80 (10th Cir. 1993) (arbitrariness review permitted); United States v. Rexach, 896 F.2d 710, 713 (2d Cir.), *cert. denied*, 498 U.S. 969 (1990); United States v. Smitherman, 889 F.2d 189, 191 (8th Cir.), *reh'g denied*, 1989 U.S. App. LEXIS 18784 (8th Cir. Dec. 6, 1989), *cert. denied*, 494 U.S. 1036 (1990). *See also* United States v. Urbani, 967 F.2d 106, 110 (5th Cir. 1992) (interpreting *Wade*); United States v. Taylor, 868 F.2d 125, 126 (5th Cir. 1989).

[74] *See, e.g.*, Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Lewis, 896 F.2d 246, 249 (7th Cir. 1990).

occurs, the defendant may be entitled either to withdraw his guilty plea, if one has been made pursuant to the "contract," or to receive specific performance of the government's promise.[75]

District court discretion is at its zenith in this realm because the court must determine not only remedies (where appropriate) but, more importantly, a series of interrelated questions, such as whether an agreement exists,[76] what the terms of that agreement are, whether the agreement has been honored, and possibly, the harmlessness of the breach.[77] Courts have not been reticent in any of these areas. For example, several district courts have read plea agreements to include an obligation on the government's part to act in good faith, both when negotiating the agreement and in endeavoring to comply with its terms.[78] This may mean rewarding defendants who provide as much assistance as could reasonably have been expected;[79] it may mean construing ambiguities in the agreement in favor of the defendant;[80] it may mean ensuring that the government give honest consideration to the filing of a motion;[81] or it may even mean forcing the government to file a motion because it agreed to do so, regardless of whether the defendant's efforts actually did assist the law enforcement effort.[82]

Of course, this remediation is unavailable when the defendant has breached the agreement, a return volley often made by United States Attorneys accused of failing to live up to their end of the bargain. When such accusations are traded, the district courts must examine not only what the agreement requires of the government but also what

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[75] *See* United States v. Watson, 988 F.2d 544, 550 (5th Cir.), *reh'g denied sub nom.* United States v. Camphele, 1 F.3d 1239 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 698 (1994). The defendent also may have a right to discovery and/or a hearing on the matter. *See generally* James E. Felman, *Litigation Strategies for Substantial Assistance Downward Departures*, 41 FED. BAR NEWS & J. 422, 424 (1994).

[76] *See* United States v. Floyd, 1 F.3d 867, 870–71 (9th Cir. 1993); United States v. Spees, 911 F.2d 126, 128 (8th Cir. 1990).

[77] *See* United States v. Forney, 9 F.3d 1492, 1499–1501 (9th Cir. 1993).

[78] *See* United States v. Khan, 920 F.2d 1100, 1105 (2d Cir. 1990), *cert. denied*, 499 U.S. 969 (1992).

[79] *See generally* United States v. Fairchild, 940 F.2d 261, 266 (7th Cir. 1991) ("The government should make clear its requirements for making the substantial assistance departure motion."). *See also* United States v. Hernandez, 17 F.3d 78 (5th Cir. 1994).

[80] *See* United States v. De la Fuente, 8 F.3d 1333, 1340–41 (9th Cir. 1993).

[81] *See* United States v. Dixon, 998 F.2d 228, 231 (4th Cir. 1993) ("The government undertook to 'deem' whether [defendant's] assistance had been substantial, and not whether it should withhold the 5K1.1 motion for some unrelated tactical reason. The government promised to 'deem,' one way or the other. It must keep this promise.").

[82] *See generally* United States v. Knights, 968 F.2d 1483, 1488 (2d Cir. 1992); United States v. Fairchild, 940 F.2d 261, 266 (7th Cir. 1991); *see also* United States v. Laliberte, 25 F.3d 10, 14 (1st Cir. 1994).

it requires of the defendant, and whether he complied, or thought he complied, with those requirements.[83] There are interesting variations on these themes. For example, in one case the plea agreement explicitly ceded complete discretion to the district court, obliging the government to make a motion for downward departure "in the event that the district court found 'substantial compliance'" on the defendant's part.[84]

Although the standard of appellate review in this arena is not completely settled,[85] there is little doubt that district court discretion in respect to the government motion requirement is quite robust, provided that there is a colorable claim that an agreement to file a motion exists.

c. *Influencing the Decision to Make a Motion*

In practice, the government motion requirement is more flexible than one might expect. Frequently the requirement is spoken of as something completely within the control of the government. But this platitude overlooks the obvious; defendants and district judges alike play significant roles in determining whether a government motion is made. These roles arise largely out of the fact that close to ninety percent of all cases involve plea agreements.[86] Defendants, through this process, have the right to reserve their cooperation, without penalty, until the government commits to seek or consider a downward departure;[87] and, in certain situations, judges may withhold their agreement to a plea bargain unless an appropriate commitment is made.[88] More-

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[83] *See* United States v. Baker, 4 F.3d 622, 624 (8th Cir.), *reh'g denied*, 1993 U.S. App. LEXIS 26024 (8th Cir. Oct. 7, 1993); United States v. Conner, 930 F.2d 1073, 1076–77 (4th Cir.), *cert. denied*, 112 S. Ct. 420 (1991); *see also* United States v. Yee-Chau, 17 F.3d 21, 25–26 (2d Cir. 1994).

[84] United States v. Fields, 906 F.2d 139, 142 (5th Cir.), *cert. denied*, 498 U.S. 874 (1990).

[85] *Compare* United States v. Watson, 988 F.2d 544, 548 (5th Cir. 1993) ("Whether the government's conduct violated the terms of the plea agreement is a question of law.") *with* United States v. Conner, 930 F.2d 1073, 1076 (4th Cir. 1991) (district court's determination of whether defendant provided assistance contemplated by agreement was subject to review for clear error). *See also* United States v. Gonzalez-Perdomo, 980 F.2d 13, 16 n.2 (1st Cir. 1992) (listing cases identifying in-circuit tension on this point). The "contradiction" is probably a mirage. Courts will undoubtedly resolve to review these issues as they have other contract law issues, and the result will be a spectrum of standards ranging from *de novo* review for predominantly legal issues to clearly erroneous for predominantly factual issues. *See generally* United States v. Mariano, 983 F.2d 1150, 1158 (1st Cir. 1993); *see also* United States v. Howard, 996 F.2d 1320, 1327–28 (1st Cir. 1993).

[86] *See* 1992 UNITED STATES SENTENCING COMM'N ANN. REP. 56.

[87] *See* U.S.S.G. § 5K1.2, p.s.; *see also* United States v. Klotz, 943 F.2d 707, 710 (7th Cir. 1991); United States v. La Guardia, 902 F.2d 1010, 1016 (1st Cir. 1990).

[88] *See generally* FED. R. CRIM. P. 11(e)(4); *see also* Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 471–74 (1987).

over, even outside the plea agreement context, a prosecutor who refuses to file a substantial assistance motion when one seems appropriate "may be reasoned with by the judge and, on appropriate occasions, a supervisor may be called in."[89]

In sum, although the government motion requirement is strict, the district judge and the defendant each retain some say in determining whether the requirement will be fulfilled in a given case. And once a motion is actually filed, section 5K1.1 incorporates immense opportunities for combatting ultra-uniformity.

2. The "Substantial Assistance" Requirement

Perhaps the greatest such opportunity is offered by the section's central requirement—that the defendant have provided "substantial assistance."[90] After all, when a district court departs under section 5K1.1, that action, by definition, helps set apart sentences on the basis of a particularized circumstance, namely, whether or not the defendant has rendered substantial assistance. But the mechanisms of section 5K1.1 may also diminish ultra-uniformity in ways that extend beyond the truistic, for ascertaining the presence of substantial assistance is itself a process imbued with the particular.

The statutory roots of section 5K1.1 offer little guidance in defining the term "substantial assistance."[91] The guideline itself, however, affords some substantial assistance in this regard:

> The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.[92]

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[89] Jack B. Weinstein, *A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines*, 5 FED. SENT. REP. 6, 7 (1992).

[90] U.S.S.G. § 5K1.1, p.s.

[91] 28 U.S.C. § 994(n); *see also* 18 U.S.C. § 3553(e) (1988).

[92] U.S.S.G. § 5K1.1, p.s.

The commentary to section 5K1.1 further notes that "[t]he nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis."[93] For this reason, the commentary suggests that "[l]atitude [be] . . . afforded the sentencing judge to reduce a sentence based upon variable factors."[94]

In such latitude lies liberality. Each of the five enumerated factors, and other factors related to substantial assistance which a court might consider, has the potential to import a wide range of mitigating circumstances into the departure calculus. For example, in certain contexts a district court considering "the risk of injury to the defendant or his family" might properly mete out a lesser sentence (*i.e.*, might decide to depart or to depart further) where a defendant has a large number of dependents and, therefore, is exposed by cooperation to a greater aggregate risk.[95] Similarly, several of the defendant's personal circumstances might relate to his or her vulnerability and, therefore, to the level of danger that cooperation imposes. These are sketchy hypotheticals; the richly textured reality that sentencing courts face on a daily basis invariably involves more closely intertwined facts and, consequently, a greater likelihood that mitigating factors traditionally thought potentially relevant only to section 5K2.0 departures also will contribute to judicial decisionmaking in the substantial assistance sphere.[96]

This is not to say that section 5K1.1 can be transmogrified into an all-consuming vortex which swallows up the restrictions imposed by other provisions of the guidelines. The section authorizes district courts to consider mitigating factors only to the extent that they relate to a defendant's cooperation.[97] Moreover, the section, while remarking the

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[93] *Id.*, comment. (backg'd).

[94] *Id.*

[95] The section explicitly mentions "risk of injury to the defendant or his family," U.S.S.G. § 5K1.1(4), p.s., and thus counteracts, in this specific context, the Commission's general admonition that "[f]amily ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. § 5H1.6, p.s.; *see* United States v. Atkinson, 979 F.2d 1219, 1225–26 (7th Cir. 1992) (discussing, in § 5K1.1 context, the fact that defendant had testified against his own brother).

[96] *See* United States v. Mariano, 983 F.2d 1150, 1156 n.6 (1st Cir. 1993); *see also* United States v. Gregory, 932 F.2d 1167, 1168 (6th Cir. 1991) (dicta upholding sentence where district court had considered defendant's history of abuse as relevant to evaluating her cooperation); Felman, *supra* note 75 at 423–24.

[97] *See Mariano*, 983 F.2d at 1156; United States v. Chestna, 962 F.2d 103, 106–07 (1st Cir.) (per curiam), *cert. denied*, 113 S. Ct. 334 (1992); United States v. Rushby, 936 F.2d 41, 42–43 (1st Cir. 1991); United States v. Thomas, 930 F.2d 526, 528–29 (7th Cir.), *reh'g denied*, 1991 U.S. App. LEXIS 11171 (7th Cir. May 23, 1991), *cert. denied*, 112 S. Ct. 171 (1991); *see also* United States v.

nonexclusivity of its enumerated list, nonetheless identifies five factors likely to be of pivotal importance in divining the appropriateness of a substantial assistance departure.[98] Still, the district court retains broad discretion when weighing these factors and measuring the extent of its departure.[99] Moreover, these factors, along with the notion of substantial assistance itself, indirectly incorporate into the sentencing calculus circumstances likely to ward off ultra-uniformity.

3. The "Investigation or Prosecution" Requirement

Section 5K1.1 further requires that the defendant's assistance have been rendered to an "investigation or prosecution."[100] This phrase operates to restrict the scope of the section,[101] but, as with the "substantial assistance" requirement, it also contains the seeds of the section's potential expansion. Thus, the requirement is restrictive because it means that substantial assistance rendered to the justice system as a whole will not suffice; section 5K1.1 does not contemplate departures based, for instance, on the defendant's setting a good example and, by cooperating, perhaps inducing codefendants to plead guilty, thereby helping to alleviate the "seriously overclogged dockets of the District Courts of the United States."[102] Similarly, facilitating a civil forfeiture proceeding has been held not to constitute assisting in an investigation or prosecution.[103]

On the other hand, the phrase "investigation or prosecution" can encompass a wide range of activities not all of which might be immediately apparent. For example, this rather general language is not limited to instances of assistance to *federal* authorities. Presumably,

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Hall, 977 F.2d 861, 865 (4th Cir. 1992) (arguing that Supreme Court precedent mandates such a result); United States v. Dale, 991 F.2d 819, 857 (D.C. Cir.) (discussing *Hall*), *cert. denied*, 114 S. Ct. 650 (1993).

[98] *See Mariano*, 983 F.2d at 1156 (labelling these "the mother lode of substantial assistance inquiries"); *Thomas*, 930 F.2d at 531; United States v. La Guardia, 902 F.2d 1010, 1017 (1st Cir. 1990).

[99] *See infra* notes 125–64 and accompanying text. The court will also be given discretion by the defendant's efforts to obtain relevant information through, for example, *Brady* motions. *See* Felman, *supra* note 75 at 423.

[100] U.S.S.G. § 5K1.1, p.s.

[101] *See generally* Williams, *supra* note 62, at 373 n.20 (citing the "necessity that other investigations exist" as a practical "drawback" to the section limiting its usefulness to defense attorneys).

[102] United States v. Garcia, 926 F.2d 125 (2d Cir. 1991); *see* United States v. Lockyer, 966 F.2d 1390, 1391–92 (11th Cir. 1992) (per curiam) (departure under § 5K1.1 for "substantial assistance to the judiciary" not warranted).

[103] United States v. Sanchez, 927 F.2d 1092, 1093–94 (9th Cir. 1991); *see also* U.S.S.G. § 5K1.1, p.s, comment. (backg'd) (referring exclusively to a "defendant's assistance to authorities in the investigation of *criminal* activities") (emphasis added).

other forms of assistance may also constitute grounds for departure. The section's title and commentary support such a reading—referring generically to a defendant's "assistance to authorities."[104] And the Third Circuit has recently held that departures are permissible under section 5K1.1 to reflect assistance rendered in the course of state criminal investigations and prosecutions.[105]

The question is how far this opportunity extends. May a district court depart to reflect a defendant's assistance to private investigations conducted by, say, his employer?[106] Taking another tack, is there any subject matter limitation on the connection between the assisted investigation and the crime with which the defendant is charged? And if such a limitation exists, what are its boundaries?[107] Although cases interpreting other guidelines provisions may prove helpful in formulating answers to these questions and others like them,[108] because

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[104] *See* U.S.S.G. § 5K1.1, p.s. Nor does the statutory source for § 5K1.1 refute this interpretation. *See* 28 U.S.C. § 994(n) (referring only to defendant's assistance "in prosecution of another person who has committed an offense"); *see also* 18 U.S.C. § 3553(e) (similar with respect to district court's authority to sentence below statutory minimum).

[105] United States v. Love, 985 F.2d 732, 734–35 (3d Cir. 1993); *see* United States v. Egan, 966 F.2d 328 (7th Cir. 1992), (deciding the issue *sub silentio* in upholding a departure based on assistance to state authorities) *cert. denied,* 113 S. Ct. 1021 (1993); United States v. Shoupe, 929 F.2d 116, 120–21 (3d Cir.), *cert. denied,* 112 S. Ct. 382 (1991); United States v. Hill, 911 F.2d 129 (8th Cir. 1990), *vacated on other grounds,* 501 U.S. 1226 (1991); United States v. Lewis, 896 F.2d 246 (7th Cir. 1990); *cf.* United States v. Emery, 991 F.2d 907, 910–12 (1st Cir. 1993) (interpreting similarly generic terms contained in obstruction of justice provision of U.S.S.G. § 3C1.1 to include state as well as federal authorities); United States v. Lato, 934 F.2d 1080, 1082–83 (9th Cir.), *cert. denied,* 112 S. Ct. 271 (1991).

[106] Looking to other provisions for guidance produces conflicting answers in this case. On one hand, it has been held that the obstruction of justice provision does not apply to private investigations. *See* United States v. Kirkland, 985 F.2d 535, 537–38 (11th Cir. 1993). On the second hand, the guidelines place a value on the success of private organizations' internal crime control mechanisms. *See* U.S.S.G. § 8A1.2, comment. (n.3(k)). Arguably, assistance rendered to private investigations would also assist the "authorities" referred to in the commentary to § 5K1.1. *See* U.S.S.G. § 5K1.1, p.s., comment. (n.2) (backg'd).

[107] *See, e.g.,* United States v. Anderson, 929 F.2d 96, 100 (2d Cir. 1991) ("It is routine for individuals to provide cooperation to the government [and benefit from the cooperation] on matters completely unrelated to the crimes with which they are charged such as aiding in later government 'sting' operations.") *cf.* United States v. Wittie, 25 F.3d 250 (5th Cir. 1994) (motion in initial prosecution did not carry over to conduct involved in second prosecution). To the degree that caselaw interpreting other sections of the guidelines is instructive, it suggests a requirement of some form of nexus between the conduct activating the section and the charged conduct. *See, e.g., Emery,* 991 F.2d at 911 (interpreting U.S.S.G. § 3C1.1 dealing with enhancements for obstruction of justice); United States v. Luna, 909 F.2d 119, 120 (5th Cir. 1990) (per curiam). *But see* United States v. Barry, 938 F.2d 1327, 1334–35 (D.C. Cir. 1991) (interpreting pre-amendment section as requiring a much lesser nexus). We hasten to add, however, that the value of such analogies is limited by the fact that § 5K1.1, because it looks beyond the individual defendant at bar, plays a unique role in the guidelines praxis.

[108] *See supra* note 106 and accompanying text.

section 5K1.1 remains relatively unexplored in the appellate literature, basic questions concerning the section's scope remain open.

4. The "Another Person" Requirement

Before a district court may depart pursuant to section 5K1.1, there is a final requirement: the defendant's substantial assistance must have contributed to the investigation or prosecution "of another person who has committed an offense."[109] In other words, lending a hand in one's own prosecution, helping to clean up after one's own crimes, is not, in and of itself, sufficient to justify the invocation of section 5K1.1.[110] A defendant's assistance, however substantial, must have had at least the potential to "be used by the government to prosecute other individuals" before it can justify a departure.[111]

A number of courts and commentators have suggested that this requirement has the potential to sire sentences of a severity inverse to the defendant's culpability. After all, this thesis runs, the larger the criminal enterprise and the closer a defendant's links to the inner sanctum, the more information she will possess concerning other defendants, and, the syllogism continues, the more information a defendant possesses, the more likely it is that she will able to obtain a substantial assistance departure by divulging that information.[112]

The criticism, if voiced as an attack on the constitutionality of the provision, must fail.[113] Even when construed as a policy argument, the

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[109] U.S.S.G. § 5K1.1, p.s.

[110] *See* United States v. Lockyer, 966 F.2d 1390, 1391–92 (11th Cir. 1992) (defendant's guilty plea and waiver of pretrial motions did not constitute substantial assistance).

[111] *Khan*, 920 F.2d at 1106–07. The deliberateness and importance of this requirement are illustrated by the linguistic lengths to which the Commission went to ensure that departures in sentencing organizations would occur only under similar circumstances. *See* U.S.S.G. § 8C4.1(a), p.s. (requiring assistance in investigation or prosecution "of another organization that has committed an offense, or . . . of an individual not directly affiliated with the defendant who has committed an offense").

[112] *See* United States v. Agu, 949 F.2d 63 (2d Cir. 1991) (speaking of the "'troubl[ing]' concern that 'those minimally involved in criminal offenses often do not have the quantity or quality of information that would result in the government making a motion for downward departure pursuant to § 5K1.1 while those most deeply involved would have the necessary information'") (quoting United States v. Reina, 905 F.2d 638, 640 (2d Cir. 1990)), *cert. denied*, 112 S. Ct. 2279 (1992); *see also* United States v. Brigham, 977 F.2d 317, 318 (7th Cir. 1992); United States v. Musser, 856 F.2d 1484, 1486–87 (11th Cir. 1988), *cert. denied*, 489 U.S. 1022. *See generally* Thomas W. Hillier, II, *Congressional Oversight*, 2 FED. SENT. REP. 224, 226 (1990); Schulhofer, *supra* note 1, at 852–57; Susan E. Ellingstad, Note, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 965 n.41 (1992); Gordon Seymour, Comment, *Downward Departures From the Federal Sentencing Guidelines Based on the Defendant's Drug Rehabilitative Efforts*, 59 U. CHI. L. REV. 837, 852 (1992).

[113] *See, e.g.*, Chapman v. United States, 500 U.S. 453, 465 (1991) (offenders have no right to

criticism is largely misguided and distorts the "another person" requirement. First, it incorrectly assumes that the usefulness of a defendant's assistance is the primary determinant of whether it satisfies the test of substantiality. But, as we have discussed, a salmagundi of other considerations are relevant.[114] The section itself identifies timeliness, completeness, and riskiness of the assistance (to name only a few), and each of these has the potential to operate more forcefully in favor of minnows as opposed to "big fish."[115]

Of still greater interest is the way in which this criticism exaggerates the "another person" prerequisite. There is no requirement in section 5K1.1 that a defendant have been hip-deep in some large criminal enterprise or even that he possess, *at the time of his decision to cooperate*, extensive information about other felons. Rather, the requirement is that the defendant have provided assistance *by the time of sentencing*.[116] Thus, defendants who were only peripherally involved in an ongoing criminal activity frequently have an opportunity, after the authorities have begun investigating them, to gain more information by working undercover.[117] In this way, a defendant who did not collaborate with "another person" in the commission of the offense of convic-

be sentenced in proportion to their respective harms), *reh'g denied*, 501 U.S. 1270 (1991); United States v. Horn, 946 F.2d 738, 746 (10th Cir. 1991) (collecting cases and rejecting argument that substantial assistance requirement in 18 U.S.C. § 3553(e) violates Equal Protection Clause by disadvantaging those who are unable to render such assistance); United States v. Musser, 856 F.2d 1484, 1487 (11th Cir. 1988) (similar); United States v. Broxton, 926 F.2d 1180, 1183 (D.C. Cir.) (holding similarly with regard to Due Process Clause), *cert. denied*, 499 U.S. 911 (1991); *see also* United States v. Peters, 978 F.2d 166, 170 (5th Cir. 1992) (rejecting proportionality attack in § 5K1.1 context); United States v. Brigham, 977 F.2d 317, 318 (7th Cir. 1992); United States v. Kohl, 972 F.2d 294, 299 (9th Cir. 1992); United States v. Keene, 915 F.2d 1164, 1170–71 (8th Cir. 1990).

[114] *See supra* notes 91–99 and accompanying text.

[115] Indeed, it is easy to imagine how a minor participant's assistance, although providing less information, might actually be more deserving of a departure because of the greater risk it imposed on him and his family.

[116] This timing principle which, as will be illustrated, operates sometimes to benefit defendants, also means that defendants may not obtain the unguent of § 5K1.1 *after* sentencing. *See* United States v. Robinson, 948 F.2d 697, 698 (11th Cir. 1991) (per curiam) ("Section 5K1.1 is a sentencing tool, not a resentencing tool; thus, the sentencing judge, when faced with a section 5K1.1 motion, must rule on it before imposing sentence."); *see also* Fed. R. Crim. P. 35(b) (permitting reductions for substantial assistance for up to one year after sentencing); United States v. Lopez, 26 F.3d 512, 520 n.9 (5th Cir. 1994); United States v. Martin, 25 F.3d 211, 216 (4th Cir. 1994); United States v. Mittelstadt, 969 F.2d 335, 337 (7th Cir. 1992); United States v. Mitchell, 964 F.2d 454, 461–62 (5th Cir. 1992); United States v. Drown, 942 F.2d 55, 59 (1st Cir. 1991); United States v. Howard, 902 F.2d 894, 897 (11th Cir. 1990).

[117] *See, e.g.*, Williamson v. United States, 114 S. Ct. 2431, 2437 (1994); *Anderson*, 929 F.2d at 100; Hutchison et al., *supra* note 14, at app. 11; U.S. Department of Justice: Prosecutor's Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984, Pt. V (1989 & Supp. 1991).

tion can still provide assistance in the investigation and prosecution of that person.[118] Appellate courts have held that district courts may not attempt to interfere with a defendant's right to cooperate in this manner.[119] Indeed, it has been suggested that defense counsel must, as part of proficient representation, explore with their clients the possibility of *ex post* cooperation leading to a section 5K1.1 departure.[120] And, in appropriate circumstances, a defendant may even have the right to defer the imposition of sentence to allow more time for his assistance to come to fruition.[121]

Still, despite these weaknesses, the criticism correctly indicates that individual culpability is not the main concern of section 5K1.1 and that the "another person" requirement plays a role in shifting the section's focus to issues of broader societal concern. Thus, this requirement serves notice that the substantial assistance departure provision has a different aim than that of U.S.S.G. § 3E1.1 (which requires an offense level reduction when defendants accept responsibility for their crimes in a timeous manner). Indeed, the commentary explicitly sets the two sections apart.[122] Broadly speaking, providing reductions in the

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[118] United States v. Gerber, 24 F.3d 93, 97 (10th Cir. 1994) (not criminal conduct but, rather, all conduct prior to sentencing was conduct relevant to § 5K1.1 departure). This point raises a different, related criticism, namely, that the section operates to reward those who commit "group" crimes and not those who restrict themselves to more sparsely populated transgressions. *See* 1992 United States Sentencing Commission Ann. Rep. at 131 (table 51) (showing that departures for simple possession of drugs occurred only 0.5% of the time as compared to 25.6% for drug trafficking, 31.1% for bribery, 20.1% for racketeering, and 22.2% for money laundering). Despite the inference, this fact does not mean that serious criminals are receiving lighter sentences than small-time hoodlums. There is no necessary correlation between the solitary nature of a crime and its severity. Thus, substantial assistance departures have been relatively rare in connection with relatively grave offenses such as murder, manslaughter, kidnapping, sexual abuse and assault—presumably because these offenses do not, as a matter of course, involve large numbers of participants—while departures for arguably less serious crimes, such as auto theft and wildlife violations, occur more frequently. *See id.*

[119] *See* United States v. Vargas, 925 F.2d 1260, 1263–66 (10th Cir. 1991) (vacating sentence and holding district court prohibition on defendant's assistance to be a fundamental error of law which also ran counter to strong public policy reasons underlying section 5K1.1); United States v. French, 900 F.2d 1300, 1301–02 (8th Cir. 1990) ("We do not think it is open to district courts to frustrate a criminal defendant's desire to cooperate (not to mention the government's conduct of criminal investigations) . . . ."); *cf.* United States v. Laliberte, 25 F.3d 10 (1st Cir. 1994) (district court's interference with defendant participation was permitted because defendant received benefit which participation would have brought).

[120] *See* United States v. Day, 969 F.2d 39, 45–47 (3d Cir. 1992).

[121] *See, e.g.*, United States v. Johnson, No. 93-2433, 1993 U.S. App. LEXIS 31323, at *2 (8th Cir. Dec. 2, 1993) (stating that such claims will be reviewed under an abuse of discretion standard at appellate level).

[122] *See* U.S.S.G. § 5K1.1, p.s., comment. (n.2); *see also* United States v. Chotas, 968 F.2d 1193, 1197 n.1 (spelling out difference between the two sections); United States v. Singh, 923 F.2d 1039, 1044 (3d Cir.), *cert. denied*, 499 U.S. 950 (1991); United States v. Escobar-Mejia, 915 F.2d 1152, 1154 (7th Cir. 1990) (remanding because district court might not have grasped difference).

offense level for acceptance of responsibility helps to ensure that individual offenders receive sentences which fairly reflect the danger they present to society.[123] The substantial assistance departure provision approaches the problem from a different angle; it is designed to secure the smooth functioning of the criminal justice system more generally and is a means of apprehending and punishing *all* those who have broken the law.[124]

Much of the foregoing analysis demonstrates, first, that this is not the only function of section 5K1.1 and, second, that even in accomplishing this objective, section 5K1.1 indirectly promotes other goals related to the need for individualized sentences. Nonetheless, section 5K1.1 does, to a significant extent, gaze beyond the individual defendant. It is, therefore, hardly surprising that the particularization of sentences is not generally a ground *directly* supporting departures under the section.

B. *Degree of Departure*

We turn now to stage two. Once a sentencing court has decided to depart in recognition of a defendant's substantial assistance, it must determine the degree of that departure and, therefore, at what point along the broad sentencing spectrum the defendant's punishment will fall. While the district judge is the undisputed sovereign in this realm,[125] the precise nature and measure of his discretion remain relatively undeveloped. Must a sentencing court follow, and make clear that it is following, certain arithmetic steps in quantifying a departure? Alternatively, is the court free to employ a more holistic approach? Is there any absolute floor beneath which a departure may not plunge? Alternatively, may a court depart below statutory minima and, indeed, forego an incarcerative sentence altogether? If precedent with regard to other departure provisions is illustrative, there may be no unani-

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[123] Of course, the provision also attempts to offer defendants an incentive to speed up the criminal justice process insofar as it applies to their *own* cases. *See* U.S.S.G. § 3E1.1(b)(2) (providing for additional level of reduction when defendant has "timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently"). This is not, however, the predominant feature of the provision. *See* U.S.S.G. § 3E1.1(a) (referring only to defendant's acceptance of responsibility for his offense and not to implications for criminal justice system); *id.* at comment. (n.1(g)) (referring to defendant's rehabilitative efforts); *see also Chotas*, 968 F.2d at 1197 & n.1.

[124] *See* United States v. Mogel, 956 F.2d 1555, 1560 n.4 (11th Cir.), *cert. denied*, 113 S. Ct. 167 (1992) ("The Commission has not linked [section 5K1.1] to any of the penological goals of the Guidelines."); United States v. Monaco, 23 F.3d 793, 802 (10th Cir. 1994); *see also supra* notes 47-50 and accompanying text.

[125] *See* United States v. Mariano, 983 F.2d 1150, 1157 (1st Cir. 1993).

mously endorsed answer to these and other questions.[126] Nonetheless, some guiding principles have emerged.

1. Choreographing the Decision as to a Departure's Degree

Sentencing jurisprudence has developed a dichotomy between "guided" and "unguided" departures.[127] So-called "guided" departure provisions are those which dictate, with some measure of specificity, the steps a sentencing court should take in determining the degree of a departure. Thus, when a court decides to depart because, for example, it believes the defendant's criminal history category inadequately reflects the seriousness of his crimes or the likelihood of recidivism, the pertinent provision instructs that the court use "as a reference, the guideline range for a defendant with a higher or lower criminal history category as applicable."[128] In contrast, the girding effect of the sentencing grid is much weaker in the case of "unguided" departures. These occur when a sentencing court is specifically authorized to depart but afforded little detailed information about how to calculate the exact degree of that departure.

Section 5K1.1 does not fall cleanly onto either side of this divide. In one respect, substantial assistance departures are more "guided" than those that depend upon section 5K2.0. After all, in the substantial assistance sphere, as elsewhere, a sentencing court is not free to consider any factor it wishes when mulling the extent of a departure. The degree of a departure must be cabined by reference to the factors that justify the original decision to depart.[129] And with respect to section 5K1.1, compared to its counterpart departure provisions, these factors are very specific; the Commission has provided a nonexclusive, but still weighty, list of five factors useful in determining "[t]he appropriate reduction."[130] In this sense, then, the substantial assistance provision administers a large dollop of guidance to district courts considering the proper extent of a departure.

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[126] *See* United States v. Emery, 991 F.2d 907, 913 n.10 (1st Cir. 1993) (referring to contrary views of circuits with regard to measure of district court discretion in determining degree of departure under U.S.S.G. § 4A1.3, p.s.).

[127] *See* U.S.S.G. Ch.1, Pt.A, intro. comment. (n.4(b)) (distinguishing "guided" departures from others); Selya & Kipp, *supra* note 3, at 11–12.

[128] U.S.S.G. § 4A1.3, p.s.

[129] *See* United States v. Hall, 977 F.2d 861, 865 (4th Cir. 1992); *see also* Selya & Kipp, *supra* note 3, at 38–49 (same principle applies with respect to other departure provisions); United States v. Ferra, 900 F.2d 1057, 1061–62 (7th Cir. 1990) ("A judge may not simply say: 'I have decided to depart, so I now throw away the guidelines.'"), *appeal after remand*, 948 F.2d 352 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1939 (1992).

[130] U.S.S.G. § 5K1.1, p.s.

In another respect, however, sentencing courts retain appreciably more discretion in determining the contours of a substantial assistance departure than when making departures under other guideline provisions. Unlike the quintessential "guided" departure provision (section 4A1.3) and the prototypical "unguided" departure provision (section 5K2.0), section 5K1.1 has precious little to do with either axis of the sentencing grid (offense conduct or criminal history). Thus, while a district court *may* look to the grid for analogues when determining the proper extent of section 5K2.0 departures,[131] and while it *must* do so for section 4A1.3 departures,[132] the grid offers scant solace in regard to substantial assistance departures. Rather, the sentencing judge is left to evaluate the circumstances and situate them somewhere in his or her own mental grid–a grid whose architecture is informed by the five factors in the provision's text but whose more specific features will undoubtedly be influenced by the accumulated experiences of a lifetime in the law.[133]

The interplay between the guided and unguided aspects of section 5K1.1 is well illustrated by the Seventh Circuit's decision in *United States v. Thomas*.[134] There, in offering insights to aid the sentencing judge on remand, the court began by using the language and approach applicable to guided departures. It analogized section 5K1.1 to the acceptance of responsibility adjustment provision and the obstruction of justice enhancement provision.[135] Then, noting that the provisions, in appropriate circumstances, mandated a two-level shift in the offense level (the former, at the time, dictating a two-level reduction,[136] and the latter dictating a two-level increase), the court reasoned that "departures based on a defendant's cooperation with authorities may warrant something on the order of a two level adjustment for each [of the five] factor[s] found by the court to bear similarly on its evaluation of the defendant's cooperation."[137]

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[131] *See, e.g.*, United States v. Genty, 925 F.2d 186, 189 (7th Cir.), *reh'g denied*, 1991 U.S. App. LEXIS 4035 (7th Cir. Mar. 12, 1991); United States v. Fonner, 920 F.2d 1330, 1331–32 (7th Cir. 1990).

[132] *See* U.S.S.G. § 4A1.3, p.s., comment.

[133] *See* U.S.S.G. Ch.1, Pt.A., intro. 4(b) (referring to Chapter Five, Part K departures as "unguided"); *see also infra* notes 181–86 and accompanying text (discussing district court's unique experience).

[134] *See* 930 F.2d at 530–31.

[135] *See* U.S.S.G. § 3C1.1 (obstruction of justice); U.S.S.G. § 3E1.1 (acceptance of responsibility).

[136] The provision has since been amended and now contemplates the possibility of a three-level reduction. *See* U.S.S.G. § 3E1.1.

[137] *Thomas*, 930 F.2d at 531. Prosecutors too employ rules of thumb of this sort. *See, e.g.*, Felman, *supra* note 75, at 422.

Standing alone, this is constricting stuff. At first blush, *Thomas* appears to consign the substantial assistance section to the family of guided departures. First, the opinion suggests that section 5K1.1 can be given deeper meaning by analogizing it to other, non-discretionary guideline provisions.[138] Second, it invokes the talisman of mathematics, calling into play "an incremental process that quantifies the impact of the factors considered by the court on the defendant's sentence."[139] Finally, the opinion refers the sentencing court to the vertical axis of the sentencing grid as a benchmark.[140]

But the unvarnished fact is that, if the substantial assistance section bears any blood relation to the guided departure provisions, it is at most a distant cousin. Section 5K1.1 simply does not call for such strict formulae, and the *Thomas* court, as well as later decisions in the Seventh Circuit, recognize as much. *Thomas* goes on to make clear that, while the methodology it suggests has some family resemblance to a guided departure approach, departures under section 5K1.1 have rather different bloodlines:

> [The acceptance of responsibility section and the obstruction of justice section] provide but imperfect guidance, however, since weighing the impact of any given factor on the quality of the defendant's cooperation is an imprecise art, at best. We do not intend to preclude the district court from utilizing a scale with more gradations in order to assign greater or lesser weight to the factors it considers.[141]

Here the court places the resort to analogous guideline provisions in its proper context: it is an approach providing "imperfect guidance" to sentencing courts and not a congressionally mandated straitjacket. Here also, the court puts its mathematical incrementalism into context, describing the choice of a sentence as "an imprecise art, at best," and emphasizing the district court's role in the process.[142] Finally, the opinion proceeds to loosen the reins of the

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[138] *Thomas*, 930 F.2d at 529.

[139] *Id.* at 531.

[140] *Id.*

[141] *Id.*; *see* United States v. Atkinson, 979 F.2d 1219, 1226 (7th Cir. 1992) (holding that "the language of U.S.S.G. § 5K1.1 does not lend itself easily to [a mechanistic] methodology; it simply sets forth a nonexhaustive list of considerations to guide the discretion of the district court"), *remanded & aff'd*, 15 F.3d 715 (1994) (holding that a two level departure for each instance of participation was not required).

[142] *See* United States v. Johnson, 997 F.2d 248, 252–53 (7th Cir. 1993) (describing *Thomas'* mathematics as approximate and ruling that district court's failure to follow it does not constitute a ground for appeal); United States v. Correa, 995 F.2d 686, 687 (7th Cir. 1993) (per curiam).

guideline grid's vertical axis by indicating that a sentencing court contemplating the degree of a substantial assistance departure should do so with reference to the government's recommended departure—a recommendation expressed in terms of the number of years of immurement and not in terms of the offense level.[143]

Circuit splits and judicial uncertainty have been pretty much the rule when it comes to determining the extent of a departure.[144] In *Thomas*, however, we see a circuit that has a relatively "guided" framework in other contexts recognizing the limits of such a stringent approach in the precincts patrolled by section 5K1.1.[145] Other circuits are likely to agree.[146] After all, given the fundamentally divergent purposes served by the substantial assistance provision and the Chapter Three adjustment provisions,[147] the value of analogy to these provisions is minimal; given the declared nonexclusivity of the factors listed by the substantial assistance provision[148] and the commentary's recommendation that wide latitude be afforded sentencing courts in setting the departure amount,[149] the wisdom of following a ritualistic ratio of levels to factors is questionable; and, given the fact that substantial assistance bears no direct correlation to either axis of the sentencing grid, the value of binding sentencing courts to that particular mast is infinitesimal.

It seems likely, then, that the caveats in *Thomas* will defeat any attempt to over-magnify its mechanistic elements. Sentencing courts may follow the tripartite process of resorting to analogous guidelines,

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[143] *See id.*; *see also* United States v. Stowe, 989 F.2d 261, 263–64 (7th Cir. 1993); *cf.* United States v. Harris, 994 F.2d 412, 414–15 (7th Cir. 1993).

[144] *Compare* United States v. Ferra, 900 F.2d 1057, 1062–64 (7th Cir. 1990) (requiring unguided departures to be by analogy), *appeal after remand*, 948 F.2d 352 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1939 (1992); United States v. Kim, 896 F.2d 678, 685 (2d Cir. 1990); United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991) (en banc) *with* United States v. Kikumura, 918 F.2d 1084, 1112–13 (3d Cir. 1990) (strongly recommending such an approach); United States v. Lassiter, 929 F.2d 267, 271 (6th Cir. 1991); United States v. Jackson, 921 F.2d 985, 991 (10th Cir. 1990) (en banc) *with* United States v. Emery, 991 F.2d 907, 913–14 (1st Cir. 1993) (sanctioning the use of such an approach but refusing to require it); United States v. Hummer, 916 F.2d 186, 194 n.7 (4th Cir. 1990), *cert. denied*, 499 U.S. 970 (1991); United States v. Landry, 903 F.2d 334, 341 (5th Cir. 1990); United States v. Shuman, 902 F.2d 873, 877 (11th Cir. 1990).

[145] *See Ferra*, 900 F.2d at 1064 (setting forth strict standard for § 5K2.0 departures); Eric Lotke, *Guideline Developments in the Seventh Circuit: A Rigid Court*, 5 FED. SENT. REP. 259, 260–62 (1993) (discussing circuit's strict standards with regard to departure sections other than § 5K1.1).

[146] *See* United Stated v. Mariano, 983 F.2d 1150, 1157 (1st Cir. 1993); *see also* United States v. Martinez, No. 92-2265, 1993 U.S. App. LEXIS 27159 (10th Cir. Oct. 14, 1993) (refusing to examine extent of § 5K1.1 departure); United States v. Hazel, 928 F.2d 420, 427 (D.C. Cir. 1991) (§ 5K1.1 is unguided) (Mikva, C.J., concurring on other grounds).

[147] *See supra* notes 36–50 and accompanying text.

[148] *See* U.S.S.G. § 5K1.1., p.s.

[149] *See id.*, comment. (backg'd); *see also* U.S.S.G. Ch.1, Pt.A, intro. 4(b).

developing mathematical formulae which link substantial-assistance-related factors to departure amounts, and referring to the vertical axis of the sentencing grid as the base for making departures. But they need not do so.

2. Absolute Caps on a Departure's Degree

We turn from the question of a district court's methodological approach when determining a departure's degree to an abbreviated examination of whether there are any absolute substantive limitations on the extent of a departure. On the one hand, there is no indication in section 5K1.1 of any such barrier;[150] no absolute limitation emerges from elsewhere in the guidelines; and it is clear that the government may not create such doorstops simply because it is the party which sets the swinging gate in motion.[151] On the other hand, one must consider the vast array of minimum sentence statutes.[152] In an independent provision, 18 U.S.C. § 3553(e), Congress explicitly stated that, upon government motion, a sentencing court may depart below statutorily prescribed minimum sentences to reflect a defendant's substantial assistance.[153] The existence of this separate and specific route for a district court to follow, should it deem a departure below the statutory minimum to be appropriate, has led the Eighth Circuit to conclude that the path of section 5K1.1 was not blazed with such departures in mind.[154]

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[150] *See* United States v. Wilson, 896 F.2d 856, 859–60 (4th Cir. 1990) (upholding district court decision to impose probation); *see also* United States v. Pippin, 903 F.2d 1478, 1484–85 (11th Cir. 1990).

[151] *See Pippin*, 903 F.2d at 1485–86 (government may not limit its § 5K1.1 motion to the fine portion of a sentence); *see also* United States v. Spiropoulos, 976 F.2d 155, 163 (3d Cir. 1992); United States v. Udo, 963 F.2d 1318, 1319 (9th Cir. 1992). Of course, this absolute principle does not apply if the sentencing court accepts a binding plea agreement explicitly limiting the extent of the departure. *See, e.g.*, United States v. Cunavelis, 969 F.2d 1419, 1422–23 (2d Cir. 1992); United States v. Mukai, 26 F.3d 953, 956 (9th Cir. 1994).

[152] *See, e.g.*, Hatch, *supra* note 57, at 192–95 & n.8; Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993).

[153] The statute provides:

> Upon motion of the government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person. Such sentence shall be imposed in accordance with the Guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3553(e) (1988).

[154] *See* United States v. Rodriguez-Morales, 958 F.2d 1441, 1442–47 (8th Cir.), *cert. denied*, 113 S. Ct. 375 (1992); *see also* United States v. Baker, 4 F.3d 622, 624 (8th Cir. 1993) (adhering to circuit precedent), *reh'g denied*, 1993 U.S. App. LEXIS 26024 (8th Cir. Oct. 7, 1993); United States

The majority rule, however, is to the contrary. In at least four circuits, and arguably seven, once the government makes a motion for a section 5K1.1 departure, the district court may depart as far as is reasonable without regard to whether this means departing below a statutory minimum—even a so-called "mandatory minimum."[155] The support for this position is twofold. First, section 3553(e) and section 5K1.1 are juxtaposed closely enough, in their terms and through numerous references in the commentary,[156] that the latter should be read as a conduit for the application of the former.[157] Second, construing section 5K1.1 in this fashion:

> reflect[s] the proper balance of power between the district court and the prosecution. . . . [A]lthough the prosecution is in the best position to determine whether a defendant's cooperation rises to the level of substantial assistance, once that determination has been made, it is within the sound discretion of the district judge to determine the extent of the departure. [Any other interpretation] would allow the prosecution to . . . impermissibly usurp the district court's sentencing discretion.[158]

In sum, sentencing courts retain broad discretion to determine the degree of a section 5K1.1 departure. As in other contexts, those appellate courts which have spoken to the issue have indicated that they will review a departure's degree only for its reasonableness.[159]

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v. Womack, 985 F.2d 395, 399 (8th Cir.) (refusing to reconsider *Rodriquez-Morales* despite more recent decisions to the contrary), *cert. denied sub nom.*, Carraway v. United States, 114 S. Ct. 276 (1993).

[155] United States v. Beckett, 996 F.2d 70, 72–75 (5th Cir. 1993); United States v. Ah-Kai, 951 F.2d 490, 492–93 (2d Cir. 1991); United States v. Wade, 936 F.2d 169, 171 (4th Cir. 1991); United States v. Keene, 933 F.2d 711, 714 (9th Cir. 1991); *see also* United States v. Gregory, 932 F.2d 1167, 1168–69 (6th Cir. 1991) (upholding sentence below statutory minimum on basis of government's § 5K1.1 motion). *See* United States v. Thomas, 11 F.3d 1411 (7th Cir. 1993); *see also* United States v. Padilla, 23 F.3d 1220, 1223 n.3 (7th Cir. 1994). The Tenth Circuit appears to agree; *see* United States v. Campbell, 995 F.2d 173, 174–75 (10th Cir. 1993); *see also* United States v. Gamble, 917 F.2d 1280, 1281–82 (10th Cir. 1990) (upholding district court's § 5K1.1 departure below statutory minimum despite apparent absence of § 3553(e) motion); United States v. Kuntz, 908 F.2d 655, 657 (10th Cir. 1990) (section 5K1.1 implements § 3553(e)); United States v. Felman, 28 F.3d 94, 95–96 (10th Cir. 1994). The Supreme Court has mentioned, but not resolved, the issue. *See* Wade v. United States, 112 S. Ct. 1840, 1843 (1992) ("We are not . . . called upon to decide whether 5K1.1 'implements' and thereby supersedes 3553(e), or whether the two provisions pose two separate obstacles.") (citations omitted). The same is true in the Eleventh Circuit. *See* United States v. Chavarria-Herrard, 15 F.3d 1033, 1037 n.6 (11th Cir. 1994).

[156] *See* U.S.S.G. § 5K1.1, p.s., comment. (n.1) (backg'd); U.S.S.G. § 2D1.1, comment. (n.7).

[157] *See Beckett*, 996 F.2d at 72–75; *Ah-Kai*, 951 F.2d at 492.

[158] *Beckett*, 996 F.2d at 72–75; *see also Ah-Kai*, 951 F.2d at 492.

[159] *See* United States v. Mariano, 983 F.2d 1150, 1157 (1st Cir. 1993); United States v. Pippin,

While this term naturally sets some limits, the majority rule is that there is neither an absolute lower bound on departures nor a specific methodological approach that must be followed in arriving at the sentence.

C. *Deciding Not to Depart*

We have seen various portals through which mitigating factors may enter, directly or indirectly, into district court decisions to depart under the substantial assistance provision, and we have seen the latitude district courts retain in setting the degree of a downward departure once the decision to depart is made. Departures, however, constitute only half the picture. The decision *not* to depart also carries with it the potential to combat ultra-uniformity in sentencing—a potential that, to date, has been largely ignored.

1. Sentencing Court's Discretion

The bedrock principle of departure jurisprudence generally, and substantial assistance jurisprudence in particular, is that the district court possesses the option not to depart.[160] This avenue remains open despite the parties' contrary agreement and the government's filing of a departure motion.[161] Thus, the government motion requirement provides prosecutors only half a loaf of control. While a prosecutor can largely rule out the possibility of a departure, she cannot conceive one unless the district court agrees to play the midwife: "Put bluntly, while a government motion is a necessary precondition to a downward departure based on substantial assistance, the docketing of such a motion does not bind a sentencing court to abdicate its responsibility,

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903 F.2d 1478, 1485 (11th Cir. 1990); *see also* 18 U.S.C. § 3742(e)(3) (1988) (statutory basis for reasonableness review). Indeed, for the most part, the beneficiary of a departure cannot be heard to complain about its degree at all. *See* United States v. Doe, 996 F.2d 606, 607 (2d Cir. 1993) (circuit survey); United States v. Gregory, 932 F.2d 1167, 1169 (6th Cir. 1991) (collecting cases); United States v. Pighetti, 898 F.2d 3, 4 (1st Cir. 1990) (holding that "the statute affords no grounds for the *beneficiary* of a departure to complain that the deviation should have been greater"); Selya & Kipp, *supra* note 3, at 14–15.

[160] *See* U.S.S.G. § 5K1.1, p.s. ("Upon motion of the government . . . the district court *may* depart . . . .") (emphasis added).

[161] *See, e.g.*, United States v. Foster, 988 F.2d 206, 208 (D.C. Cir.), *cert. denied*, 113 S. Ct. 2431 (1993); *Mariano*, 983 F.2d at 1155; United States v. Spiropoulos, 976 F.2d 155, 162 (3d Cir. 1992); *Ah-Kai*, 951 F.2d at 494; United States v. Munoz, 946 F.2d 729, 730 (10th Cir. 1991); United States v. Carnes, 945 F.2d 1013, 1014 (8th Cir. 1991); United States v. Richardson, 939 F.2d 135, 139 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 942 (1992); United States v. Keene, 933 F.2d 711, 715 (9th Cir. 1991); United States v. Damer, 910 F.2d 1239, 1241 (5th Cir.) (per curiam), *cert. denied*, 498 U.S. 941 (1990); United States v. Pippin, 903 F.2d 1478, 1485 (11th Cir. 1990).

stifle its independent judgment, or comply blindly with a prosecutor's wishes."[162]

Disappointed defendants and petulant prosecutors have at times challenged this position by trumpeting the Commission's advice that "[s]ubstantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain."[163] But courts have turned deaf ears to this siren song, refusing to construe this portion of the Commission's commentary as forging inroads on the fundamental prerogative of sentencing courts to decide whether departure is appropriate. Rather, the prevailing view is that the advice concerns the deference a district court should give to a prosecutor's assessment of the *facts* surrounding a defendant's assistance.[164] Assaying these facts and deciding what other facts may be relevant to the departure calculus—matters that fall outside the prosecutor's encincture—remain essentially the district court's province.

2. Aggravating Factors

The sentencing court's prerogative to remain within the guideline sentencing range in the face of a motion for a substantial assistance departure introduces significant possibilities for treating different defendants differently at sentencing. And since the sentencing range is itself an expression of Congress's will, appellate courts have afforded district judges great latitude to consider factors unrelated to substantial assistance when deciding to forgo departures. For example, in United States v. Mittelstadt, the Seventh Circuit ruled that the district court had not abused its discretion in considering the defendant's chronic alcoholism when mulling a substantial assistance departure.[165] More-

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[162] *Mariano*, 983 F.2d at 1155.

[163] U.S.S.G. § 5K1.1, p.s., comment. (n.3).

[164] *Mariano*, 983 F.2d at 1156; *Spiropoulos*, 976 F.2d at 163 n.5; United States v. Castellanos, 904 F.2d 1490, 1497 (11th Cir. 1990); *see also Keene*, 933 F.2d at 714 (observing that "the prosecutor is in the best position to know whether the defendant's cooperation has been helpful").

[165] *See* 969 F.2d 335, 336–37 (7th Cir. 1992); *Mariano*, 983 F.2d at 1156–57; *cf.* United States v. Foster, 988 F.2d 206, 208 (D.C. Cir. 1993) (in knowingly exercising its discretion over whether to grant 5K1.1 motion sentencing court could consider fact that offender's assistance "seems to me to have been no greater than that of anybody else who comes here and who has a plea bargain and agrees to testify against his cohorts"); United States v. Egan, 966 F.2d 328, 332 (7th Cir. 1992); United States v. Carnes, 945 F.2d 1013, 1014 (8th Cir. 1991) (court could consider benefit defendant derived from cooperating in denying substantial assistance departure); United States v. Goroza, 941 F.2d 905, 909 (9th Cir. 1991), *appeal after remand*, 979 F.2d 856 (9th Cir. 1992); United States v. Spees, 911 F.2d 126, 128 (8th Cir. 1990); United States v. Justice, 877 F.2d 664, 669 (8th Cir. 1989), *cert. denied*, 493 U.S. 958 (1989).

over, amendments since the enactment of the guidelines hint that the Commission approves the consideration of a wide range of matters in deciding not to depart.[166]

By allowing trial courts this flexibility, section 5K1.1 in effect multiplies the number of situations in which district courts may impose stiffer sentences to reflect a spectrum of aggravating circumstances. In this way, the section operates to combat ultra-uniformity both when it is invoked and when it is not. Indeed, there is an argument to be made that this "dormant substantial assistance provision" is more powerful than its insomniatic counterpart. In the last analysis, "the limitations on the variety of considerations that a court may mull in withholding . . . a substantial assistance departure are not nearly so stringent as those which pertain when a court in fact departs downward."[167]

This is not to say that a district court may consider any factor it wishes in deciding not to depart. The Constitution proscribes consideration of a number of factors, such as race.[168] Similarly, the guidelines bar courts from taking certain matters into account.[169] Finally, Congress and the Commission have deemed particular considerations "general[ly] inappropriate[]" in the sentencing context.[170]

Even so, a court deciding not to depart may directly consider a kaleidoscopic array of offender- and offense-specific circumstances, while as we have noted, a court opting to depart, although it may often reflect upon such factors, must usually do so in a more indirect fashion, filtering them through the affirmative requirements of section 5K1.1.

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[166] *Compare* United States v. Malvito, 946 F.2d 1066, 1067–68 (4th Cir. 1991) (vacating and remanding because district court's decision not to depart was based on self-incriminating evidence divulged as part of defendant's cooperation pursuant to a plea agreement and plea agreement restricted use of such information) *with* U.S.S.G. App. C., amend. 441 (amending U.S.S.G. § 1B1.8 so as to reverse the rule of *Malvito*, thus empowering sentencing courts to consider all such information in substantial assistance context regardless of government agreement not to use information against defendant).

[167] *Mariano*, 983 F.2d at 1157.

[168] *Wade*, 112 S. Ct. at 1843–44; *Mariano*, 983 F.2d at 1157; United States v. Drown, 942 F.2d 55, 60 (1st Cir. 1991).

[169] U.S.S.G. § 5H1.10, p.s. (race, sex, national origin, creed, religion, and socio-economic status "not relevant in the determination of a sentence").

[170] *See* 28 U.S.C. § 994(e) (listing such factors as a defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties); U.S.S.G. Ch.5, Pt.H (adds defendant's age, mental and emotional conditions, physical condition, military, civic, charitable or public service, and lack of guidance as a youth); *see also* United States v. Rivera, 994 F.2d 942, 948 (1st Cir. 1993) (referring to these as "discouraged factors" in the context of interpreting § 5K2.0); United States v. Hatchett, 923 F.2d 369, 373–75 (5th Cir. 1991) (vacating and remanding sentences imposed within the guideline sentencing range because district court inappropriately considered factors discouraged by U.S.S.G. §§ 5H1.1-10, p.s.), *aff'd after remand*, 952 F.2d 400 (5th Cir. 1992).

There is nothing unusual or unsettling about this asymmetry. It is part of the warp and woof of a departure provision—a feature that helps to set these discretionary sections apart from the guidelines' pattern of mandatory adjustment provisions.[171]

IV. Lessons for the Guidelines as a Whole

Our examination of the substantial assistance departure provision has revealed a number of points which are not emphasized frequently enough when the guidelines are the topic of conversation. Some of these points, such as the fact that substantial assistance departures occur with astounding frequency in drug-related cases or the idea that the section bears many of the hallmarks of an unguided departure provision, are specific to the substantial assistance context. Others, such as the notion that particularization of sentences can occur when a district court decides *not* to depart as well as when it departs, have more general applicability. Still others, however, concern the tendency of the guidelines as a whole to achieve particularization of sentences. In this Part, we draw out four "lessons" of this last-mentioned genre.

A. *The Power of Words*

The first point deals with the power of words to constrain discretion. Once one examines the specific words of a guidelines provision, it often becomes apparent that, while containing a core meaning, the language permits a broad measure of fuzziness around the edges. For example, the five factors identified in the substantial assistance provision create significant opportunities for other factors indirectly to influence the sentencing decision. This process combats rigid ultra-uniformity, a result that starkly contrasts with the rhetoric which routinely swirls around section 5K1.1, namely that the section is merely a tool for the near-exclusive employment of prosecutorial discretion.[172]

In this regard, the flexibility of the substantial assistance provision is illustrative of the guidelines more generally. For example, nothing could appear more straightforward than the guidelines' drug quantity table which consists of six and one-half pages of lists identifying the

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[171] *Mariano*, 983 F.2d at 1157; United States v. Malvito, 946 F.2d 1066, 1069–70 (4th Cir. 1991) (Wilkins, J., dissenting).

[172] *See, e.g.*, Bennett L. Gershman, *Symposium: The New Prosecutors*, 53 U. Pitt. L. Rev. 393, n.178 (1992); Bennett L. Gershman, *The Most Fundamental Change in the Criminal Justice System: The Role of the Prosecutor in Sentence Reduction*, 5 Crim. Just. 2 (1990); McGrath, *supra* note 28; Kimberly S. Kelley, Comment, *Substantial Assistance Under the Guidelines: How* Smitherman *Transfers Sentencing Discretion from Judges to Prosecutors*, 76 Iowa L. Rev. 187 (1990).

offense levels applicable to the manufacture, importing, exporting or distribution of particular quantities of illicit substances.[173] In fact, these tables are far from self-implementing. First, there has been dispute about the actual meaning of the words employed: for example, do the weights listed in the table refer to the weight of the drug alone, or do they refer to the weight of the entire substance in which the drug is diluted?[174] Second, and more significant in this context, determining which entry on the lists adequately captures the particular factual situation of a given case has a markedly discretionary aspect. Unless the defendant has been caught red-handed with the quantity in question, the ballgame often will turn on the testimony of witnesses; that testimony itself will frequently be approximate, sketching only a broad impression of the circumstances;[175] and, the credibility of the witnesses will often be open to debate.[176] Moreover, if the case involves a conspiracy to distribute drugs, myriad questions will likely arise about how much of the overall operation was "reasonably foreseeable" by the defendant.[177] And the beat goes on.

In short, the hard-and-fast drug quantity table, thought by many to be simple and precise, actually calls for the sentencing court to make a number of discretionary determinations that can have a significant impact on the ultimate sentence received. To be sure, in many cases these determinations are made in the first instance by the authors of a defendant's presentence investigation report ("PSI Report").[178] Among the risks of too much talk about the guidelines' constricting effect are that defendants will fail to ferret out and challenge the discretionary determinations included in their PSI Reports and that sentencing judges will defer reflexively to those reports.[179]

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[173] *See* U.S.S.G. § 2D1.1.

[174] For the most part, the guidelines and case law have now answered this question by saying "the latter." *See* U.S.S.G. § 2D1.1 (n.1) ("mixture or substance" as used in section has same meaning as in 21 U.S.C. § 841); *Chapman*, 500 U.S. at 461–66 (interpreting 21 U.S.C. § 841).

[175] *See, e.g.*, U.S.S.G. § 2D1.4, comment. (n.2); *see also* United States v. Sklar, 920 F.2d 107, 112–14 (1st Cir. 1990); United States v. Hilton, 894 F.2d 485, 486 (1st Cir. 1990).

[176] *See, e.g.*, U.S.S.G. § 6A1.3 (indicating that district judges have broad discretion to resolve disputed facts); United States v. Tardiff, 969 F.2d 1283, 1287 (1st Cir. 1992) (discussing § 6A1.3).

[177] *See* U.S.S.G. § 1B1.3(a)(1)(B); *see also* Pinkerton v. United States, 328 U.S. 640 (1946); William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

[178] *See* U.S.S.G. Ch.6, Pt.A.

[179] *See generally* Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 469 (1987) (noting risk that judges would "go by the book," and "play it safe" and "stop thinking"); Edward R. Becker, *Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime*, FED. PROB., Dec. 1991, at 10–15 (same); Gerald Bard Tjoflat, *The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines*, FED. PROB.,

Like any other attempt to eliminate discretion, then, the guidelines could not do so, even were it their intention. Like some natural phenomenon, discretion simply reconfigures and burbles up in either the words themselves or in the attempt to apply these words in the real world.[180] This is an important point to emphasize, because anti-guidelines rhetoric has the potential to discourage sentencing participants from seeking out, and seizing upon, the discretion which is there for the taking. Courts must avoid creating patterns of abdication whereby discretion is distributed by default to the parties who are not properly its sole proprietors.

B. *The Unique Perspective of District Courts*

A second set of lessons from our examination of section 5K1.1 emerges from the disparity between the section as interpreted in appellate opinions and the section as it actually functions in the *nisi prius* courts.[181] While this divergence is especially great with regard to the substantial assistance departure provision because of the unique government motion requirement, this point also has more general applicability to the guidelines as a whole. As such, it contains dual implications.

First, it implies that many critics may be looking for discretion in all the wrong places. Careful examination of the manner in which trial courts apply specific guideline provisions, when measured against the ways in which they could be applied, frequently reveals hidden discretion. Second, and more interestingly, this disparity has the potential to

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Dec. 1991, at 4–9 (same; berating attorneys for failing at times to "turn guideline sentencing hearings into the meaningful adversarial process they were designed to be"); Weinstein, *supra* note 89, at 7–9 (stressing ways in which judges can play a more active role in sentencing and identifying areas where judges are likely to be too deferential).

[180] While most people have long accepted that any effort to eliminate judicial discretion through positivistic rules cannot succeed completely (*see, e.g.*, John Dewey, *Logical Method and Law*, 10 CORNELL L. REV. 17 (1924); Oliver W. Holmes, Jr., *The Common Law* (Lecture I) (1881)), there is less agreement about the degree to which such efforts can prove fruitful. *Compare* H.L.A. HART, THE CONCEPT OF LAW (1961) (esp. Ch. VII) (law contains broad core meanings graspable by all and only on the outermost edges of these cores does the penumbra of indeterminacy arise) *with* LON FULLER, ANATOMY OF THE LAW (1968) (responding to Hart and arguing that, even at their "core," laws require judges to exercise discretion) *and* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978) (attempting to bridge the Hart/Fuller divide by arguing that factfinder will have to exercise at least mild discretion in determining whether particular conception being put forward matches underlying ascertainable concept embodied in law). Generally, those criticizing the sentencing guidelines have lost sight of this fundamental debate or assumed that the guidelines somehow stand immune from the long-established lesson that positivism cannot succeed completely.

[181] *See supra* notes 21–35 and accompanying text.

become a nesting place for the discretion-granting notion that sentencing courts have a unique perspective on the guidelines and, as a result, develop a level of expertise which both the Commission and appellate courts should recognize when performing their respective roles in the guidelines pavane.

The First Circuit's recent decision in *United States v. Rivera* illustrates this latter point.[182] That opinion carved out an area for the exercise of district court discretion in considering the propriety of section 5K2.0 departures. The court held that appellate panels should be wary of interfering with a district court determination of whether a case is sufficiently outside a section's heartland to merit a departure. The court first reasoned that district courts view the facts of given cases from a front-lines vantage point and, as a result, they are better equipped than an appellate court to evaluate whether a case is "unusual." Second, the court indicated that district courts are "likely to have seen more *ordinary* Guidelines cases, while appellate courts hear only the comparatively few cases that counsel believe present a colorable appeal."[183]

This second point, whispered with ever-increasing frequency in one form or another, is a potential foot in the door for sentencing court discretion. It rests upon the explicit assumption that, as an institutional matter, district courts have something to teach both the Commission and the appellate courts about the real meaning of the terms employed in the guidelines. As such, it need not be restricted to the departure context. For instance, the idea that sentencing judges may, as a rule, have much "experience with the mainsprings of human conduct" has been used to underpin the deferential review afforded role-in-the-offense determinations.[184]

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[182] 994 F.2d 942 (1st Cir. 1993). The primary focus of the opinion is to spell out in more detail the distinction between the first branch (*de novo* review) and the second branch (clear error review) of the tripartite standard of review framework for § 5K2.0 departures limned in the circuit's seminal opinion of United States v. Diaz-Villafane, 874 F.2d 43, 49–50 (1st Cir.), *cert. denied*, 493 U.S. 862 (1989). *See also* Selya & Kipp, *supra* note 3, at 18–22 (fleshing out framework and surveying approach of other circuits, most of which have either explicitly or implicitly adopted *Diaz-Villafane*'s approach).

[183] *Rivera*, 994 F.2d at 951 (citing statistic that 85% of guidelines sentences are not appealed).

[184] United States v. Wright, 873 F.2d 437, 444 (1st Cir. 1989) (citing Pierce v. Underwood, 487 U.S. 552, 562 (1988) (deferential appellate review appropriate where a statute's proper application is a "question . . . likely to profit from the experience that an abuse-of-discretion rule will permit to develop")); *see also* Aaron Rappaport, *Guideline Developments in the First Circuit: The Two Faces of Appellate Review*, 5 FED. SENT. REP. 267, 269 (1993); Charles P. Sifton, *Theme and Variations*, 5 FED. SENT. REP. 303, 304 (1993) (introducing special issue of Federal Sentencing Reporter devoted to district court ability to take into consideration local conditions when breathing meaning into guidelines, and stating that "[c]onfrontation with large numbers of offenders

Of course, the principle has its limits. District court "expertise" may alert the Commission to guidelines provisions which require repairs or renovations, but, if such "expertise" is to be employed in specific cases to alter actual sentences, the usage will be sustained on appeal only if it has operated within the meaning of the then-extant guidelines. In other words, there is space for district court "expertise," but not wide-open space; the surrounding walls are solid.

Two pre-*Rivera* opinions evaluating section 5K2.0 departures that, in turn, reflected local circumstances known by the district judge, illustrate the proper scope of district court "expertise." In *United States v. Big Crow*, the Eighth Circuit held that the guidelines permitted a downward departure to reflect the fact that the defendant, who lived on an Indian reservation where the unemployment rate was seventy-two percent and the per capita annual income was $1,042, had an excellent employment history, solid community ties and a consistent history of "efforts to lead a decent life in a difficult environment."[185] In *United States v. Aguilar-Pena*, by contrast, the First Circuit held that the district court could *not* justify an upward departure on the basis of its impression that the drug smuggling engaged in by the defendant was particularly distasteful to Puerto Rico and its inhabitants.[186]

Here lies the key to the appropriate sweep of district judge "expertise." The essential difference between *Big Crow* and *Aguilar-Pena* is the nexus between the judge's knowledge of local conditions and the individual defendant. In the former case, the judge used his special knowledge to evaluate the particular defendant—a defendant whom the Sentencing Commission could not have known and whom the appellate courts would only know through an algid record. By contrast, in *Aguilar-Pena* the district judge's knowledge of local conditions was employed as a way of evaluating the proper punishment for *any* person who committed the crime in question—just the sort of matter that the Sentencing Commission, and Congress, would normally consider. Put another way, in *Big Crow*, the defendant and the circumstances of his crime were set apart from others that had come before the judge; in *Aguilar-Pena*, the opposite was true. In short, the "expertise" involved in *Aguilar-Pena* did not merit deference because it was employed to make a categorical departure that had equal pertinence to an entire

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may give a local judge a greater appreciation of the relative roles of offenders"); Stith & Koh, *supra* note 4, at 246–47 (collecting authorities and implicitly discussing theory of district court "expertise" in context of § 5K2.0).

[185] United States v. Big Crow, 898 F.2d 1326, 1331–32 (8th Cir. 1990).

[186] United States v. Aguilar-Pena, 887 F.2d 347, 351–53 (1st Cir. 1989).

class of cases while the "expertise" involved in *Big Crow* was correctly employed in an offender-and-offense- specific fashion.

The lesson is that, just as the disparity between the guidelines as they appear at the appellate level and the guidelines as they appear elsewhere is not something confined to section 5K1.1, neither is the discretion-granting principle of deference to district court "expertise" that emerges from this fact so confined. In future years, this area, though it has some natural limits, is one that bears watching.

C. *The Guidelines Under Construction*

Another lesson growing out of our examination of section 5K1.1 deals with the importance of recognizing the guidelines' ability to change over time. In our consideration of the purposes of the various departure provisions, we have seen that the amendment process has implications for the future role of section 5K1.1 vis-a-vis sections 5K2.0 and 4A1.3.[187] We have also seen that both Congress and the Commission conceived of the amendment process as a crucial vehicle allowing the guidelines to evolve in response to feedback from district judges and others.[188] The first, more localized lesson and the second, more general lesson, each has implications for those who seek to combat ultra-uniformity.

We begin with the localized implication. To date, the strategy of many litigators and commentators who oppose ultra-uniformity has rested on two assumptions: (1) that section 5K2.0 and section 5K1.1 are enmeshed in something like a zero-sum battle; and (2) that the goal of desirable disparity would be better realized if section 5K2.0 won this battle. The first assumption has a certain force. Every articulated ground for departure which the judiciary construes as falling within the contemplated scope of section 5K1.1 automatically becomes less eligible, although not entirely ineligible, as a basis for a section 5K2.0 departure.[189] Thus, the fact that section 5K1.1 permits district courts

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[187] *See supra* notes 36–50 and accompanying text.

[188] *See id.*

[189] *See generally* United States v. Agu, 949 F.2d 63, 66 (2d Cir. 1991) (court would be particularly unlikely to permit departures from procedural requirements, such as government motion requirement, even where it could be said that a factor, such as assistance, was present to a degree not adequately considered by Commission); United States v. Khan, 920 F.2d 1100, 1106–07 (2d Cir. 1990) (Commission clearly considered situation where defendant cooperates; "only exception" is where defendant shows evidence of assistance "which could not be used by the government to prosecute other individuals . . . but which could be construed as a 'mitigating circumstance'"), *cert. denied*, 499 U.S. at 969 (1991); United States v. Sklar, 920 F.2d 107, 115 (1st Cir. 1990) (noting that "'because the guidelines addressed departures for substantial assistance in

to consider in their departure calculus "any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance"[190] means that such circumstances were considered by the Commission. This, in turn, makes it more difficult for them to serve as the basis for a mitigating circumstances departure.[191] Conversely, the fact that a defendant's assistance to the judicial system as a whole is not contemplated by section 5K1.1 as a possible ground for departure implies that it can, in certain circumstances, justify a departure under section 5K2.0.[192]

The second assumption—that it is best to contract section 5K1.1 and expand the swath of section 5K2.0—derives largely from the questionable perception that section 5K1.1 lacks the potential for wide applicability. The statistics and other evidence we have identified have cut much of the ground from beneath this second assumption by revealing that section 5K1.1 already *has* wide applicability.[193] Whatever justifications remain for this assumption are refuted by the effect of the amendment process on the respective provisions; the evolutionary aspect of the guidelines ensures that section 5K1.1, already the preferred vehicle for departures, is gaining popularity. The upshot is that those who seek to reduce ultra-uniformity would be well advised to identify methods of expanding the applicability of substantial assistance departures, rather than putting all their eggs in the section 5K2.0 basket.

The more general point that stems from this discussion is that the evolutionary system contemplated by Congress and implemented by the Commission can be a very powerful tool if participants do their best to let it function as designed.[194] Three recent amendments illus-

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section 5K1.1, departures for the same reason cannot be sustained under the generic [departure provisions of the guidelines],' at least in an ordinary case") (quoting United States v. La Guardia, 902 F.2d 1010, 1017 n.6 (1st Cir. 1990)); *see also* United States v. Dawson, 990 F.2d 1314, 1317 (D.C. Cir. 1993); United States v. Aslakson, 982 F.2d 283, 284 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1875 (1993); United States v. Chotas, 968 F.2d 1193, 1195 (11th Cir. 1992); United States v. Goroza, 941 F.2d 905, 909 (9th Cir. 1991); United States v. Bruno, 897 F.2d 691, 695 (3d Cir. 1990); United States v. Justice, 877 F.2d 664, 666 (8th Cir. 1989); *cf.* United States v. Higgins, 967 F.2d 841, 845 (3d Cir. 1992) (implying that substantial assistance could serve as basis for 5K2.0 departure in some special circumstances), *reh'g denied*, 1992 U.S. App. LEXIS 16316 (3d Cir. July 17, 1992).

[190] U.S.S.G. § 5K1.1(a)(4), p.s.

[191] *See* United States v. Mason, 966 F.2d 1488, 1498 (D.C. Cir. 1992).

[192] United States v. Garcia, 926 F.2d 125, 127–28 (2d Cir. 1991); *see also* United States v. Baker, 4 F.3d 622, 624 (8th Cir. 1993); United States v. Khan, 920 F.2d 1100, 1106–07 (2d Cir. 1990).

[193] *See supra* notes 31–35 and accompanying text.

[194] *See generally* Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755 (1992).

trate this proposition. The Commission drafted the first amendment to meet well-founded criticism that the guidelines often punished "mules" (persons who transport contraband for sizable drug operations) too severely because of the composition and impact of the drug quantity table.[195] The amendment explicitly authorizes downward departures in some of these instances.[196] A second amendment responds to the emerging issue of sentencing factor manipulation—a process by which the government intentionally structures a sting operation with the guidelines in mind, thus maximizing a defendant's ultimate sentence.[197] The new law permits downward departures upon a showing that the government intentionally induced the defendant to purchase a greater drug quantity than he otherwise might have by setting a price below market value.[198] The final amendment was in response to the Supreme Court's recent decision in *Chapman v. United States*[199] and the popular reaction that decision produced.[200] The amendment alters the way quantities of LSD are measured for sentencing purposes so as to limit the effect of carrier media, such as blotter paper, on the ultimate sentence.[201]

These amendments make clear that departures—a favorite focal point of those considering how to make the guidelines more sensitive to relevant differences among offenders and offenses—are not the exclusive method for combatting ultra-uniformity. In the long run, active involvement in the Commission's amendment process by interested on-lookers can improve the guidelines and make them more sensitive to individual differences.

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[195] *See, e.g.*, United States v. Valdez-Gonzalez, 957 F.2d 643, 649–50 (9th Cir. 1992); *Memorandum*, 5 FED. SENT. REP. 298 (1993) (reproducing letter from Judge Weinstein announcing his decision to decline further consideration of drug cases partially on this ground).

[196] *See* 58 Fed. Reg. 27,148, 27,154–55 (1993) (proposed amendment number 11) (enacted at U.S.S.G. § 2D1.1, comment. (n.16)).

[197] *See generally* United States v. Connell, 960 F.2d 191, 194–97 (1st Cir. 1991) (discussing sentencing factor manipulation); United States v. Castiello, 915 F.2d 1, 5 n.10 (1st Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

[198] *See* 58 Fed. Reg. 27,148, 27,155 (1993) (proposed amendment number 13) (enacted at U.S.S.G. § 2D1.1, comment. (n.17)).

[199] *See* Chapman v. United States, 111 S. Ct. 1919, 1929 (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes carrier medium in which LSD is absorbed), *reh'g denied*, 112 S. Ct. 17 (1991).

[200] *See, e.g.*, Linda Himelstein & Eva M. Rodriguez, *Panel Approves More Leeway in Drug Sentencing: First Step to Broad Reassessment?*, LEGAL TIMES, May 26, 1993, at 2; Jim Newton, *Long LSD Prison Terms . . . Its All in the Packaging*, L.A. TIMES, July 27, 1992, at A1.

[201] *See* 58 Fed. Reg. 27,148, 27,155–56 (1993) (proposed amendment number 14) (enacted at U.S.S.G. § 2D1.1(c)).

D. *The Double-Edged Effect of Individualized Sentences*

Much of the persuasive punch packed by the critics of ultra-uniformity comes from the Orwellian images their criticism evokes. In most people's minds, individuality and individualized treatment are desirable, and squeezing defendants' situations into boxes of a grid appears dehumanizing and narrow-minded. Using section 5K1.1 as an example, we have attempted to illuminate many of the ways in which a defendant's sentence can be individualized within the confines of the guidelines. But even if one accepts the notion that the guidelines have decapitated (if not decimated) the body of discretion previously reposed in the sentencing courts—and it is difficult not to credit that idea to some degree—the conclusion that sentencing has become overly harsh or dehumanizing does not necessarily follow.

First, there is the obvious; a certain measure of uniformity furthers the goal of fairness rather than undermining it.[202] This was, after all, a major impetus for the guidelines,[203] and the limits reflected in the guidelines are intended, in part, to safeguard defendants from arbitrary sentences based on regional differences or judges' personal idiosyncrasies.[204] Second, to the degree that sentencing rules do not leave room for an unfettered district court focus on a defendant's individual culpability, they are a double-edged sword.[205] The defendant-harming side of this sword is evident; the guidelines seem to punish relatively minor first-time offenders on the periphery of narcotics rings, for example, with undue severity because of the drug quantities handled by the ring, as if to sacrifice the individual for the greater good of society's war on drugs. Less exposed is the defendant-benefitting side of this sword. Section 5K1.1 is cast in this mold. It peers beyond the individual defendant's culpability to the broader societal concern fur-

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[202] *See, e.g.*, United States v. Seluk, 873 F.2d 15, 17 (1st Cir. 1989) (per curiam).

[203] *See* S. Rep. No. 225, 98th Cong., 2d Sess. 38, 65, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221; *see also* 18 U.S.C. § 3553(a)(6) (1988); *Aguilar-Pena*, 887 F.2d at 352.

[204] *See* Mistretta v. United States, 488 U.S. 361, 376 (1989); United States v. La Guardia, 902 F.2d 1010, 1014 (1st Cir. 1990).

[205] Each edge of the sword reflects a policy concern. There is no constitutional requirement of individualized sentencing. *See, e.g.*, Locket v. Ohio, 438 U.S. 586, 604–05 (1978) (stating that "in noncapital cases, the [then] established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes"); *La Guardia*, 902 F.2d at 1014 (collecting cases and holding that "Congress has the power to cabin judicial sentencing discretion, or even to eliminate discretion entirely, by fixing precise rather than indeterminate sentences"); *see also* McMillan v. Pennsylvania, 477 U.S. 79, 89–90 (1986); United States v. Grayson, 438 U.S. 41, 45–46 (1978); Williams v. Illinois, 399 U.S. 235, 243 (1970); *Ex parte* United States, 242 U.S. 27, 42 (1916).

nishing incentives for productive cooperation with law enforcement initiatives.[206] Section 5K1.1 is illustrative of the non-individualistic concern of the guidelines in another respect as well. In determining the exact sentence, judges are commanded to consider factors such as the need for deterrence and the yen to provide victims with restitution.[207] These non-individualistic factors have the capacity to cut in favor of defendants as well as against them.[208]

Finally, our investigation of section 5K1.1 reveals that the guidelines leave defendants with significant opportunities to participate in the sentencing process and influence its outcome. Thus, for example, a defendant has some control over whether, and with what degree of force, the section will come into play. For the most part, a defendant voluntarily decides whether he will provide assistance; he voluntarily determines many of the attributes which comprise the substantiality of his assistance, such as its timing and degree; and, he may insist that any plea agreement contain a clause either obligating the government to move for a substantial assistance departure or imposing some less stringent, but related, obligation on the government to move for a departure should certain criteria be satisfied. In short, even if one views section 5K1.1 as hampering the district court's discretion to depart, this view does not translate directly into restrictions on a defendant's ability to obtain a departure. In sum, the section is not a mechanism for the wholesale transfer of discretion from the district court to the prosecution.

A similar principle can be seen at work throughout the guidelines. To pick one example, a defendant may play a role in insuring himself a reduced offense level by complying with the requirements set out in the acceptance of responsibility section.[209] *Ex ante*, a criminal can, with some degree of specificity, cabin his exposure to penal liability by structuring his activity to avoid certain guideline trouble areas.[210] In other words, even if the certainty and objectivity of the sentencing guidelines effectively deprive district courts of considerable discretion, some of that lost discretion passes into the hands of defendants, empowering them and diminishing somewhat the rhetorical force of the ultra-uniformity criticism.

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[206] *See supra* notes 47–50 and accompanying text.

[207] *See* 18 U.S.C. § 3553(a).

[208] *Cf. Rivera*, 994 F.2d at 954–56 (discussing district court's decision to depart downward on the ground that defendant could not provide restitution while languishing in jail).

[209] U.S.S.G. § 3E1.1.

[210] In many ways, this observation concerns the flip side of the sentencing factor manipulation cases. *See supra* notes 197–98.

V. Conclusion

We have attempted, in this short space, to perform two tasks. First, this article examines in some detail section 5K1.1, a guideline provision which promises to gain increasing importance in the years to come. Although section 5K1.1's provisions are not self-implementing and its jurisprudence, with one area of exception, is relatively scant, a number of guiding principles and "how to" instructions have emerged. We have, where possible, catalogued them. Second, this article tests, in the laboratory of a specific guidelines provision, the argument against ultra-uniformity. We conclude that, in many ways, it is a correct argument, that, in many ways, it is right to make the argument, but also that, in certain respects, the argument is hyperbolic. To that extent, it is wrong.