Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines

Douglas A. Berman

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ARTICLE

BALANCED AND PURPOSEFUL DEPARTURES:
FIXING A JURISPRUDENCE THAT
UNDERMINES THE FEDERAL
SENTENCING GUIDELINES

Douglas A. Berman*

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"Can we all get along? . . . I mean, we’re all stuck here for a while.
Let’s try to work it out.”

—Rodney King

INTRODUCTION

Rodney King’s poignant plea may well have been resonating in the Supreme Court’s collective consciousness as it considered the punishment of the Los Angeles police officers convicted of violating King’s civil rights. In *Koon v. United States*, the Supreme Court used the dispute over these officers’ federal sentences to address, in broad terms, judicial authority to “depart” from the sentencing ranges prescribed by the Federal Sentencing Guidelines. The clear effort in *Koon* to enhance district judges’ departure power suggests the Supreme Court hoped that, by imbuing sentencing courts with greater discretion, it could help those “stuck” with the Guidelines to “all get along” and “work it out.”

The Supreme Court had the right instincts in *Koon* because, as this Article will argue, a misguided departure jurisprudence lies at the heart of what ails the Federal Sentencing Guidelines. Refocusing this jurisprudence would be a critical first step toward an improved federal sentencing system. But, unfortunately, the Supreme Court in *Koon* failed to set departure jurisprudence on the right course. In fact, by focusing on the threshold decision to depart—rather than on the extent of departures—and by eschewing normative analysis in departure decision-making, *Koon* at best retards the development of an effective departure jurisprudence and at worst further propels the federal sentencing system down a destructive path.

This Article discusses mistakes of both the U.S. Sentencing Commission and the federal courts that have produced a misguided departure jurisprudence under the Federal Sentencing Guidelines. In so doing, I hope not only to explain how this misguided jurisprudence has undermined federal sentencing reform, but also to suggest how an improved departure mechanism might help remedy problems associated with the Federal Sentencing Guidelines. I propose refocusing the Guidelines’ departure authority to give district judges broad discretion to depart, but with appellate judges carefully examining the extent of departures and with the entire enterprise concerned principally with the purposes of punishment. In addition to its benefits for the federal sentencing system, such a revised approach to departures would comport better with both the spirit and the text of the Sentenc-

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ing Reform Act—the statutory foundation for the Federal Sentencing Guidelines.

Providing context for this analysis of federal departure jurisprudence, Part I of this Article discusses the origins of modern sentencing reforms and guideline sentencing systems. This Part highlights the critical role of departures in the balancing of judicial sentencing discretion and the development of principled sentencing law within sentencing guidelines systems. It then reviews federal reforms more specifically, describing the Sentencing Reform Act and the fundamental place of departure authority within the Act’s revolution of federal sentencing.

Following this review of the background and theory of modern sentencing reforms, Parts II and III examine the Federal Sentencing Guidelines and its departure mechanism in practice. Part II identifies critical missteps in the initial development of departure standards by the Sentencing Commission and the lower courts. As detailed in this Part, because courts focused on the threshold decision to depart and failed to consider the purposes of sentencing, the initial departure jurisprudence undermined the Guidelines’ efforts to balance judicial sentencing discretion and to develop principled sentencing law.

Part III then turns to the Supreme Court’s 1996 Koon decision, examining the Court’s key missteps in its effort to remedy the Guidelines’ departure mechanism. This Part highlights that, despite a laudable effort to improve departure practices, the Court’s opaque opinion has failed to achieve a better balance in judicial sentencing discretion under the Guidelines. This Part also details how the Koon decision put forward a shallow conception of departures and eschewed purpose considerations in departure decision-making, which has further undermined the role of departures as a means for principled and purposeful judicial contributions to sentencing law within the Guidelines system.

Lastly, Part IV proposes a revised departure jurisprudence—an approach that is balanced by focusing on the extent of departures and purposeful by focusing on the fundamental goals of punishment. This Part discusses the potential benefits for the Federal Sentencing Guidelines from a departure jurisprudence that, with particular attention to the purposes of punishment, is primarily concerned not with the threshold decision to depart, but rather with the extent of such departures. Seeking a silver lining in what is otherwise a dark story, this Part concludes by suggesting how the Sentencing Commission or lower federal courts might still bring about an improved departure mechanism. That is, this Part calls for the Commission and lower courts to seize upon the opportunity missed by the Supreme Court in
Koon and to heed Rodney King’s plea: they should take the lead in refocusing departure jurisprudence to help all those involved in federal sentencing to “get along” and “work it out.”

I. SENTENCING REFORM IN THEORY: THE MERITS OF SENTENCING GUIDELINES AND THE ROLE OF DEPARTURES

The origins of modern sentencing reform and the Federal Sentencing Guidelines merit review before examining federal departure jurisprudence and the Supreme Court’s decision in Koon. This background highlights the central and fundamental role of “departures” in the efforts of sentencing guidelines systems to balance judicial sentencing discretion and to develop principled sentencing law.

A. The Origins and Early Lessons of Modern Sentencing Reform

For the first three-quarters of the twentieth century, vast and virtually unlimited discretion was the hallmark of the sentencing enterprise. Trial judges in both federal and state systems had nearly unfettered discretion to impose on defendants any sentence from within the broad statutory ranges provided for criminal offenses.\(^3\) During this period, punishment decisions and offender treatments were premised upon a rehabilitative model.\(^4\) Broad judicial discretion in the ascription of sentencing terms—complemented by parole officials exercising similar discretion concerning prison release dates—was viewed as necessary to ensure that sentences could be individually tailored to the particular rehabilitative prospects and progress of each offender.\(^5\)

\(^3\) See, e.g., Michael Tonry, Twenty Years of Sentencing Reform: Steps Forward, Steps Backward, 78 JUDICATURE 169, 169–70 (1995) (“Subject only to statutory maximums and the occasional minimums, judges had the authority to sentence convicted defendants either to probation (and under what conditions) or to prison (and for what maximum term.”)); see also Mistretta v. United States, 488 U.S. 361, 363 (1989) (discussing the “wide discretion” given to federal judges in ascribing sentences during this time).


\(^5\) See, e.g., ANDREW VON HIRSCH, THE SENTENCING COMMISSION’S FUNCTIONS, IN THE SENTENCING COMMISSION AND ITS GUIDELINES 3, 3 (ANDREW VON HIRSCH ET AL. EDs., 1987) (“[W]ide discretion was ostensibly justified for rehabilitative ends: to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender’s need for treatment.”); see also BURNS v. UNITED STATES, 287 U.S. 216, 220
By the early 1970s, criminal justice researchers and scholars became concerned with the unpredictable and often widely disparate sentences that this highly discretionary sentencing system produced. Empirical research and anecdotal evidence revealed that sentencing judges’ exercise of broad and largely unreviewable discretion resulted in substantial and undue differences in both the lengths and types of sentences meted out to similar defendants. Even more worrisome, some studies found that purportedly irrelevant personal factors, such as an offender’s race, gender, and socioeconomic status, impacted sentencing outcomes and accounted for certain disparities.

Troubled by the disparity and discrimination resulting from highly discretionary sentencing practices—and fueled by concerns over increasing crime rates and powerful criticisms of the entire rehabilitative model of punishment and corrections—many criminal justice experts proposed reforms in order to bring greater consistency

(1932) (discussing need “to individualize each case” through giving “that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion”). See generally Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9–22 (1998) (reviewing the early history of federal sentencing and the link between the rehabilitative ideal and discretionary sentencing practices).

6 See Dorzynski v. United States, 418 U.S. 424, 431–32 (1974); see also 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.”). Noting that trial judges possess considerable discretion in many areas, Judge Cabranes and Professor Stith suggest that “[w]hat made sentencing authority truly extraordinary was not the broad discretion the judge exercised, but, rather, the fact that the decision was virtually unreviewable on appeal.” Kate Stith & José A. Cabranes, Judging Under the Federal Sentencing Guidelines, 91 Nw. U. L. Rev. 1247, 1251–52 (1997).


and certainty to the sentencing enterprise. An influential 1976 report of the Twentieth Century Fund Task Force on Criminal Sentencing exemplifies these sentiments. The report asserted that discretionary sentencing schemes created "unexplained and seemingly inexplicable sentencing disparity" and called for structural reforms in sentencing to construct a "system that is both more just to individual defendants in terms of fairness and more effective in terms of reducing crime." Though varying in rhetoric, others urging sentencing reform echoed a similar refrain.

In many respects, the federal system was at the forefront of this sentencing reform movement. As early as the 1930s, commentators expressed concerns about "wide disparities and great inequalities" in the criminal sentences being meted out by different judges in the federal system. A 1972 book by United States District Judge Marvin Frankel, which assailed federal sentencing practices, was probably the single most significant catalyst for modern sentencing reforms. In Criminal Sentences: Law Without Order, Judge Frankel lamented "the

10 See, e.g., David Fogel, "We Are the Living Proof:" The Justice Model for Corrections (2d ed. 1976); Nat'l Conference of Comm'rs on Unif. State Laws, Model Sentencing and Corrections Act (1979); Pierce O'Donnell et al., Toward a Just and Effective Sentencing System: Agenda for Legislative Reform (1977); von Hirsch, supra note 9; see also Norval Morris, The Future of Imprisonment (1974) (stressing need to reform sentencing practices as a prerequisite to making imprisonment a rational and humane means of punishment). See generally Alfred Blumstein et al., Research on Sentencing: The Search for Reform 126–42 (1983) (describing forces behind early reforms); Miller et al., supra note 4, at 6–13, 13 (noting that sentencing reform was "stimulated by perceptions of increasing crime, unwarranted differences in sentences, and ineffective rehabilitation programs").


12 See, e.g., Fogel, supra note 10; Nat'l Conference of Comm'rs on Unif. State Laws, supra note 10; O'Donnell et al., supra note 10; von Hirsch, supra note 9.

13 Wilkins et al., supra note 8, at 358 (quoting 1938 statement of Attorney General Frank Cummings); see also Nagel, supra note 7, at 895 (reviewing studies of sentencing disparities from the 1930s).


15 Marvin E. Frankel, Criminal Sentences: Law Without Order (1973). Judge Frankel first presented the ideas from his book in a series of lectures delivered at the
unruliness, the absence of rational ordering, the unbridled power of the sentencers to be arbitrary and discriminatory" in the federal sentencing system.\textsuperscript{16} Attributing these problems to judges' exercise of unregulated sentencing discretion, Judge Frankel was among the first to call for extensive reforms of traditional discretionary sentencing practices.

Even before Judge Frankel's call for change, concerns about sentencing disparities had prompted limited reforms in a few jurisdictions. Seeking greater sentencing consistency, some judges and researchers experimented with sentencing institutes or sentencing councils and then later with "voluntary" guidelines.\textsuperscript{17} These reform efforts typically involved judges collectively examining past sentencing practices in order to develop general sentencing norms to consider in future cases.\textsuperscript{18} However, such reforms proved to be an inadequate solution to unwarranted sentencing disparities. Lacking enforcement mechanisms, sentencing councils and voluntary guidelines largely failed to meaningfully constrain judicial discretion. Studies revealed these reforms had little impact on sentencing outcomes, and thus they did not significantly reduce disparities.\textsuperscript{19}

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\textsuperscript{16} Frankel, supra note 15, at 49.


\textsuperscript{19} \textit{See}, e.g., Shari Seidman Diamond \& Hans Zeisel, \textit{Sentencing Councils: A Study of Sentencing Disparity and Its Reduction}, 43 U. CHI. L. REV. 109, 148-49 (1975) (discussing limited impact of sentencing councils); O'DONNELL ET AL., \textit{supra} note 10, at 16-18 (discussing limited value of sentencing institutes and councils in the federal system); WILLIAM D. RICH ET AL., \textit{Sentencing by Mathematics: An Evaluation of the Early Attempts to Develop and Implement Sentencing Guidelines}, at xxix (1982) (concluding that "[v]oluntary sentencing guidelines do not work"); BUREAU OF JUSTICE ASSISTANCE, \textit{supra} note 18, at 12 ("[R]eview of all the major studies conducted on voluntary/advisory guidelines reveals low compliance by judges and, hence, little impact on reducing disparity."). Recently, a few states—in particular Delaware and Pennsylvania—have had some success reducing sentencing disparities through purely voluntary guidelines. There is reason to suspect, however, that unique forces operating within these jurisdictions foster greater-than-usual compliance with voluntary
Meanwhile, some other jurisdictions, hoping to deliver a strong deterrent message while also reducing sentencing disparities, turned to laws that mandated specific sentences or minimum terms for certain offenses. For instance, in 1956 Congress enacted a set of mandatory minimum sentences for drug offenses. However, this approach to sentencing reform also proved largely unsuccessful. Experience showed that mandatory sentencing laws had little deterrent benefit and actually tended to increase sentencing disparities, as judges and lawyers often sought ways to circumvent these laws whenever they seemed to call for unduly harsh sentences. For these reasons, Congress in 1970 repealed nearly all mandatory minimum sentences for drug offenses. Although a recent resurgence in mandatory sentencing provisions reveals their enduring political appeal, criminal justice experts have consistently concluded that these laws are rarely effective and often produce unjust sentencing outcomes.

22 See, e.g., Tonry, supra note 20, at 98 ("Not only do mandatory sentencing laws not achieve their stated goals [of increased deterrence], they increase the extent of sentencing disparities by the divergence in punishment between those diverted from the system to avoid the mandatory sentence and those few who ultimately receive it."); Barbara S. Vincent & Paul J. Hofer, Federal Judicial Center, The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings 11, 17 (1994).
25 See Michael Tonry, Sentencing Matters 134 (1996) ("Experienced practitioners and social science researchers have long agreed, for practical and policy reasons... that mandatory penalties are a bad idea."); David Yellen, What Juvenile
Tellingly, these early reform efforts were unsuccessful largely because they failed to strike an appropriate balance in the amount of judicial discretion retained in the sentencing process. At one extreme, sentencing councils and voluntary guidelines failed primarily because, by retaining too much judicial sentencing discretion, they proved too pliant. Sentencing outcomes still exhibited unwarranted disparities. At the other extreme, mandatory sentencing laws failed primarily because, by retaining too little judicial sentencing discretion, they proved too rigid. Sentencing outcomes exhibited unwarranted uniformity (or increased disparities due to circumventions).

B. The Guidelines Model and the Critical Role of Departures

Educated by these early experiences, reformers recognized that, to be fair and effective, a sentencing system had to strike an appropriate balance in the amount of judicial sentencing discretion. Sentencing reformers concluded—indeed, often stressed—that a sentencing system must permit the exercise of some judicial discretion in order to allow consideration of unusual or unforeseen circumstances in individual cases. Reformers spoke not of divesting judges of all sentencing discretion, but rather of “structuring” or “guiding” its exercise to Court Abolitionists Can Learn From the Failures of Sentencing Reform, 1996 Wis. L. Rev. 577, 583–84 (“[T]here is near unanimity . . . that mandatory minimums are failures, imposing unduly harsh sentences in many cases and inviting evasion and manipulation.”); see also Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 210–11 (1993) (noting the “persistent criticism of mandatories” and explaining how “uniform treatment through mandatories invariably produces unfairness and generates systemic pressure for evasion”).

26 See, e.g., FAIR AND CERTAIN PUNISHMENT, supra note 11, at 18 (asserting that “some degree of flexibility must be maintained . . . in order for the system to be just and effective”); DON M. GOTTREDSON ET AL., GUIDELINES FOR PAROLE AND SENTENCING 120 (1978) (“Uniform sentences for each statutory offense may lead to results as unfair and unjust as does presently unguided discretion.”); O’DONNELL ET AL., supra note 10, at 34–35, 90–91 (“An inflexible, mechanical sentencing process . . . would be as inequitable and unfair as the current nonsystem.”). See generally KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 4 (1971) (stressing that predictable and uniform rules must always coexist with a measure of flexibility and discretion).

27 See Albert W. Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing, 126 U. Pa. L. Rev. 550, 559 (1978) (noting that even those seeking drastic sentencing reform “recognize the need for some small amount of judicial discretion to take account of variations in culpability”); see also Lawrence F. Travis III, The Politics of Sentencing Reform, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 59, 64–69 (Martin L. Forst ed., 1982) (reviewing a range of reform proposals all of which retained at least a measure of judicial discretion in the sentencing process). Many reform proposals called for the abolition of parole and advocated the complete elimination of the discretion tradi-
achieve greater consistency across a range of cases without sacrificing the flexibility needed to take account of differences between individual offenders.\textsuperscript{28}

Nearly all experts and scholars advocating sentencing reform came to propose or endorse some form of presumptive sentencing guidelines.\textsuperscript{29} The fundamental component of this reform model was a set of binding rules to govern sentencing outcomes across a range of cases from which judges would have authority to diverge under certain circumstances. That is, rules or "guidelines" were to be drafted—preferably by an expert "sentencing commission"\textsuperscript{30}—which, by incorporating pertinent characteristics of offenses and offenders, would establish applicable sentences for most cases.\textsuperscript{31} Judges would, however,
retain some discretion to "depart" from these presumptive sentences when an individual case involved special aggravating or mitigating factors. 32

The failures of other early reform efforts highlighted the importance of balancing judicial sentencing discretion through departure authority. 33 If departure authority too readily allows judges to deviate from the guidelines' presumptive sentences, the system will be too pliant and have the difficulties of voluntary guidelines: judicial discretion will not be sufficiently limited and unwarranted sentencing disparity will persist. 34 Yet, if departure authority too rarely allows judges to depart from the guidelines' presumptive sentences, the system will be too rigid and have the difficulties of mandatory sentencing laws: judicial discretion will be overly limited and unwarranted sentencing uniformity (or increased disparity through circumvention) will occur. 35 In other words, the departure mechanism is at the focal point

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32 See Andrew von Hirsch, The Enabling Legislation, in THE SENTENCING COMMISSION AND ITS GUIDELINES, supra note 5, at 62, 71 ("A sentencing guideline system contemplates departures from the presumptive terms or ranges in special circumstances of aggravation and mitigation."); Stephen C. Rathke, Departure Criteria Under the Minnesota Sentencing Guidelines, 2 FED. SENTENCING REP. 296, 296 (1990) ("Sentencing guidelines require adherence to two principles. First, judges must impose the presumptive sentence in the vast majority of cases. Second, judges must have discretion to depart from the presumptive sentence in those cases which are unusual.").

33 See DAE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 115-32 (1988) (stressing that departure rules "will determine, in large measure, the guidelines' success"); see also Michael S. Gelacak et al., Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis, 81 MINN. L. REV. 299, 303 (1996) (explaining that departure policies and practices are "crucial to the effective functioning" of a sentencing guidelines system); John H. Kramer & Jeffrey T. Ulmer, Sentencing Disparity and Departures from Guidelines, 13 JUST. Q. 81, 81-82 (1996) (describing departures as the "crucial 'window of discretion' for judges and other court actors within any guidelines scheme").

34 See Parent, supra note 33, at 187 (explaining that "[i]f departure rates are high, disparity will not be reduced"); Andrew von Hirsch, Structure and Rationale: Minnesota's Critical Choices, in THE SENTENCING COMMISSION AND ITS GUIDELINES, supra note 5, at 84, 106 (stressing that without "significant constraints [on departures] . . . the guidelines become little more than precatory"); see also Kathleen J. Hanrahan & Alexander Greer, Criminal Code Revision and the Issue of Disparity, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY, supra note 27, at 35, 44-46 (explaining that loosely defined departure provisions have the "potential to reintroduce substantial amounts of discretion, and thus have potential consequences for disparity").

35 See Gelacak et al., supra note 33, at 303 ("[T]he failure to depart in appropriate cases may result in excessive rigidity"); see also von Hirsch, supra note 34, at 106
of a guidelines system’s efforts to achieve greater sentencing consistency without sacrificing needed sentencing flexibility.

Importantly, Judge Frankel and other reformers promoted the guidelines model with its departure mechanism as promising benefits even more profound than simply balancing judicial sentencing discretion. Sentencing disparity, in Judge Frankel’s words, was a symptom of the greater disease of “lawlessness in sentencing.” As he put it, the failure of legislatures “to study and resolve . . . questions of justification and purpose” left sentencing judges “wandering in deserts of uncharted discretion” and thus necessarily produced “a wild array of sentencing judgments without any semblance of consistency.”

Sentencing guidelines were needed to encourage the development of a “code of penal law” to govern the assessment and application of the “numerous factors affecting the length or severity of sentences.” Frankel and other reformers believed that a guidelines system, by requiring the creation of explicit sentencing rules, would serve as a catalyst for the much needed development of principled sentencing law.

In the words of Professor Andrew von Hirsch, another leading advocate of sentencing reform, sentencing guidelines provided a “way of introducing policy and purpose into what has largely been a normless sanctioning system.”

(stressing the importance of departures for sentencing variations and praising Minnesota’s departure standard for “afford[ing] a measure of flexibility in practice”).

36 Frankel, supra note 15, at 1.

37 Id. at 7–8; see also Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 101st Cong. 54 (1990) (testimony of Judge William W. Wilkins, Chairman, U.S. Sentencing Comm’n) (explaining that the “root of the problem was that sentencing . . . was essentially ungoverned by law”), reprinted in 2 Fed. Sentencing Rep. 214, 214–16 (1990).

38 FRANKEL, supra note 15, at 103–18; see also Marvin E. Frankel & Leonard Orland, A Conversation About Sentencing Commissions and Guidelines, 64 U. COLO. L. REV. 655, 656 (1993) (explaining that the “overriding objective” of sentencing guideline reforms “was to subject sentencing to law” (statement of Marvin Frankel)).

39 See FRANKEL, supra note 15, at 118–24; Peter A. Ozanne, Judicial Review: A Case for Sentencing Guidelines and Just Deserts, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY, supra note 27, at 177, 188 (“A sentencing guidelines system brings a rule of law to the criminal sentencing process.”); Morris, supra note 7, at 283–85 (advocating guidelines systems as a means to “at last bring principle, coherence, predictability, and justice to sentencing criminal offenders”); see also VON HIRSCH, supra note 9, at 98–104; O’DONNELL ET AL., supra note 10, at 94–95; FAIR AND CERTAIN PUNISHMENT, supra note 11, at 19–26.

40 Andrew von Hirsch, Federal Sentencing Guidelines: Do They Provide Principled Guidance?, 27 AM. CRIM. L. REV. 367, 368 (1989). Professor von Hirsch and others presented guidelines proposals in the context of specific recommendations that a modern retributivist philosophy—that is, a “just deserts” model—serve as the norma-
The departure mechanism was to play a fundamental part in a guidelines system’s development of purposeful and principled sentencing law. The guidelines model called for sentencing judges to provide written reasons in support of any decision to depart from the guidelines’ presumptive sentences, and appellate courts were expected to review closely these decisions. According to reformers, an articulation and review of the reasons for deviating from the guidelines’ presumptive sentences would provide meaningful feedback for the continuous evolution of sentencing law and policy within the guidelines system. Discussing the “reformist ideal,” Professor Kevin Reitz effectively described the critical role of departures in the guidelines system’s development:

The courts, most of the time, would be bound by the commission’s guidelines. The courts would have responsibility, however, for developing a jurisprudential approach to those occasions in which it is appropriate to set the guideline presumptions aside. The commission, for its part, would benefit from the ongoing elaboration of such a common law of sentencing. Over time, the substantive principles developed by judges could coexist with, or even be incorporated into, the guidelines themselves.

This notion of judicial development of a “common law of sentencing” was a fundamental component of the guidelines model that hoped to take advantage of “the interlocking substantive lawmaking
tive principles for a revised sentencing system. See von Hirsch, supra note 9, at 35-104; Nat’l Conference of Comm’rs on Unif. State Laws, supra note 10, § 3-101, at 95-96.

41 See, e.g., Fair and Certain Punishment, supra note 11, at 21-41 (“Any deviation [from the presumptive sentence] would have to be justified in a reasoned opinion subject to a searching review on appeal.”); Kress, supra note 28, at 222; Nat’l Conference of Comm’rs on Unif. State Laws, supra note 10, §§ 3-207, 208; O’Donnell et al., supra note 10, at 59-60; Leslie T. Wilkins et al., Sentencing Guidelines: Structuring Judicial Discretion, at xvi (1978); see also Harold R. Tyler, Sentencing Guidelines: Control of Discretion in Federal Sentencing, 7 Hofstra L. Rev. 11, 21 (1978) (describing departure provisions of the bill that became the Sentencing Reform Act).

42 See Wilkins et al., supra note 41, at xvii (discussing value of departures in providing “an informational feedback loop,” which “inject[s] a continuous element of self-improvement and regeneration into the guidelines”); O’Donnell et al., supra note 10, at 59-60 (asserting that requiring specific reasons for, and appellate review of, the decision to deviate from the guidelines’ presumptive ranges provides “an ideally suited institutional mechanism to upgrade—from the gradual development of case law—the rationale and rationality of sentencing”).

competencies of the commission and the judiciary." Reformers stressed that judges had special knowledge and insights as a result of their fact-specific, case-by-case consideration of sentencing policy and practice that counseled their involvement in the development of sentencing law. Accordingly, departure authority was seen as especially valuable because it fostered judicial contributions, through the development of a "common law of sentencing," to the principled evolution of the guidelines system. The initial drafting of the sentencing guidelines would make certain policy determinations and set a course for the development of substantive sentencing rules. But then trial and appellate judges, through their articulation and review of reasons supporting decisions to depart from the guidelines in individual cases, would have their say in the evolution of principled and purposeful sentencing law and policy.

In sum, reformers believed that sentencing guidelines, by codifying standards which would direct judges' sentencing decisions in most but not all cases, could reduce sentencing disparities and maintain sentencing flexibility, while promoting the development of principled sentencing law and policy. The departure mechanism was critical to both the guidelines system's effectiveness and its broader mission.

44 Id.
45 See Morris, supra note 7, at 275 (calling the judiciary an "inevitably appropriate sentencing figure in the drama of crime and punishment"); see also Berman, supra note 24, at 96 (explaining that sentencing reformers believed "a critical aspect and asset of the guideline model was that it incorporated mechanisms to promote a 'common law of sentencing' and thereby not only allowed, but actually fostered, a judicial role in sentencing lawmaking").
46 See Morris, supra note 7, at 283–85 (urging broad departure authority to "preserve flexibility and provide an incentive for the essential process of judicial development of common law of sentencing"); Reitz, supra note 43, at 1455 (stressing reformists vision of "a partnership model of shared institutional powers" between the drafters of guidelines and the courts, which would apply and depart from them); see also O'Donnell et al., supra note 10, at 94–95 (suggesting that "a coherent national sentencing policy in time should develop" through the combined work of those developing sentencing guidelines and those rendering sentencing decisions).
47 See, e.g., O'Donnell et al., supra note 10, at 94–95 (asserting that guidelines would create a "structured, rational, and purposeful system designed to preserve our commitment to individualized sentencing while producing sentences fairer to defendants and to society"); Ozanne, supra note 39, at 188 (stressing that a guidelines system "preserves a realistic amount of discretion to vary sentences in individual cases . . . [while] increas[ing] the likelihood that the sentencing rules will be based on reason").

In addition, though not often stressed as a fundamental reason for sentencing guidelines, some reformers highlighted that a guidelines system—especially when managed by a specialized sentencing commission—could provide an effective and appropriate means for controlling the growth of prison populations. See, e.g., John M.
Not only was departure authority to supply a balanced measure of discretion in the sentencing of individual cases, it would also “facilitate the development of a ‘common law of sentencing’ to buttress and supplement the guidelines.”

C. Congress Embraces the Sentencing Guidelines Model

In 1975, Senator Edward Kennedy introduced a bill based largely on Judge Frankel’s and other reformers’ ideas for a guidelines sentencing system. This bill, in addition to calling for the abolition of parole, proposed: (1) creating a federal sentencing commission to produce sentencing guidelines, (2) authorizing judges to depart from the guidelines when justified, (3) requiring judges to give reasons for sentencing determinations, and (4) appellate review of sentencing decisions. Assailing “shameful” disparity resulting from the “absence in the federal criminal code of any guidelines and articulated goals of sentencing,” Kennedy touted his bill as providing “for the first time the general purposes and goals of sentencing to be considered by the judge.”

Kennedy also stressed that the guidelines model, by expressly permitting judges to impose a sentence “outside of the guidelines in an appropriate case,” retained “[n]ecessary flexibility.” Thus, echoing the refrain of reformers, Kennedy advocated guidelines as “preserv[ing] flexibility in sentencing while simultaneously proposing a procedure for the reduction of disparity through the development of more standardized procedures.”

Greacen, Foreword to Rich et al., supra note 19, at xii, xiv; von Hirsch, supra note 5, at 12–14.

48 Nat’l Conference of Comm’rs on Unif. State Laws, supra note 10, § 3-208 cmt., at 165, 166.

49 See S. 2699, 94th Cong. (2d Sess. 1975). Judge Frankel’s ideas first became the centerpiece of a series of policy workshops at Yale Law School, which culminated in a book setting forth proposed federal legislation for sentencing reform. See O’Donnell et al., supra note 10, at xi–xii. Kennedy’s bill was in turn based on the findings of the Yale workshops. See Edward M. Kennedy, Foreword to O’Donnell et al., supra note 10, at vii, ix.

50 As noted before, though always seeking to retain some judicial role in sentencing, many reformers did call for eliminating parole and the sentencing role of parole officials. See supra note 27 and accompanying text.


52 Kennedy, supra note 49, at viii–ix.


54 Id.
Senator Kennedy’s proposals were the foundation for what ultimately became the Sentencing Reform Act of 1984. The provisions of the Sentencing Reform Act (SRA), as well as the Senate Report that constitutes its principal legislative history, reveal that Congress agreed with Judge Frankel and other reformers that the guidelines model could not only help balance judicial sentencing discretion, but also foster the development of purposeful and principled sentencing law.

Congress’s overriding interest in establishing a principled and purpose-driven sentencing system is clear from the Act’s many references to the purposes of sentencing and from the Senate Report’s emphasis on the requirement that “each Federal offender be sentenced . . . in order to achieve the general purposes of sentencing.” The SRA’s first mandate for the newly created U.S. Sentencing Commission was to “establish sentencing policies and practices for the Federal judicial system.”

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55 A lengthy legislative process preceded the final passage of federal sentencing reform legislation based on Senator Kennedy’s bill. See Stith & Koh, supra note 14, at 224–25, 230–66 (detailing the “long and complex” legislative history of the Sentencing Reform Act and the leading role of Senator Kennedy in the federal sentencing reform effort); see also Nagel, supra note 7, at 899–900 (discussing the Sentencing Reform Act’s legislative history).


59 See, e.g., 18 U.S.C. §§ 3551(a), 3552(b), 3555, 3562, 3563(b), 3572(a), 3582(a), 3583, 3584 (1994); 28 U.S.C. §§ 991(b)(1)(A), (b)(2), §§ 994(a)(2), (g), (m) (1994).

eral criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in [the Act]."61 The same statutory provision also requires the Commission to continually "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in [the Act]."62

Critically, the SRA did not give sole responsibility for the consideration of sentencing purposes to the Sentencing Commission. In fact, the list of sentencing purposes repeatedly referenced in the Act—which reflect "the basic purposes of sentencing[:] deterrence, incapacitation, just punishment and rehabilitation"63—appears in the Act's instructions to judges concerning the "Factors To Be Considered in Imposing a Sentence."64 As the Senate Report explains, this precise articulation of the purposes of sentencing was "to recognize the four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case."65 Thus, the SRA called upon judges "in each case" to be responsible for and integrally involved in ensuring that sentencing under the federal guidelines would be developed around and governed by the purposes of sentencing.66

62 Id. § 991(b)(2).
64 18 U.S.C. § 3553(a) (1994). In pertinent part, this statement of purposes provides:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

. . . .

(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 . . . .

Id.
66 See Miller, supra note 60, at 417, 426–28 ("Congress . . . could not have been more explicit in giving both the Commission and judges responsibility for considering how guideline sentences would achieve the purposes of sentencing."); see also Freed, supra note 60, at 1708–10 (noting that the SRA stresses purposes in its instructions "to the Commission and the courts"); Wilkins et al., supra note 8, at 373 (stressing that
Though clear about the centrality of purpose considerations, Congress was somewhat less clear in the SRA about exactly how the Commission and judges were to incorporate purposes into the guidelines sentencing scheme. Nevertheless, many statements in the Senate Report suggest that Congress expected judges to address sentencing purposes in departure cases and, in this way, aid the Commission in its on-going development of principled sentencing law. The Senate Report asserts, for example, that the articulation and review of decisions to depart from the Guidelines will “provide case law development of the appropriate reasons for sentencing outside the guidelines [which], in turn, will assist the Sentencing Commission in refining the sentencing guidelines.” Similarly, the Senate Report calls the statement of reasons for departure decisions “especially important” and then speaks of the role such statements will play in “assist[ing] the Sentencing Commission in its continuous reexamination of its guidelines and policy statements.” These passages confirm that the SRA seeks to foster a common-law dialogue about sentencing purposes through which judges would contribute case-specific insights to the evolution of federal sentencing law, and that Congress viewed departures as the key means for this judicial contribution to principled sentencing law under a guidelines system.

“the overarching purposes of sentencing identified in the SRA... enter into the sentencing calculus to guide the Sentencing Commission in its construction of sentencing guidelines [and]... to direct sentencing judges to the kinds of considerations that are relevant and legally proper in imposing sentence”.

67 See Feinberg, supra note 57, at 326-27 (discussing how Congress was “ambivalent” about clearly defining the role and priority of sentencing purposes and thus “largely fudged the issue in drafting the [SRA]”); see also Miller, supra note 60, at 420-22 (detailing numerous questionable conclusions drawn by those interpreting the SRA about how purpose considerations are to be integrated with the guidelines system).

68 S. REP. No. 98-225, at 151, reprinted in 1984 U.S.C.C.A.N. at 3334. Likewise, in discussing the role of judges within the SRA’s effort to establish consistent sentencing law, the Senate Report highlights both the availability and the reviewability of departures and then suggests that “case law developed from these appeals [of sentences outside the guidelines] may, in turn, be used to further refine the guidelines.” Id. at 50-52, reprinted in 1984 U.S.C.C.A.N. at 3233-35.

69 Id. at 80, reprinted in 1984 U.S.C.C.A.N. at 3263.

70 See Kennedy, supra note 58, at 271 (stressing that the “structure of the guidelines system draws upon the expertise of the judiciary in addressing [key] issues” in sentencing law and that statement and review of reasons for departures were “the cornerstone of the new system, because it will lead to the development of a common law of sentencing”); see also Paul J. Hofer, Discretion to Depart after Koon v. United States, 9 FED. SENTENCING REP. 8, 11 (1996) (discussing departures as part of SRA’s “model of collaborative policy development, in which the Commission’s rules would evolve through a process of appellate review”); Barry L. Johnson, Discretion and the
Congress also stressed the role of departures in providing a balanced measure of judicial discretion within the guidelines system. The Senate Report makes clear that Congress did not want or expect a guidelines sentencing system to "eliminate the thoughtful imposition of individualized sentences" and that judges' authority to depart from the guidelines was to be the central mechanism enabling individualized sentencing. The Senate Report repeatedly references the Act's departure provisions when explaining that the SRA preserves "considerable flexibility in the formulation of an appropriate sentence for each particular case." Yet, Congress also appreciated that departure authority had to be circumscribed for the guidelines to control most sentencing outcomes and thereby reduce unwarranted disparity. The Senate Report recounts that Congress, fully aware that voluntary guidelines had proved "ineffective in reducing sentencing disparities," rejected an effort to significantly expand the SRA's departure authority because doing so would "make the sentencing guidelines more voluntary than mandatory."

Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of Koon v. United States, 58 Ohio St. L.J. 1697, 1740-45 (1998) (highlighting the special role of departures and appellate review within SRA's effort to create "a body of legal sentencing principles, a jurisprudence of sentencing").

71 S. Rep. No. 98-225, at 52, reprinted in 1984 U.S.C.C.A.N. at 3235; see also Mistretta v. United States, 488 U.S. 361, 367 (1989) (noting that the legislative history of the SRA indicates that Congress "rejected strict determinate sentencing because it concluded that a guidelines system would be successful in reducing sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case"); S. Rep. No. 98-225, at 150-51, reprinted in 1984 U.S.C.C.A.N. at 3333-34 (stressing that "each offender stands before a court as an individual, different in some ways from other offenders" and that "[s]ome variation [in sentencing outcomes] is not only inevitable but desirable").

72 See Judy Clarke & Gerald McFadden, Departures from the Guideline Range: Have We Missed the Boat, or Has the Ship Sunk?, 29 Am. Crim. L. Rev. 919, 921-27 (1992) (stressing the importance Congress placed on departures as the mechanism for retaining judicial discretion under the Guidelines); Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity, 29 Am. Crim. L. Rev. 833, 861-62 (1992) (highlighting that "departures are an integral and important part of the statutory scheme... [serving as] the crucial mechanism for avoiding undue rigidity"); see also Johnson, supra note 70, at 1700-01 (explaining that Congress expected the departure provision of the SRA "to provide a safety valve for unusual cases").


74 Id. at 79, reprinted in 1984 U.S.C.C.A.N. at 3262; see also 133 Cong. Rec. S16, 644-48, 16,647 (daily ed. Nov. 20, 1987) (statement of Sen. Hatch) ("If the standard [for departures] is relaxed, there is a danger that trial judges will be able to depart from the guidelines too freely, and such unwarranted departures would undermine..."
Accordingly, Congress adopted a departure standard in the SRA which provides that a judge must impose a sentence within ranges set forth in the guidelines, "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." As detailed in the Senate Report, Congress thought the language of this provision would guarantee that "most cases will result in sentences within the guideline range" and yet still provide "the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines."

Indeed, Congress expressed faith that the entire guidelines sentencing structure, buttressed by the departure mechanism, "should permit enough flexibility to individualize sentences according to the characteristics of the offense and the offender, while at the same time resulting in the imposition of sentences that treat offenders consistently and fairly."

II. THE FEDERAL SENTENCING GUIDELINES IN PRACTICE: THE ORIGINS AND CONSEQUENCES OF A MISGUIDED DEPARTURE JURISPRUDENCE

Drawing upon the experience of early reforms and the recommendations of criminal justice experts, Congress created through the SRA what appeared to be an ideal model for sentencing reform. Given the SRA's seemingly sound theoretical foundation and statutory structure, the transition to guidelines sentencing should have been a spectacular advancement in the federal criminal justice system.
But, as is well known to those familiar with the federal system, the implementation of the Federal Sentencing Guidelines has been fraught with difficulties and marked by far more criticism than praise.\textsuperscript{79} Federal judges have been perhaps the most strident complainants. Judge José Cabranes, in a widely cited 1992 speech, deemed the Guidelines "a dismal failure."\textsuperscript{80} Other judicial critics have called the federal guidelines system "a dark, sinister, and cynical crime management program [with] . . . a certain Kafkaesque aura about it,"\textsuperscript{81} and even "the greatest travesty of justice in our legal system in this century."\textsuperscript{82} Many defense attorneys and academic commentators have been only slightly more tempered in their criticisms.\textsuperscript{83} Even sup-

\textsuperscript{79} In accordance with the SRA's mandates, the United States Sentencing Commission submitted the first set of Guidelines to Congress on April 13, 1987. See U.S. SENTENCING GUIDELINES MANUAL 1.1 (1987). After the prescribed period of congressional review, the initial Guidelines became effective on November 1, 1987. Pub. L. No. 98-473, § 235, 98 Stat. 2031 (1984). However, within two years, over 200 district judges declared at least some portion of the SRA's structure unconstitutional. See Tonry, supra note 25, at 73–74 (discussing arguments made against the SRA's constitutionality). Professor Michael Tonry sensibly suggests that many of these rulings, "though necessarily couched in constitutional terms, . . . [revealed] judges' deep antipathy to the guidelines themselves." Id. at 73. The Supreme Court conclusively ruled in favor of the SRA's constitutionality by an eight to one vote in Mistretta v. United States, 488 U.S. 361 (1989). The Guidelines have been continuously updated through both yearly and emergency amendments; the latest incarnation of the Guidelines appears as U.S. SENTENCING GUIDELINES MANUAL (1999).


\textsuperscript{82} Id. at 21 (quoting U.S. District Judge Donald Lay); see also Sith & Cabranes, supra note 5, at 5 & n.12 (providing detailed evidence that "[m]any federal judges have been openly and strongly critical of the Guidelines"); Marc Miller, Rehabilitating the Federal Sentencing Guidelines, 78 JUDICATURE 180, 180–83 (1995) (detailing widespread judicial hostility to the federal sentencing guidelines).

Supporters of federal reforms readily acknowledge that the Guidelines are flawed in many ways. Perhaps most tellingly, states that have recently considered adopting guidelines systems have expressly rejected the Federal Sentencing Guidelines as a model for their own reform efforts.

So what went wrong? How did the guidelines model that, in theory, was widely advocated become a federal guidelines system that, in practice, is widely abhorred? Though there is no single or simple answer to this question, much of the difficulties and discontentment with the Federal Sentencing Guidelines can be traced to misapplications of the SRA's departure authority. The misguided departure

the way the Guidelines "have revolutionized the practice of criminal law in the federal courts".


85 See TONY, supra note 25, at 73 (noting that, in numerous states considering sentencing reforms, "committees at early meetings adopted resolutions expressly repudiating the federal guidelines as a model for anything they might develop"); see also Kevin R. Reitz & Curtis R. Reitz, Building a Sentencing Reform Agenda: The ABA's New Sentencing Standards, 78 JUDICATURE 189, 189–92 (1995) (explaining that, during the American Bar Association's drafting of model sentencing standards, "the federal system was held out repeatedly as a bad example," requiring the proposed standards "to be defended as very different than the federal guidelines").

86 Technically, "departure authority" encompasses several distinct elements of the guidelines system. The Sentencing Commission utilized the departure mechanism to implement Congress's directive that the Guidelines "reflect the general appropriateness of imposing a lower sentence . . . to take into account a defendant's substantial assistance in the investigation and prosecution" of others. 28 U.S.C. § 994(n) (1994). The Guidelines' provision for departures based on "substantial assistance," U.S. SENTENCING GUIDELINES MANUAL S.G. § 5K1.1, raises many issues that are conceptually distinct from those that are the centerpiece of this Article. See HUTCHISON ET AL., supra note 74, at 1411 (discussing the "ideological difference" between section 5K1.1 departures and other departures). See generally Cynthia Kwei Yung Lee, From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Power Over Substantial Assistance Departures, 50 RUTGERS L. REV. 199 (1997) (discussing substantial assistance departures). Further, in certain guideline sections, the Commission has expressly provided for "guided" departures by specifying particular fact situations in which a departure would be appropriate. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2G1.1, cmt. n.1; § 2Q1.3, cmt. n.7; see also id. ch. 1, pt. A, introductory cmt. 4(b) (discussing these sorts of departures). As others have noted, because "guided departures are more akin to adjustments . . . which judges use to calculate the applicable Guidelines range, rather than a departure from the Guidelines range," such departures do not implicate the same issues and policy concerns as "unguided" departures.
jurisprudence developed by the Sentencing Commission and the federal courts fails to give effect to the fundamental role of departures within a guidelines system and has had dire consequences for the entire federal sentencing enterprise.

As suggested in the Introduction, the Supreme Court seemed to be trying in *Koon v. United States* to remediate the system's difficulties by enhancing sentencing judges' discretion to depart.\(^7\) However, as discussed in Part III, the Court's decision in *Koon* may have ultimately exacerbated some of the worst features of an already troubled departure jurisprudence.\(^8\) Yet before we can effectively assess the Supreme Court's failure to fix the Guidelines' departure jurisprudence, we need to examine how this jurisprudence initially got broken. This Part thus identifies the critical missteps by the Sentencing Commission and the lower federal courts that initially produced a departure jurisprudence that undermined, rather than fostered, both the effectiveness and broader mission of the Federal Sentencing Guidelines.

A. Initial Development of the Departure Standard

1. The Sentencing Commission's Direction of the Departure Inquiry

Though the background and legislative history of the SRA emphasized the importance of departures, the Act itself set forth only in broad terms the framework and standards for departure authority.\(^9\) Thus, how the Sentencing Commission initially expounded upon the SRA's statutory directives was largely to determine the scope and functioning of departure authority under the Guidelines. It was ultimately

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\(^7\) See supra text accompanying note 2.
\(^8\) See infra text accompanying notes 229–87.
\(^9\) The failure of the SRA to address departure authority with particularity is not surprising given the sentencing reform proposals on which the SRA was built. Early advocates of reform typically described only the broad contours of the guidelines model, and few addressed in detail how the departure mechanism would operate; though the principles and justifications for departure authority were presented, little attention was given to the functioning of departures in practice. See, e.g., Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 10, §§ 3–207, 3–208, at 160–66; O'Donnell et al., *supra* note 10, at 59; von Hirsch, *supra* note 9, at 99–101; see also Parent, *supra* note 33, at 118–32 (noting many issues of departure policy and practice that Minnesota's legislature did not address when passing guidelines sentencing reform legislation); Hanrahan & Greer, *supra* note 34, at 44–46 (noting the "lax definition" of departure standards in states that adopted the guidelines model).
the Sentencing Commission's task to develop a departure mechanism that would appropriately balance judicial sentencing discretion and also foster the development of principled sentencing law within the guidelines system.

But rather than recognize and embrace departures as a fundamental component of guidelines sentencing, the Sentencing Commission approached departure authority quite warily. Viewing the SRA principally as a mandate for sentencing uniformity, the Commission seemed exceedingly concerned when formulating the Guidelines that retaining any significant sentencing discretion could subvert efforts to reduce disparities. The Commission appeared to regard departures not as an integral part of a guidelines scheme, but rather as a dangerous necessity whose scope and significance needed to be narrowly conceived and greatly confined. This cramped view of departure authority colored the Commission's work as it expounded upon the SRA's departure provisions. In the initial Guidelines Manual, the Commission developed a restrictive and narrow approach to the SRA's standard for when judges can depart from the Guidelines. At

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90 See Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. Davis L. Rev. 617, 632 (1992) (noting that "the way that the Sentencing Commission read its statute and defined its task... made uniformity the key objective of the guidelines"); Nagel, *supra* note 7, at 934 (suggesting that, in formulating the Guidelines, the Commission's "emphasis was more on making sentences alike"); see also Freed, *supra* note 60, at 1704–05, 1728–30, 1740–47 (discussing ways in which the Commission exalted uniformity over discretion and flexibility in the guidelines sentencing process).

91 See Nagel, *supra* note 7, at 938–39 (suggesting that, when formulating the Guidelines, the Commission was especially concerned about "the potential disparity introduced by excessive judicial 'departures' from the guidelines"); Hutchison et al., *supra* note 74, at 1411 (explaining that "the Commission's purpose was to minimize those occasions on which... departures would be allowed"); see also Schulhofer, *supra* note 72, at 862–69 (discussing the "pervasive assumption" by the Commission that "departures are highly suspect... a sign of disloyalty to the Guidelines or of some flaw in their implementation").

The initial Commission’s failure to appreciate the fundamental role of departure authority was tellingly revealed in its *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*. This lengthy document, which was released along with the original Guidelines and purported to explain the "background, empirical basis, structure, underlying rationale, and significant estimated effects" of the Guidelines, barely even mentioned departure authority. See U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, at 1 (1987).

Similarly, the Commission’s cramped view of departure authority was also revealed through its early record-keeping, wherein the Commission labeled sentences involving departures as "non-compliance" with the Guidelines. See Katherine Oberlies, *Reviewing the Sentencing Commission’s 1989 Annual Report*, 3 Fed. Sentencing Rep. 152, 153 (1990).
the same time, however, the Commission virtually ignored the SRA's standard for how much judges should depart from the Guidelines.

a. When Judges Can Depart

The key provision of the SRA that grants departure authority, § 3553(b), states:

The court shall impose a sentence of the kind, and within the range, [established by the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.92

Though rarely noted, this statutory standard for when judges may depart from the Guidelines actually has two distinct requirements, which might be labeled separately as "descriptive" and "prescriptive" components.93 The first requirement—the descriptive component of § 3553(b)—concerns the presence of an aggravating or mitigating circumstance that was "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." This requirement calls upon a sentencing court, after identifying the aggravating and mitigating factors present in the case at hand, to assess whether the Sentencing Commission "adequately" incorporated these factors into the applicable guideline. The second requirement—the prescriptive component of § 3553(b)—concerns the presence of an ag-

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92 18 U.S.C. § 3553(b) (1994). A 1987 amendment to this provision adds the instruction that, "[i]n determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." Id. The legislative history that accompanied this amendment indicates that it was principally designed to protect Commissioners and their work product from being subjected to discovery by litigants seeking information on the background of specific guideline provisions. See 123 Cong. Rec. S16,647-48 (daily ed. Nov. 20, 1987) (statements of Sens. Thurmond and Kennedy); see also Gelacak et al., supra note 33, at 328 n.127 (discussing this amendment).

93 Interestingly, Judge William W. Wilkins, Jr., who served as the Chairman of the Sentencing Commission when the Guidelines were first drafted and implemented, is one of only a few to have discussed in detail the "two-prong test" set forth in the departure standard of § 3553(b). See William W. Wilkins, Jr., Sentencing Reform and Appellate Review, 46 Wash. & Lee L. Rev. 429, 438-39 (1989); see also United States v. Summers, 893 F.2d 63, 66 (4th Cir. 1990) (Wilkins, J.) (discussing the "two-prong test" for departures). Judge Wilkins' insight is ironic because, as discussed herein, many of the problems with the Guidelines' departure jurisprudence can be attributed to the Commission's failure to place appropriate emphasis on each element of the departure standard.
gravating or mitigating circumstance "that should result in a sentence different from that described." This requirement calls upon a sentencing court, after identifying the aggravating and mitigating factors present in the case at hand, to assess whether the sentencing court itself believes these factors justify a sentence outside the Guidelines' prescribed range.

Critically, in setting forth the initial Guidelines, the Commission made the descriptive component of § 3553(b) the focal point of the departure inquiry. In expounding on departure authority in the first Guidelines Manual, the Commission twice quoted only the descriptive portion of the statutory standard. The Manual intimated that the central issue for any departure decision was whether the Commission "had adequately considered a particular factor." The Commission further indicated that sentencing courts should "treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes" and consider a departure only when confronted with "an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm." In other words, the Commission suggested that a sentencing court's departure decision-making should involve first divining the parameters of the "heartland" of the applicable guideline and then contemplating a departure only if the case at hand somehow fell outside these parameters.

Moreover, in articulating this approach to departures, the Commission intimated that the Guidelines were comprehensive and complete and that judges would not, and should not, find many reasons or opportunities to depart. Though parts of the Guidelines Manual seemed to welcome sentencing judges' use of their departure authority, the Commission ultimately asserted that departures would be

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95 Id. ch. 1, pt. A, introductory cmt. 4(b), at 1.6.
96 Id.
97 See Wilkins, supra note 93, at 439–40 (discussing the Commission's "heartland" approach to departures roughly in these terms).
98 In the Sentencing Guidelines and Policy Statement's introduction, for example, the Commission explained that it did "not intend to limit the kinds of factors... that could constitute grounds for departure in an unusual case." U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. 4(b), at 1.7 (1987). Further, through a series of policy statements, the Commission identified more than a dozen factors that it had not fully taken into account in the initial Guidelines and could thus provide a basis for a departure. See id. ch. 5, pt. K, introductory cmt. 2, at 5.30; id. §§ 5K2.1–2.14. And, in § 5K2.0, the policy statement that addressed departure authority in general, the Commission recognized that the circumstances "that may war-
“rare” and that relatively few cases should involve factors that it had "not adequately taken into consideration." In the Guidelines Manual’s introduction, the Commission explained that “despite the courts’ legal freedom to depart from the guidelines, they will not do so very often . . . because the guidelines, offense by offense, seek to take account of those factors that the Commission’s sentencing data indicate make a significant difference in sentencing.” Thus, asserted the Commission, departures on grounds not mentioned in the Guidelines “will be highly unusual.”

The text of the Guidelines re-affirmed the message that cases calling for the exercise of departure authority should be few and far between. The sheer size of the initial Guidelines Manual, which ran more than 200 pages and contained over 100 multi-section guidelines, implied that the Commission had considered most sentencing factors. The strict language and many details of particular provisions likewise suggested that sentencing judges would seldom find opportunities to depart from the Guidelines’ prescribed sentencing ranges.
Of particular note, the Commission declared many potentially mitigating personal characteristics "not ordinarily relevant" or entirely irrelevant to whether an offender's sentence should involve a departure.\(^{104}\)

In sum, the Commission in the initial Guidelines elaborated a narrow and restrictive approach to when judges could depart. By focusing on the descriptive component of the SRA's departure standard, the Commission suggested that a court's departure decision-making should focus only on divining what was in the heartland of the applicable guideline. Moreover, the Commission also intimated that its heartlands were quite large; departures would be "rare," because very few cases would involve factors outside the Commission's heartlands.

b. How Much Judges Should Depart

Though the SRA addresses when judges can depart from the Guidelines, the Act does not set forth a clear standard for how much judges should deviate from the Guidelines' sentencing ranges when having the authority to depart. Section 3553(b) provides a statutory standard for the threshold decision to depart, but no corresponding section directly governs the extent of departures. Instead, the extent of departures is addressed only indirectly through the SRA's provisions concerning appellate review. Specifically, § 3742 states that "the court of appeals shall determine whether the sentence . . . outside of the applicable guideline range . . . is unreasonable."\(^{105}\) In this way, the SRA simply instructs that the extent of any departure must be "reasonable."

The Commission did not expound upon this statutory provision anywhere in the initial Guidelines Manual. The Commission's only direct reference to this part of § 3742 was in the Manual's introduction, where the Commission simply cited the statute and stated: "If the

\(^{104}\) See U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1-1.6 (providing that age, education and vocational skills, mental and emotional conditions, physical condition, previous employment record, family ties and responsibilities, and community ties are "not ordinarily relevant in determining whether a sentence should be outside the guidelines"); id. § 5H1.4 (providing that drug dependence or alcohol abuse "is not a reason for imposing a sentence below the guidelines"); see also Reitz, supra note 43, at 1464-65 (explaining how the "restrictive flavor" of particular guideline provisions "could be understood as an announcement that many of the 'human elements' of punishment decisions, which were salient considerations before the guidelines were created, are now for the most part off the table").

\(^{105}\) 18 U.S.C. § 3742(e)(3) (1994); see also id. § 3742(f)(2) (providing instructions for setting aside a departure if it "is unreasonable").
judge departs from the guideline range, an appellate court may review the reasonableness of the departure."106 In its discussions of departure authority, the Commission did not address in any way what sorts of departures might or might not qualify as "unreasonable."107

More generally, the Commission in the initial Guidelines did not set forth any general standards or methodology concerning the extent of departures.108 On this issue, the initial Guidelines said no more than that controlling decisions as "to what extent departure is warranted can only be made by the court at the time of sentencing."109

2. The Courts Follow the Commission's Lead

The Commission's initial approach to departures set the tone for the federal courts as they began applying the Guidelines. The courts of appeals, in particular, largely carried forward the Commission's focus on sentencing uniformity and the concern that too many departures could undermine efforts to reduce sentencing disparity.110

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107 See United States v. Nuno-Para, 877 F.2d 1409, 1414 n.3 (9th Cir. 1989) (la-
menting that neither the SRA "nor the guidelines express clear guidance for deter-
mining when a sentence that departs from the guidelines is unreasonable"); see also Stith & Cabranes, supra note 5, at 127 (noting that the Commission has not ampli-
fied the SRA's requirement that departures be reasonable).
108 See Hutchinson et al., supra note 74, at 1419-20 ("The guidelines do not set forth any procedures for the district courts to follow when departing under Section 5K2.0."); Jeffri Wood & Diane Sheehey, Federal Judicial Center, Guidelines Sentenc-
ing: An Outline of Appellate Case Law on Selected Issues 213 (1997) ("The guidelines do not . . . recommend procedures for departures."); see also Stith & Cabranes, supra note 5, at 127 ("By and large, the Guidelines only govern the bases for departure, not the amount of departure."); Saris, supra note 58, at 1042 (noting that "[o]nce a court has decided to depart, generally there is no formula governing the degree of departure").
110 In the context of the few particular guidelines provisions that recommended a departure on specific grounds, the initial Commission did occasionally outline a methodology or some considerations for the extent of the departure. See, e.g., id. § 4A1.3 (recommending a procedure for departures based on criminal history); id. §§ 5K2.1, 5K2.2, 5K2.3 (discussing relevant factors for an increased sentence when death, physical injury, or extreme psychological injury resulted from the commission of the of-
fense); id. § 5K2.10 (discussing relevant factors for a decreased sentence when the victim's wrongful conduct provoked the offense behavior).
111 See, e.g., United States v. Uca, 867 F.2d 783, 787 (3d Cir. 1989) (asserting that Congress's overriding purpose in the SRA was "achieving general uniformity of treatment" and that "attempts to impose uniformity will be destroyed if courts often depart from the Guidelines"); United States v. Brewer, 899 F.2d 503, 511 (6th Cir. 1990) (asserting that the Guidelines were "designed to bring about uniformity"); United States v. Russell, 917 F.2d 512, 515 (11th Cir. 1990) (stressing that "one of the main
result, most courts gave effect to and even extended the Commission's restrictive approach to when judges could depart from the Guidelines. Yet, these courts, like the Commission, failed to give serious attention to how much judges should depart from the Guidelines when having authority to depart.

a. When Judges Can Depart

In line with the Commission's discussion of departure authority in the Guidelines Manual, early departure decisions focused almost exclusively on whether particular factors at hand had been considered by the Sentencing Commission and thus fell within the applicable guideline's "heartland." In considering their authority to depart, courts concluded that the "crux of the matter is whether the guidelines have taken the principal sentencing factors into account." District and appellate courts surmised that it was "only when the case before the court falls outside the 'heartland' that departure comes into play." In other words, taking their cue from the Commission, the federal courts focused almost exclusively on the descriptive component of the SRA's departure standard.

goals of the Sentencing Reform Act of 1984 was the achievement of a high degree of uniformity in federal sentencing"; United States v. Jackson, 921 F.2d 985, 988 (10th Cir. 1990) (expressing concern that "uniformity is threatened" by "a judge who departs [and] no longer strictly follows the standards of the Guidelines"); see also Schulhofer, supra note 72, at 862-69 (discussing the "general view" of the courts of appeals that "departures are a threat to the... system").


112 United States v. Studley, 907 F.2d 254, 257-60 (1st Cir. 1990); see also cases cited supra note 111.


114 See supra text accompanying notes 92-97 (discussing descriptive component of SRA's departure standard). When setting out the general terms of departure authority, courts would on some occasions include a reference to or a brief discussion of the...
The courts of appeals also made a number of their own consequential decisions about the jurisprudence of departure review.116 The circuits all decided that, in the absence of a legal misunderstanding about departure authority, a district court’s decision not to depart from the Guidelines was unappealable.116 In addition, the courts of appeals concluded that whether a particular factor provided a valid basis for a departure involved a question of law calling for de novo review.117 Neither of these determinations was clearly mandated by the SRA; the Act’s provisions might be read to permit review of a district court’s decision not to depart,118 and they suggest various possi-

SRA’s prescriptive requirement that a factor could serve as the basis of a departure only if it “should result” in a sentence outside the Guidelines. See, e.g., United States v. Rivera, 994 F.2d 942, 947 (1st Cir. 1993); United States v. Goff, 907 F.2d 1441, 1445–47 (4th Cir. 1990); United States v. Lira-Barraza, 897 F.2d 981, 989 (9th Cir. 1990). However, courts’ analysis of whether factors in these cases would allow a departure rarely include serious or extended discussion of this requirement.


116 See, e.g., United States v. Morales, 898 F.2d 99, 103 (9th Cir. 1990); United States v. Tucker, 892 F.2d 8, 10 (1st Cir. 1989); United States v. Franz, 886 F.2d 973, 978 (7th Cir. 1989); United States v. Colon, 884 F.2d 1550, 1552 (2d Cir. 1989); ROGER W. HAINES, JR. ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 744 (1997) (citing cases and explaining that “all of the circuits have repeatedly held that they lack appellate jurisdiction to review a district court’s discretionary refusal to depart downward from the Guideline range”); Hutchison et al., supra note 74, at 1429 n.8 (same).

117 The First Circuit’s decision in United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir. 1989), was among the first to address departure review standards. In Diaz-Villafane, the First Circuit developed a three-part test for appellate review of departures, the first step of which called for plenary review of “whether or not the circumstances [relied on by the district court] may appropriately be relied upon to justify departure.” Id. at 49. The basic approach articulated in Diaz-Villafane—which the First Circuit itself further refined in United States v. Rivera, 994 F.2d 942 (1st Cir. 1993), through an opinion by then-Circuit Judge Stephen Breyer—was expressly adopted in four other circuits, and its substantial equivalent was followed in others. See Selya & Kipp, supra note 115, at 18–21 nn.88–96 (reviewing the Diaz-Villafane standard and cases from other circuits that adopted a similar departure review methodology); see also Miller & Wright, supra note 113, at 770–93 (discussing at length the decisions in Diaz-Villafane and Rivera and noting their impact on all of departure jurisprudence).

118 The failure to depart might in some cases be characterized as “a violation of law” appealable under 18 U.S.C. § 3742(a)(1), (b)(1), or as “an incorrect application of the sentencing guidelines” appealable under 18 U.S.C. § 3742(a)(2), (b)(2). See David Yellen, Appellate Review of Refusals to Depart, 1 FED. SENTENCING REP. 264, 264–65 (1988); Freed, supra note 60, at 1738–39; see also United States v. Denardi, 892 F.2d 269, 272 (3d Cir. 1989) (Becker, J., dissenting) (arguing for appellate review of refusals to depart under certain circumstances). But see Wilkins, supra note 93, at 437.
ble standards for review of a decision to depart. Nevertheless, adopting procedures that clearly operated to discourage departures, the courts of appeals concluded that they were to review closely any decision to depart, but were not to review at all any refusal to depart.

Though the courts developed a uniform approach to departures, the early results of departure decision-making were somewhat mixed. Because application of the Sentencing Commission’s abstract “heartland” concept proved challenging, outcomes in departure cases often varied from court to court and from circuit to circuit. Some (suggesting that Congress made a conscious decision in the SRA to deny any right to appeal a sentencing court’s decision not to depart from the Guidelines).

119 The SRA’s appellate review provision, 18 U.S.C. § 3742, does not clearly address the appropriate standard for reviewing departures. This section indicates that appellate courts shall determine whether a sentencing outside the Guidelines “is unreasonable,” and it further provides that the “courts of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous, and shall give due deference to the district court’s application of the guidelines to the facts.” Id. § 3742(e)(3). Commentators have debated, particularly with respect to review of departure decisions, how appellate courts should interpret and apply the directives of § 3742. See, e.g., Johnson, supra note 70, at 1724–28 (“Neither section 3742 nor any relevant legislative history tell us how departure review should be treated.”); MacCarthy & Murnighan, supra note 99, at 60–63 (debating what the “vague” terms of § 3742(e) mean for review of departures); Steven E. Zipperstein, Certain Uncertainty: Appellate Review and the Sentencing Guidelines, 66 S. Cal. L. Rev. 621, 634–39 (1992) (noting that “appellate courts have struggled to formulate appropriate standards of review”).

Of course, as discussed in Part III, the Supreme Court’s decision in Koon v. United States expressly concerned the appropriate standard for appellate review of departures.

120 See Stith & Cabrantes, supra note 5, at 73 (noting that the “asymmetrical rule of appealability [through which] a decision to depart risks an appeal and reversal, while a decision to adhere to the prescribed sentencing range insulates the judge from second-guessing . . ., [serves] to discourage judges from departing”).

121 See Miller & Wright, supra note 113, at 765–79 (noting that judges have “struggled to give meaning to the heartland idea in theory, and in the context of particular cases and guidelines”); MacCarthy & Murnighan, supra note 99, at 55 (observing that the heartland idea “has not been a simple concept for the courts to grasp and apply”).

122 See Daniel J. Freed & Marc Miller, Departures Visible and Invisible: Perpetuating Variation in Federal Sentences, 5 Fed. Sentencing Rep. 3, 3–5 (1992) (discussing statistics which indicated “that circuits in fact depart quite unevenly”); Gelacak et al., supra note 33, at 337–51 (detailing how, though “each appellate court applied the same formal standard of review,” the outcomes in departure cases in the circuits “differed significantly . . . with respect to downward departures”); see also John Frazier Jackson, Departure from the Guidelines: The Frolic and Detour of the Circuits—How the Circuit Courts are Undermining the Purposes of the Federal Sentencing Guidelines, 94 Dick. L. Rev. 605,
district courts, stressing those Commission statements that seemed to welcome departures, readily found factors falling outside the heartland of particular guidelines that could provide a basis for departure.123 A few appellate decisions lent support to the notion that sentencing judges possessed considerable discretion to depart from the Guidelines. In some cases, particularly in the Second, Third, and Ninth Circuits, appellate courts affirmed departures with opinions that suggested a number of factors had not been adequately considered by the Commission.124

But early decisions which countenanced the exercise of departure authority were in a decided minority. Most district courts reasoned that "valid departures are likely to be few in number," since the Sentencing Commission "already considered all but the most esoteric factors."125 Reflecting the views of many colleagues, one sentencing judge concluded that "[i]t is clear . . . that the Sentencing Commission intended to leave the departure window open only a crack."126

612-31 (1990) (noting that departure decisions "are not uniform: at the least they are diverse, and more likely are in conflict with each other"); Zipperstein, supra note 119, at 651–55 (discussing "decisional disparity emanating from the appellate courts" in departure cases).


126 United States v. Davis, 715 F. Supp. 1473, 1482 (C.D. Cal. 1989), aff'd in part and vacated in part, 960 F.2d 820 (9th Cir. 1992); see also Freed, supra note 60, at 1745–46 (discussing tendency of district courts to interpret the Guidelines strictly with little room for departures); Saris, supra note 58, at 1040–41 n.69 (explaining that "the general perception in district courts—according to my own experience and
The courts of appeals often validated this perspective through rulings that suggested that the Commission’s “heartlands” were large and left little room for departures. Often stressing that departures should be “quite rare,”127 the appellate courts frequently held that any consideration of a factor (or even the likely consideration of a factor) by the Commission constituted “adequate” consideration thereby precluding a departure on that basis.128 In particular, many circuits strictly construed the Guidelines’ instructions that most offender characteristics are “not ordinarily relevant” and disallowed departure on these grounds in all but the most exceptional circumstances.129

that of numerous commentators—was that departures were disapproved deviations from the standard”).

127 United States v. Justice, 877 F.2d 664, 666 (8th Cir. 1989); see also United States v. Bell, 974 F.2d 537, 538 (4th Cir. 1992) (“Downward departures are permitted only in the rare case . . . ”); United States v. Bowser, 941 F.2d 1019, 1027 (10th Cir. 1991) (“Given the Sentencing Commission’s comprehensive treatment of the factors involved in sentencing and the Congressional goals of uniformity and proportionality in sentencing, we have determined that departures should rarely occur.” (quoting United States v. Jackson, 921 F.2d 985, 989 (10th Cir. 1990) (en banc)); United States v. Enriquez-Munoz, 906 F.2d 1019, 1027 (10th Cir. 1991) (“Given the Sentencing Commission’s comprehensive treatment of the factors involved in sentencing and the Congressional goals of uniformity and proportionality in sentencing, we have determined that departures should rarely occur.” (quoting United States v. Jackson, 921 F.2d 985, 989 (10th Cir. 1990) (en banc)); United States v. Enri

128 See, e.g., United States v. Piche, 981 F.2d 706, 719 (4th Cir. 1992); United States v. Harrington, 947 F.2d 956, 962–63 (D.C. Cir. 1991); United States v. Jackson, 921 F.2d 985, 988 (10th Cir. 1990) (en banc); United States v. Russell, 917 F.2d 512, 515 (11th Cir. 1990); see also Douglas O. Linder, Journeying Through the Valley of Evil, 71 N.C. L. Rev. 1111, 1144–47 (1993) (reviewing cases reversing departures and noting that “Commission consideration of a circumstance has been found to be ‘adequate’ even where there is scant evidence to support that conclusion’); Marc Miller & Daniel J. Freed, Honoring Judicial Discretion Under the Sentencing Reform Act, 3 Fed. Sentencing Rep. 235, 238 (1991) (reviewing cases reversing departures based on a broad conception of what the Commission has adequately considered); Robert H. Smith, Departure Under the Federal Sentencing Guidelines: Should a Mitigating or Aggravating Circumstance be Deemed “Adequately Considered” Through “Negative Implication?” 36 Ariz. L. Rev. 265, 275–78 (1994) (discussing appellate cases finding by negative implication that a circumstance had been adequately considered by the Commission).

129 See, e.g., United States v. Mogel, 956 F.2d 1555, 1562 (11th Cir. 1992); United States v. Guajardo, 950 F.2d 203, 208 (5th Cir. 1991); United States v. Poff, 926 F.2d 588, 593 (7th Cir. 1991); United States v. Brand, 907 F.2d 31, 33 (4th Cir. 1990); United States v. Pozzy, 902 F.2d 133, 138–39 (1st Cir. 1990); United States v. Brewer, 899 F.2d 503, 511 (6th Cir. 1990); United States v. Sutherland, 890 F.2d 1042, 1043 (8th Cir. 1989); see also Stith & Cabranes, supra note 5, at 99–100 (detailing many early appellate rulings which reversed departures based on defendants’ personal characteristics); Schulhofer, supra note 72, at 863 (“In most cases considering downward departure based on individual circumstances, appellate courts have set aside the departure, usually in terms suggesting that the Guidelines essentially preclude departure or place an extremely heavy burden of justification on the district judge.”).
b. How Much Judges Should Depart

Though always giving considerable attention to the threshold decision to depart, courts typically treated the extent of any departure as an afterthought. In many early cases, district courts provided extended justifications for threshold decisions to depart, but then gave little or no rationale for the extent of these departures. The courts of appeals likewise gave scant consideration to how much judges should depart. Once convinced that the sentencing court in fact had authority to depart, appellate courts regularly affirmed even large departures without even addressing the extent or with a conclusory assertion that the departure was reasonable.

Fostering the tendency to give little consideration to the extent of departures were the reviewing standards adopted by the circuits. The courts of appeals universally concluded that the beneficiary of a departure could not appeal its extent—that is, a party receiving a favorable departure could not obtain review of a departure that it thought was too small. The courts of appeals also decided that their review of whether a departure was too large should show great deference to the sentencing court. Though vigorously scrutinizing


131 See, e.g., United States v. Reyes, 927 F.2d 48, 53 (1st Cir. 1991); United States v. Hummer, 916 F.2d 186, 194-95 (4th Cir. 1990); United States v. Snover, 900 F.2d 1207, 1209 (8th Cir. 1990); United States v. Ramirez-DeRosas, 873 F.2d 1177, 1180 (9th Cir. 1989); United States v. Salazar-Villarreal, 872 F.2d 121, 122-23 (5th Cir. 1989); United States v. Spraggins, 868 F.2d 1541, 1544 (11th Cir. 1989); United States v. Correa-Vargas, 860 F.2d 35, 40 (2d Cir. 1989); see also STITH & CABRANES, supra note 5, at 127 (noting the failure of "the federal courts of appeals [to] put much effort into placing constraints on the amount by which a judge may depart"); Marc Miller & Daniel J. Freed, The Emerging Proportionality Law for Measuring Departures, 2 FED. SENTENCING REP. 255, 255 (1990) ("Early appellate cases reviewing departures focused on whether the ground stated by the district court was 'of a kind or degree not adequately considered by the Sentencing Commission.' Departures of substantial magnitude were upheld without considering principles of proportionality.").

132 See, e.g., United States v. Hazel, 928 F.2d 402, 424 (D.C. Cir. 1991); United States v. Pighetti, 898 F.2d 3, 4 (1st Cir. 1990); United States v. Wright, 895 F.2d 718, 720 (11th Cir. 1990); United States v. Colon, 884 F.2d 1550, 1556 (2d Cir. 1989); see also Selya & Kipp, supra note 113, at 14-15 & nn.65-67 (citing cases holding that "the beneficiary of a departure cannot appeal the departure's extent on the ground that the court was too parsimonious"); HUTCHISON ET AL., supra note 74, at 1429 & nn.10-12 (same).
threshold decisions to depart through a de novo standard of review, the circuits concluded that their review of the “reasonableness” of a departure’s extent should be “quite deferential to the district judge.”

The courts of appeals did assert that sentencing courts had to give some rationale for the extent of a departure. A few courts of appeals called for district courts to make an analogy to other Guidelines sections to support the extent of their departures, and every circuit indicated that the Guidelines should serve as a reference in constructing a departure. And, on occasion, an appellate court

133 United States v. Hernandez Coplin, 24 F.3d 312, 316 (1st Cir. 1994); accord United States v. Jackson, 921 F.2d 985, 991 (10th Cir. 1990) (en banc); United States v. Kikumura, 918 F.2d 1084, 1110 (3d Cir. 1990); United States v. Schmude, 901 F.2d 555, 560 (7th Cir. 1990); United States v. Summers, 893 F.2d 63, 67 (4th Cir. 1990); see also Selya & Kipp, supra note 113, at 39 & n.205 (citing cases and explaining that “once sufficient reasons are given, appellate review of the departure’s extent is deferential”). Once again, many of these rulings expressly adopted or implicitly followed the reviewing standards set forth by the First Circuit in United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir. 1989). In Diaz-Villafane, the First Circuit stressed that the magnitude of a departure “involves what is quintessentially a judgment call. . . . Therefore, appellate review must occur with full awareness of, and respect for, the trier’s superior ‘feel’ for the case.” Id. at 49–50.

134 The Second, Seventh, and Ninth Circuits held that trial courts were expressly required to determine the extent of departures through analogies to other Guideline provisions. See Lira-Barraza, 941 F.2d at 748; United States v. Ferra, 900 F.2d 1037, 1062–64 (7th Cir. 1990); United States v. Kim, 896 F.2d 678, 685 (2d Cir. 1990). The Third, Sixth, and Tenth Circuits strongly recommended, but did not require, linking departures to the Guidelines. See United States v. Lassiter, 929 F.2d 267, 271 (6th Cir. 1991); Jackson, 921 F.2d at 991; Kikumura, 918 F.2d at 1112–13. The other circuits permitted analogies, but never required or endorsed this approach. See United States v. Aymelek, 926 F.2d 64, 70 (1st Cir. 1991); Hummer, 916 F.2d at 194 n.7; United States v. Landry, 903 F.2d 334, 341 (5th Cir. 1990); United States v. Shuman, 902 F.2d 873, 877 (11th Cir. 1990).

To its credit, the Tenth Circuit articulated an approach to review which, by calling for courts to justify the extent of a departure “in light of the Guidelines’ purposes,” Jackson, 921 F.2d at 989, is a move toward the approach I urge. See infra Part IV; see also United States v. White, 893 F.2d 276, 278 (10th Cir. 1990) (citing the SRA’s list of sentencing purposes and explaining that to “determine whether the degree of departure is reasonable, [an appeals court] must consider the district court’s proffered justifications as well as such factors as: the seriousness of the offense, the need for just punishment, deterrence, protection of the public, correctional treatment, the sentencing pattern of the Guidelines, the policy statements contained in the Guidelines, and the need to avoid unwarranted sentencing disparities”).

135 See Hutchison et al., supra note 74, at 1420–21 (noting that all circuits agree that the Guidelines should be a point of reference, but “appellate courts disagree . . . over the extent to which a Section 5K2.0 departure must be linked to analogies to other guideline levels”); Selya & Kipp, supra note 113, at 40–42 (noting that “the
would enforce these requirements with some rigor by reversing a departure when the sentencing court had failed to explain adequately its extent. But, by and large, the courts of appeals’ application of the statutory requirement of “reasonableness” exhibited far more bark than bite. Often emphasizing the deference due the sentencing court, the courts of appeals typically upheld even very large departures if the sentencing court provided just a nominal justification for the departure’s extent.

In sum, though circuit courts carefully examined threshold decisions to depart, the amount of any allowed departure typically received little or no serious scrutiny. As one set of commentators summarized the prevailing approach to appellate consideration of departures, “review of the decision to depart is rigorous, but the extent of departure is almost entirely left to the discretion of the district court.”

B. The Troublesome Consequences of the Early Departure Jurisprudence

The initial approach of the Commission and the courts to departures under the Federal Sentencing Guidelines was misguided and harmful. As detailed in Part I, departure authority within a guidelines scheme has a crucial role in balancing the amount of judicial sentencing discretion and in enabling judges to contribute to the development of principled sentencing law. But the restrictive and narrow departure jurisprudence which first developed under the Guidelines undermined both of these important goals.

1. Undermining the Balancing of Judicial Sentencing Discretion

From the outset, departure authority under the Guidelines did not effectively balance the amount of judicial discretion retained in the sentencing process. By overly restricting the availability of departures of appeals unanimously agree that the Guidelines should not be wholly discarded once a departure is taken, [but] they differ over the extent to which guideline analogues are required”); cases cited supra note 134.

136 See, e.g., United States v. Hernandez-Rodriguez, 975 F.2d 622, 628 (9th Cir. 1992); Lassiter, 929 F.2d at 271; United States v. Gentry, 925 F.2d 186, 189 (7th Cir. 1991); United States v. St. Julian, 922 F.2d 563, 570 (10th Cir. 1990).

137 See United States v. George, 911 F.2d 1028, 1030–31 (5th Cir. 1990); United States v. Snover, 900 F.2d 1207, 1209 (8th Cir. 1990); United States v. Correa-Vargas, 860 F.2d 35, 40 (2d Cir. 1988); see also Saris, supra note 58, at 1042 (noting how reviewing courts accord “substantial deference [to] the sentencing judge’s decision to determine whether [a departure] is in the ‘realm of reason’”).

138 Gelacak et al., supra note 33, at 337.

139 See supra text accompanying notes 26–48.
tures, the Guidelines’ initial departure jurisprudence created a system that was unduly and harmfully rigid in most cases. At the same time, this jurisprudence also produced troublesome pockets of sentencing disparity.

a. Undue Rigidity

Many sentencing participants and observers found the initial Guidelines inflexible for disallowing the consideration of relevant and important sentencing factors in individual cases. District judges and defense attorneys in particular complained that the Commission’s sentencing rules, especially the limits on considering offenders’ potentially mitigating personal circumstances, deprived judges of the discretion they needed to achieve individualized and just sentencing outcomes. Academic commentators likewise complained that, in the effort to reduce disparities, the Guidelines had overly restricted sentencing judges’ opportunities to make pertinent and important distinctions between offenders. One original Commissioner admitted that the Commission’s emphasis in the initial Guidelines “was more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment.” Consequently, as Professor Stephen Schulhofer lamented at the time, the Guidelines

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140 See Federal Courts Study Comm., Report of the Federal Courts Study Committee 137 (1990) [hereinafter Federal Courts Report] (noting judicial complaints that Guidelines “do not give the sentencing judge clear or adequate authority to adjust sentences in light of all factors that judges and others regard as pertinent for a just sentence”); id. at 142 (lamenting that in “guideline sentencing . . . key facts about the ‘offender’ are eliminated from the sentencing computation” (Statement of Judge Keep)); José A. Cabranes, Letter to the Editor, Incoherent Sentencing Guidelines, WALL ST. J., Aug. 28, 1992, at A11 (asserting that the Guidelines “ignore individual characteristics of defendants”); Clarke, supra note 83, at 45 (criticizing the Guidelines for saying “goodbye to the human aspects” of sentencing); see also Miller, supra note 82, at 183 (noting judicial complaints “that the guidelines’ excessive rigidity leads to a focus more on ‘points’ than people”).

141 See Tonry, supra note 25, at 11 (“The commission has forbidden judges to take account . . . of many considerations . . . that many judges (and most people) believe to be ethically relevant in a just system.”); Alschuler, supra note 83, at 915–34 (arguing that aggregation of harms under the Guidelines requires courts to impose the same sentences on offenders of differing culpability); Freed, supra note 60, at 1704, 1730–40 (asserting that the Guidelines are unnecessarily rigid and require disproportional sentences); Ogletree, supra note 29, at 1952–55 (complaining that the Guidelines do not sufficiently account for differences in offenders); Schulhofer, supra note 72, at 835, 851–70 (explaining how the Guidelines lack “the flexibility that the federal sentencing process needs to function effectively, with the degree of individual differentiation” needed for achieving just sentences).

142 Nagel, supra note 7, at 934.
“require undue uniformity by blocking needed differentiation among offenders.”

Complaints about the Guidelines’ inflexibility recognized, and often stressed, that an overly restrictive departure jurisprudence was at the heart of the problem. As one set of commentators put it, the Sentencing Commission and the federal courts had “missed the boat” on departures. While some primarily faulted the Sentencing Commission for promulgating strict departures standards, and others stressed the impact of circuit court decisions reversing and otherwise discouraging departures, all agreed that an overly restrictive jurisprudence failed to give effect to the role of departure authority in providing needed sentencing discretion and flexibility under the Guidelines. The departure mechanism was supposed to ensure that judges could craft individualized sentences, but restrictions on departures gave judges the impression that their sentencing role under the Guidelines was reduced to “filling in the blanks and applying a rigid, mechanical formula.”

In the words of Professor Michael Tonry, though the Guidelines “were intended to be presumptive, not mandatory . . . [i]n practice, [because of] limit[s] [on] departures from the guidelines, they [were] more and more like mandatory sentencing laws.” Believing departures were largely verboten, judges ascribed sentences without making some significant sentencing distinctions among offenders. Conse-

144 Clarke & McFadden, supra note 72, at 919.
146 See Clarke & McFadden, supra note 72, at 919–32; Schulhofer, supra note 72, at 870; see also Freed, supra note 60, at 1744–45 (allocating blame to both the Commission and the Courts for developing a restrictive departure jurisprudence); Reitz, supra note 43, at 1463–64 (same); Clarke, supra note 83, at 45 (same).
quently, sentencing under the Guidelines produced unwarranted uniformity as offenders of differing culpability were given similar sentences.

b. Pockets of Disparity

While the initial departure jurisprudence led to unwarranted uniformity in most cases, it also produced pockets of sentencing disparity as a result of (1) differing applications of the "heartland" concept, (2) circumventions of the Guidelines, and (3) departures of varying magnitudes.

As noted before, a few circuits concluded the Guidelines' "heartlands" were not too expansive and thus applied a somewhat less restrictive approach to departures.\(^{149}\) Indeed, in response to early complaints about the Guidelines' rigidity, some judges in these circuits used academic commentary to stress that departure authority under the Guidelines still provided an avenue of flexibility.\(^{150}\) However, while these judges accurately indicated that the Guidelines could be applied less rigidly in their jurisdictions, other observers accurately noted that the openness of some circuits to departures created a form of "appellate decisional disparity."\(^{151}\) As commentators highlighted, nationwide sentencing consistency throughout the federal system was undermined when, in contrast to the strict limits enforced by most courts, a few circuits were more permissive of departures.\(^{152}\)

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\(^{149}\) See supra notes 123–24 and accompanying text.


\(^{151}\) Zipperstein, supra note 119, at 651–55, 656; see also Jackson, supra note 122, at 606, 634 (lamenting the failure of the circuit courts to "develop any uniform system of application" for departures).

\(^{152}\) See Jackson, supra note 122, at 606, 634 (suggesting sentencing disparities resulting from differing approaches to departure review); Jody L. King, *Avoiding Gender Bias in Downward Departures for Family Responsibilities Under the Federal Sentencing Guidelines*, 1996 ANN. SURV. AM. L. 273, 300–02 (noting disparities between circuits as to when family circumstances permit a departure); Zipperstein, supra note 119, at 651–55, 656 (suggesting sentencing disparities resulting from differing approaches to departure review); see also Freed & Miller, supra note 122, at 3–5 (reviewing statistics on varying departure rates); Gelacak et al., supra note 33, at 337–51 (highlighting differences in departure outcomes among circuits).
Furthermore, the very fact that the Guidelines were widely perceived as inflexible resulted in an even more pernicious disparity problem, one generally associated with mandatory sentencing laws. As Professors Ilene Nagel and Stephen Schulhofer detailed in a series of articles, the Guidelines' apparent rigidity prompted some sentencing participants to craft plea agreements or strike other bargains to avoid their strict application. Though there has been some dispute over the extent of Guideline circumvention, no one disputes that such evasions through sentencing bargains have impacted a significant number of cases. For the litigants striking sentencing bargains and for judges approving such agreements, Guideline circumvention may have often appeared to be a way to achieve the needed differentiation in offenders that the departure mechanism did not seem to allow. However, even when done seeking justice in individual cases, such cir-


156 See Schulhofer, supra note 72, at 852 (explaining how "circumvention is, in effect, a form of departure from the applicable Guideline range"); Schulhofer & Nagel, Guideline Circumvention, supra note 153, at 1289 (suggesting circumventions involve instances in which the "applicable Guideline range has been manipulated to achieve the same result as a downward departure").
cumventions necessarily produced sentencing disparity as some defendants garnered the benefits of evading the Guidelines while others did not.\textsuperscript{157} As Professors Nagel and Schulhofer stress, such “hidden departures” are highly problematic, because “circumvention, unlike overt downward departure, is hidden and unsystematic . . . . By comparison to explicit departures, circumvention is far more likely to involve unwarranted disparity, and it occurs in a context that precludes oversight and obscures accountability.”\textsuperscript{158}

Last, but not least, the initial departure jurisprudence produced still another pocket of disparity by failing to seriously examine and regulate the extent of departures. As noted before, with district and appellate courts focused primarily on whether there was a permitted basis for a departure, limited consideration was given to the appropriateness and proportionality of the magnitude of any allowed departure.\textsuperscript{159} As a result, departures of widely varying extents were upheld even though premised on seemingly quite similar grounds.\textsuperscript{160} In addi-


\textsuperscript{158} Schulhofer & Nagel, Guideline Circumvention, supra note 153, at 1312.

\textsuperscript{159} See Stith & Cabranel, supra note 5, at 127 (noting the failure of “the federal courts of appeals [to] put much effort into placing constraints on the amount by which a judge may depart”); Miller & Freed, supra note 131, at 235 (noting that appellate courts did not consider “principles of proportionality” when reviewing the extent of departures); supra notes 130–37.

\textsuperscript{160} For large variations in upward departures on similar offense-related grounds, compare United States v. Otto, 64 F.3d 367, 371 (8th Cir. 1995) (upholding six-level upward departure adding years to sentence for psychological injury caused by stalking), with United States v. Miller, 993 F.2d 16, 19–21 (2d Cir. 1993) (upholding two-level upward departure adding only six months to sentence based on lengthier period of stalking). For large variations in upward departures based on criminal history, compare United States v. Guerrero, 863 F.2d 245, 250–51 (2d Cir. 1988) (upholding departure from a range of six to twelve months to a sixty-three-month sentence based on under-representation of criminal history), with United States v. Brown, 899 F.2d 94, 96–98 (1st Cir. 1990) (upholding departure to twenty-one-month term from similar sentencing range). For large variations in downward departures on similar offender-related grounds, compare United States v. One Star, 9 F.3d 60, 61–62 (8th Cir. 1993) (upholding departure to probation from sentencing range of thirty-three to forty-one months based on hardships of life on Indian reservation), with United States v. Big Crow, 898 F.2d 1326, 1330–32 (8th Cir. 1990) (upholding departure down only to twenty-four months from sentencing range of thirty-seven to forty-six months on similar facts).
tion, a number of enormous departures both upward and downward were affirmed on various grounds, often based on facts that seemed not too dissimilar from those in cases in which a departure was disallowed. In other words, the failure of the Commission and the courts to regulate effectively how much judges should depart led to considerable variations in the extent of departures and thereby produced significant disparities not only among cases that involved departures, but also between those cases that involved departures and those that did not.

In sum, then, the Guidelines' early departure jurisprudence produced an array of problems that undermined efforts to effectively balance judicial sentencing discretion. In most circuits, a restrictive approach to departures overly limited judicial discretion and resulted in unwarranted sentencing uniformity. At the same time, significant pockets of disparity developed as a result of differing inter-circuit in-

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161 See, e.g., United States v. Johnson, 964 F.2d 124, 128-30 (2d Cir. 1992) (approving departure from range of forty-six to fifty-seven months to home detention based on family circumstances); United States v. Glick, 946 F.2d 335, 339 (4th Cir. 1991) (approving departure from range of twenty-seven to thirty-three months to probation based on diminished capacity); United States v. George, 911 F.2d 1028, 1030-31 (5th Cir. 1990) (approving departure from range of fifteen to twenty-one months to sentence of fifty months based on failure to appear after release on bond); United States v. Diaz-Villafane, 874 F.2d 43, 51-52 (1st Cir. 1989) (upholding departure from range of twenty-seven to thirty-three months to sentence of 120 months based on aggravating aspects of drug offense); United States v. Ramirez-De Rosas, 873 F.2d 1177, 1180 (9th Cir. 1989) (affirming departure from range of zero to four months to sentence of thirty months based on initiation of high-speed chase); see also Saris, supra note 58, at 1042 ("Upward departures which literally triple the sentence and downward departures from a range of thirty-three months to probation have all been held to be within the 'realm of reason'.").

162 Compare George, 911 F.2d at 1030-31 (approving large upward departure based on failure to appear), with United States v. Singleton, 917 F.2d 411, 415 (9th Cir. 1990) (reversing departure based on similar facts). Compare Johnson, 964 F.2d at 128-30 (upholding large downward departure based on family circumstances), with United States v. Mogel, 956 F.2d 1555, 1565 (11th Cir. 1992) (reversing departure based on similar facts). Compare Glick, 946 F.2d at 339 (upholding large downward departure based on diminished capacity), with United States v. Johnson, 979 F.2d 396, 400-01 (6th Cir. 1992) (reversing departure based on relatively similar facts).

interpretations of the departure standard, efforts by some to circumvent the Guidelines, and departures of widely varying extents.

2. Undermining the Development of Principled Sentencing Law

The Guidelines' initial departure jurisprudence had a deeper problem than its failure to effectively balance sentencing discretion. The narrowness of this jurisprudence undermined the development of principled sentencing law under the Guidelines.

Because courts in departure cases focused almost exclusively on the "descriptive" component of the SRA's departure standard—the requirement that a particular factor was "not adequately taken into consideration by the Sentencing Commission"—departure decision-making centered upon what the Commission considered in drafting the Guidelines and whether particular factors were within certain guidelines' "heartlands." Courts, in turn, neglected the prescriptive component of the SRA's departure standard, the part that concerns whether a factor "should result" in a sentence outside the Guidelines. Departure decision-making did not address what factors should impact sentences within the guidelines scheme, as judges failed in departure cases to focus on whether factors in the case at hand might normatively justify a sentence above or below the sentencing range specified by the Guidelines. Departure cases involved significant "descriptive deliberation" as courts contemplated and discussed what the Commission had described in the Guidelines' heartlands, but they lacked serious "prescriptive deliberation," as courts did not contemplate or discuss what they prescriptively thought should result in a sentence outside the Guidelines.

The initial departure jurisprudence's narrow focus on the descriptive component of the SRA's departure standard—that departure decision-making involved descriptive deliberation and lacked prescriptive deliberation—undermined, in two critical ways, the development of principled sentencing law within the Guidelines. This narrow focus allowed for purposeless departure decisions in individual cases and produced a purposeless departure jurisprudence across cases.

164 See supra notes 111-14; see also Lisa M. Farabee, Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts, 30 CONN. L. REV. 569, 585 (1998) (explaining that "appellate review of judge-granted departures merely focuses on whether the sentencing court properly based a departure on a circumstance 'of a kind' or 'to a degree' not adequately taken into account by the Commission"); Miller & Wright, supra note 113, at 766-79 (discussing courts' concentrated focus in departure cases on the heartland concept).
a. Purposeless Departure Decisions

As detailed in Part I, Congress sought and expected the SRA to produce a principled and purpose-driven sentencing system. The narrowness of the initial departure jurisprudence undermined this goal by having courts engaged in "purposeless" departure decision-making that, in turn, allowed for "purposeless" departures.

This problem of "purposeless" departures was most apparent in cases involving factors such as family ties that the Sentencing Commission had declared "not ordinarily relevant" to a decision to depart below the applicable guideline range.165 Courts were quick to interpret the Commission's instruction to mean that, though not ordinarily relevant, family circumstances that were "unusual" or "extraordinary" could serve as the basis for a departure.166 In other words, as one court put it, though "ordinary" family ties had been considered by the Commission, "extraordinary family circumstances [were] outside the 'heartland' of cases the Guidelines were intended to cover."167 Consequently, the determinative issue in a series of departure cases became exactly what sorts of family circumstances were "extraordinary" as opposed to being simply "ordinary."168 Similar case law developed around other factors, such as age and employment history, that the Commission had declared "not ordinarily relevant."169 Courts stated

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165 See U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (1987) (providing that "family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the guidelines"). In the first years of guidelines sentencing, family ties developed to be one of the most frequent grounds upon which downward departures were granted. See 1995 U.S. SENTENCING COMM'N ANN. REP. 87, tbl. 30.

166 See, e.g., Johnson, 964 F.2d at 128-30; Mogel, 956 F.2d at 1565; United States v. Pena, 930 F.2d 1486, 1494 (10th Cir. 1991); United States v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990); United States v. Jackson, 756 F. Supp. 23, 27 (D.D.C. 1991); see also HAINES ET AL., supra note 116, at 698-700 (discussing doctrine and citing cases holding that extraordinary family ties and circumstances can be the basis for a departure).

167 United States v. Harrison, 970 F.2d 444, 447 (8th Cir. 1992) (quoting United States v. Shortt, 919 F.2d 1325, 1328 (8th Cir. 1990)).

168 See HAINES ET AL., supra note 116, at 698-700 (reviewing departure cases on family circumstances); Wood & Sheehy, supra note 108, at 190-92 (same); Donald C. Wayne, Chaotic Sentencing: Downward Departures Based on Extraordinary Family Circumstances, 71 WASH. U. L.Q. 443, 444-53 (1993) (noting cases struggling to determine what family circumstances are extraordinary); see also Patricia M. Wald, "What About the Kids?: Parenting Issues in Sentencing, 8 FED. SENTENCING REP. 137, 137 (1995) (noting that "courts have gone every which way in deciding if a particular case presents 'ordinary' or 'extraordinary' circumstances").

169 See U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (1987) (declaring age "not ordinarily relevant"); id. § 5H1.5 (employment history).
that departures could be based on such factors if and only when a particular defendant's circumstances qualified as "extraordinary."\footnote{170}

Though consistent in their doctrine, these cases were also consistent in their pedantry—missing in the dickering over what circumstances merited the label "extraordinary" was any serious or developed inquiry into why a defendant's family circumstances should result in a sentence below the applicable guideline's sentencing range. That is, the considerable case law addressing family circumstances under the Guidelines included almost no discussion of the normative justifications for considering family circumstances—whether extraordinary or simply ordinary—as a basis for reducing a sentence.\footnote{171} In this sense, many "purposeless" departures were allowed: district courts granted and appellate courts approved departures based simply on the determination that a defendant's family circumstances qualified as "extraordinary" without expressly considering whether, in the case at issue, a reduced sentence based on such circumstances actually served the purposes of punishment set forth in the SRA.\footnote{172}

Of course, arguments can certainly be made in specific factual contexts that a defendant's family circumstances justify a reduced sentence.\footnote{173} For example, a defendant who commits bank fraud to fund a necessary medical caretaker for his or her aged mother seems less culpable than a defendant who commits the same fraud to finance the

\footnote{170} See, e.g., United States v. Guajardo, 950 F.2d 203, 208 (5th Cir. 1991) (age); United States v. Jagmohan, 909 F.2d 61, 65 (2d Cir. 1990) (employment history); see also Hutchison et al., supra note 74, at 1416 (explaining that "most courts have read this restriction on the use of 'ordinary' circumstances to imply that 'extraordinary' occurrences will permit a departure").


\footnote{172} Cf. Gelacak et al., supra note 33, at 363–65 (suggesting after a review of 1400 cases that departures are sometimes granted based on facts that are not "meaningfully atypical").

\footnote{173} Some commentators, distressed over the decision of the Commission to deem family circumstances "not ordinarily relevant" and over court decisions applying this directive strictly, have argued that normative considerations do make a reduced sentence based on some family circumstances appropriate and justified. See, e.g., Cook, supra note 171, at 145; Susan E. Ellingstad, The Sentencing Guidelines: Downward Departures Based on Defendants' Extraordinary Family Ties and Responsibilities, 76 Minn. L. Rev. 957, 977–84 (1992); Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender Free World of the Federal Sentencing Guidelines, 20 Pepp. L. Rev. 905, 936–69 (1993); Eleanor L. Bush, Not Ordinarily Relevant? Considering the Defendants' Children at Sentencing, Fed. Probation, Mar. 1990, at 15.
purchase of a yacht. A court might sensibly conclude that the dutiful child’s “family circumstances” merit a lesser sentence in line with the SRA’s concern “to provide just punishment for the offense.” Similarly, consider a devoted single parent who gets involved in drug distribution, only to discover upon being caught the real possibility of permanently losing custody of his or her children. With the prospect of losing custody itself providing a significant deterrent to any further wrongdoing, a court might conclude for this parent that, because of “family circumstances,” a sentence below the otherwise applicable guideline range would suffice “to afford adequate deterrence” and “to protect the public from further crimes of the defendant” as required by the SRA.175

Given the SRA’s avowed interest in developing principled and purposeful sentencing laws and its requirement that judges “consider what impact [the traditional punishment] purpose[s] should have on the sentence in each case,” these sorts of normative considerations about culpability and crime control ought to have been the centerpiece of early case law debates over departures from the Guidelines for family circumstances. But such purpose considerations were never a significant part of courts’ decision-making in departure cases. Instead, as noted above, because of the narrow focus on the descriptive portion of the SRA’s departure standard, this jurisprudence simply involved quarrels over what sorts of circumstances should be deemed “extraordinary.” Courts adjudicated these cases by engaging in purposeless departure decision-making, which, in turn, allowed for purposeless departures.

In the end, it does not appear that all or even most departures for “extraordinary” circumstances were truly purposeless. A review of this case law reveals that often lurking beneath debates over “extraordinariness” were underlying concerns and judgments about culpability, crime control, and the traditional purposes of punishment embraced by the SRA. But the very fact that such normative considerations were subterranean rather than explicit in these cases highlights the deeper problem with the narrowness of the early

175 Id. § 3553(a)(2)(B)–(C).
177 See Freed & Miller, supra note 60, at 298 (reviewing cases in which courts “offer reasons for departure that avoid the language [of punishment’s purposes] but seem predicated on a theory of purpose”); cf. United States v. Mason, 966 F.2d 1488, 1494–96 (D.C. Cir. 1992) (suggesting that early cases did involve normative considerations when assessing permitted departures, even though it was not obvious).
Guidelines’ departure jurisprudence. Not only did the focus on the descriptive component of the SRA’s departure standard allow for purposeless departure decisions in individual cases, it also produced a purposeless jurisprudence across the range of cases that kept departures from serving as an effective means for principled judicial contributions to the Guidelines’ evolution.

b. Purposeless Departure Jurisprudence

As developed in Part I, sentencing reformers and the SRA’s drafters both sought and expected judicial contribution to the development of principled sentencing law under the Guidelines. But in few early Guidelines’ decisions did judges expressly contemplate and discuss the purposes of punishment. Even though the SRA instructs judges to consider the traditional purposes of punishment when ascribing sentences, very rarely did normative concepts find expression in sentencing opinions. As noted by Kenneth Feinberg, a principal architect of the SRA in Congress, early cases brought “little judicial discussion about purposes in conjunction with the imposition of individual sentences. . . . [L]ost in the application of the appropriate guidelines is any visible, meaningful discussion of the purposes to be served by the sentence.” Or, as put by Professors Dan Freed and Marc Miller, “the [early] years of guideline sentencing [were] ‘purposeless.’”

Though various forces account for the purposelessness of guidelines sentencing, this problem can and should be traced first and fore-
most to the narrow focus of departure jurisprudence. As highlighted in Part I, departure authority provided the central means for judges to contribute to the development of principled sentencing law under the Guidelines. But because the descriptive component of the SRA's departure standard became the focal point of departure decision-making, judges in departure cases contemplated and discussed what factors they thought were considered by the Commission, rather than what they thought provided normative justifications for a sentence outside the Guidelines in the case at hand.\textsuperscript{181} Conducting "descriptive deliberation," judges became focused in these cases on the minutia of the Guideline structure and preoccupied with divining the parameters of the Commission's heartlands.\textsuperscript{182} Courts' energies and opinions in departure cases were devoted to deciding what circumstances qualified as "extraordinary" or "atypical," rather than pondering and articulating case-specific insights concerning the relationship between the purposes of punishment and guideline sentences.\textsuperscript{183} In

\textsuperscript{181} Limited exceptions to the general failure of departure cases to include explicit normative discussion were those few cases in which courts looked to the purposes of punishment to explore whether a factor put forward as a basis for a departure even qualified as an "aggravating or mitigating" circumstance. See, e.g., Mason, 966 F.2d at 1494–96; United States v. Crippen, 961 F.2d 882, 884 (9th Cir. 1992); see also infra note 311 (noting rare cases in which lower courts considered sentencing purposes).

\textsuperscript{182} See Miller & Wright, supra note 113, at 766 ("The vast majority of federal courts, in literally thousands of published decisions, have simply regurgitated the statement from the guidelines introduction, and then announced that the facts and factors before the court either are or are not within the guidelines 'heartland.'"); see also Stith & Cabranes, supra note 6, at 1277 (noting that, in departure cases, "appellate courts have often been bogged down by consideration of a threshold issue: whether the ground cited by the trial court as a basis for departure has already been factored into the Sentencing Guidelines").

\textsuperscript{183} In a few settings, the very factor on which courts debated "extraordinariness" did relate to the purposes of punishment. For example, a line of cases concluded that, though "ordinary" post-offense rehabilitation had been "adequately taken into consideration by the [Guidelines'] acceptance of responsibility reduction," rehabilitation that qualified as "extraordinary" could be the foundation for a departure. United States v. Harrington, 947 F.2d 956, 962 (D.C. Cir. 1991) (quoting United States v. Sklar, 920 F.2d 107, 116 (1st Cir. 1990)); see, e.g., United States v. Williams, 948 F.2d 706, 708–11 (11th Cir. 1991); United States v. Sklar, 920 F.2d 107, 116 (1st Cir. 1990). Essentially, by definition, courts considering whether a defendant's post-offense rehabilitation was extraordinary were necessarily giving some thought to the traditional punishment purpose of rehabilitation. However, even within such cases, the extent and depth of courts' examination and discussion of normative considerations was disconcertingly limited. See Patricia H. Brown, Note, \textit{Considering Post-Arrest Rehabilitation of Addicted Offenders Under the Federal Sentencing Guidelines}, 10 \textit{Yale L. \\& Pol'y Rev.} 520, 526–33 (1992) (discussing problems with case law on post-offense rehabilitation as basis for departure).
the words of Professor Kate Stith and Judge José Cabranes, departure case law has been “speculative and trivial, addressing not whether a particular circumstance is relevant to just sentencing, but simply whether the Sentencing Commission can be said to have already considered the particular circumstance.”

Professor Kevin Reitz has recently remarked that “the most disappointing aspect of the appellate departure jurisprudence has been its divorce from the underlying goals of punishment” and noted with lament the absence of “positive contributions” to “substantive lawmaking” in this jurisprudence. This reality is indeed disappointing, but hardly surprising given the focus of departure decision-making on the descriptive component of the SRA’s departure standard. Because of how departure authority was set forth in the initial Guidelines and developed by the courts, departures came to serve and to be seen only as a means to fill in gaps that the Commission might have missed in the Guidelines. Lost along the way was an appreciation of departures as a mechanism through which judges could provide meaningful feedback concerning the Guidelines as they related to the fundamental purposes of punishment.

In the end, by failing to engage in prescriptive deliberation—by failing to seriously consider whether factors “should result” in a sentence outside the Guidelines—departure decisions lacked thoughtful discussion of sentencing purposes, and judges thus missed their opportunity to contribute from their case-specific vantage points to the principled evolution of the Guidelines. Because courts focused only on what the Commission considered, judges did not themselves engage in moral reasoning when contemplating, rendering, and reviewing departure decisions. Consequently, day-to-day Guidelines sentencing did not bring thoughtful judicial contributions to sentencing lawmaking. Moreover, because departure jurisprudence gave the

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184 Stith & Cabranes, supra note 6, at 1277.
185 Reitz, supra note 43, at 1468.
186 Cf. Freed & Miller, supra note 60, at 298. Freed and Miller urge judges to consider sentencing purposes because doing so enables courts to adjudicate situations that were not adequately considered by the Commission, and to furnish analyses from which the Commission can improve its guidelines. This is the sort of interaction Congress envisioned between a Commission that formulates rules but does not adjudicate cases, and a judiciary that generates principled decisions that the Commission can integrate into its rulemaking process. Id. at 351.
187 Circuit court rulings that decisions not to depart and that departures alleged to be too parsimonious were not appealable, see supra notes 116, 132, further undermined effective appellate contributions to sentencing law through departure decision-
impression that it did not even permit judicial considerations of just punishment, it is of little surprise that judges came to view their role under the Guidelines as "judicial accountants" operating a "bureaucratic scheme" that left no room for "jurists to exercise wisdom and judgment... [and] humanity." This perhaps explains judges' willingness to countenance efforts to circumvent the Guidelines' strict terms, as they may well have believed it was the only way to consider matters of purpose and justice in the case at hand.

In short, the Guidelines' early departure jurisprudence produced systemic problems that ran even deeper than, and may have even contributed to, the Guidelines' failure to effectively balance judicial sentencing discretion. This jurisprudence's narrow focus on the descriptive component of the SRA's departure standard produced purposeless departures and a purposeless departure jurisprudence that undermined the development of principled sentencing law under the Guidelines. Departures failed to foster judicial contributions, through the development of a "common law of sentencing," to the principled evolution of the guidelines system.

III. Koon v. United States: The Supreme Court's Failed Effort to Remedy a Troubled Departure Jurisprudence

Review of the Supreme Court's decision in Koon v. United States[190] makes two things clear: the Court sought to expand sentencing judges' authority to depart from the Federal Sentencing Guidelines, and its efforts to do so left much to be desired[191]. The Supreme Court

making. These doctrines eliminated sets of departure decisions from the appellate process and thus skewed the cases through which appellate courts could contribute to a sentencing jurisprudence. See Yellen, supra note 118, at 264–65 (complainting that these doctrines undermined the "important role" of appellate review and departures "in helping the Commission identify and correct flaws" in Guidelines); see also Hofer, supra note 70, at 11 (stressing that appellate departure jurisprudence has been lacking in part because "circuit courts [have] a lopsided view of the departure process").

[188] Weinstein, supra note 147, at 361.


deserves praise for recognizing harms stemming from the Guidelines’ restrictive departure jurisprudence and for trying in *Koon* to achieve a better balance of judicial sentencing discretion by liberalizing departure authority. However, the Supreme Court also deserves criticism for its shoddy execution in *Koon*. As detailed in Section A of this Part, the poor development of the legal standards adopted in *Koon* undermined the Court’s efforts to achieve a more effective departure mechanism and produced confusion and disparities in the lower courts. Moreover, as explained in Section B of this Part, the *Koon* decision has even deeper conceptual problems that serve to hinder principled judicial contributions to sentencing law and thus pose even greater long-term harm for departure jurisprudence and the guidelines system.

A. Failing to Achieve Better Balance in Judicial Sentencing Discretion

The Supreme Court in *Koon*, apparently heeding judicial and academic complaints that a restrictive departure jurisprudence created undue guideline rigidity, quite clearly set out to enhance sentencing courts’ departure authority under the Guidelines. The Court asserted that it granted certiorari simply “to determine the standard of review governing appeals from a district court’s decision to depart” from the Guidelines. But the Court’s wide-ranging opinion—which discussed at length sentencing discretion, departure authority, and the role of the courts and the Commission under the Guidelines—suggests that the Court was looking to significantly recast departure jurisprudence in order to expand district courts’ authority to depart

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192 See supra text accompanying notes 140–48 (detailing complaints about the Guidelines’ rigidity).
193 See *Reitz*, supra note 43, at 1463 n.73, 1466 & n.88 (suggesting that the Supreme Court was persuaded by critics’ protestations of the Guidelines’ inflexibility and that *Koon* was an effort “to cancel some of the pro-rigidity inclinations” of developing departure jurisprudence); see also Mark D. Harris & Douglas A. Berman, *The Koon Case: Departures and Discretion*, 9 FED. SENTENCING REP. 4–5 (1996) (reviewing a set of commentaries on *Koon* and noting “general agreement that the *Koon* decision evinces an intent by the Supreme Court to give sentencing courts greater leeway to fashion sentences outside the prescribed ranges”).
195 See *id.* at 92–100, 106–09, 113.
and thereby achieve a better balance in judicial sentencing discretion within the guidelines system. Unfortunately, the Supreme Court undermined its own efforts through an opaque opinion which has muddled departure law. Consequently, the *Koon* decision has not produced an improved balance in sentencing discretion under the Guidelines. Rather, it has produced doctrinal confusion and departure disparities in the lower courts.

1. Muddling Departure Law

The Supreme Court's discussion of departure authority in *Koon* had a schizophrenic quality: the Court simultaneously espoused and spurned district court discretion and appellate court deference in departure decision-making. In addition, the Court entirely failed to address the important issue of the extent of departures. Taken together, the opinion brought more cloudiness than clarity to the rules governing departure authority under the Federal Sentencing Guidelines.

a. Espousing Discretion and Deference

Much of the *Koon* opinion reads as a ringing endorsement of district court sentencing discretion and of departure authority's important role in enabling individualized sentencing under the guidelines scheme. The Court, per Justice Kennedy, began its legal analysis by stressing that the SRA called for "sentencing procedures that take into account individualized circumstances." The Court closed by declaring that "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." In between, the Court asserted that "district courts retain much of their traditional sentencing discretion" under the Guidelines and suggested that a departure decision "embodies the traditional exercise of discretion by a sentencing court."

Giving doctrinal content to these notions, the Supreme Court embraced and stressed the "heartland" concept as central to the departure inquiry. The Court explained that departure decision-making first calls upon a court to examine "[w]hat features of this case, potentially, take it outside the Guidelines' 'heartland' and make of it a spe-

\[196\] *Id.* at 92 (citing 28 U.S.C. § 991(b)(1)(B) (1994)).
\[197\] *Id.* at 113.
\[198\] *Id.* at 97–98.
cial, or unusual, case." Then, after examining whether the Guidelines forbid, encourage, discourage, or leave unmentioned the factor considered as the basis for a departure, a court's ultimate concern should be whether "certain aspects of the case [are] unusual enough for it to fall outside the heartland of cases in the Guideline." Moreover, continued the Supreme Court, district judges are best able to decide when a case falls outside the Guidelines' heartlands. In the words of the Koon Court, a district court "informed by its vantage point and day-to-day experience in criminal sentencing" has "an institutional advantage over appellate courts in making these sorts of determinations." Accordingly, because of a district court's special competence to decide whether a "particular factor is within the heartland given all the facts of the case," decisions to depart from the Guidelines should "in most cases be due substantial deference." Thus, concluded the Supreme Court, the de novo standard of review applied by the Ninth Circuit (and all other circuits) was erroneous; departure decisions should instead be reviewed under an abuse of discretion standard.

b. Spurning Discretion and Deference

The Supreme Court's broad statements about sentencing individualization, discretion, and deference would seem well-designed to invigorate district courts' departure authority and thereby help remedy

199 Id. at 95 (quoting United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993)). The Rivera decision and its departure framework on which the Koon Court heavily relied were the work-product of then-Circuit Judge Stephen Breyer. See 994 F.2d at 945. It seems reasonable to surmise that, although Justice Breyer did not author the majority opinion in Koon, he significantly influenced the Supreme Court's adoption of Rivera's departure framework. Of course, Justice Breyer's involvement with the Guidelines extends far past his involvement in the Koon and Rivera decisions; he was one of the original Sentencing Commissioners who drafted the initial Guidelines. See U.S. SENTENCING GUIDELINES MANUAL, at V (1987); see also Breyer, supra note 29, at 18–31 (giving an insider's account of trade-offs made by the Commission in drafting the initial Guidelines). See generally Miller & Wright, supra note 113, at 771–77 (highlighting the role of Justice Breyer in the First Circuit departure cases and in the development of the initial Guidelines).

200 Koon, 518 U.S. at 95–96, 98.
201 Id. at 98.
202 Id. at 98, 99–100.
203 See supra note 117 and accompanying text (detailing circuits' adoption of de novo review of departures).
204 See Koon, 518 U.S. at 99; see also id. at 91 ("The appellate court should not review the departure decision de novo, but instead should ask whether the sentencing court abused its discretion.").
rigidity problems under the Guidelines. Indeed, some initial observers heralded *Koon* as a “resounding victory” for federal district judges, which would “encourage creative sentencing litigation and liberal exercise of the power to depart.” But, as other commentators recognized at the time, contradictory aspects of *Koon* undermined the Court’s efforts to liberalize the use of departure authority.

The Supreme Court spurned its own message of discretion and deference in *Koon*. Though the Court espoused the importance and availability of departures, its opinion also threw splashes of doctrinal cold water on departure authority. For example, the Court closed its articulation of the heartland methodology for departures by asserting that a “court must bear in mind the Commission’s expectation that departures based on grounds not mentioned in the Guidelines will be ‘highly infrequent.’” Thus, in the course of explaining that the Guidelines were only to cover “a heartland of typical cases,” the Court prominently endorsed the Commission’s suggestion that the Guidelines’ heartlands were very large and thereby covered nearly all cases. Similarly, the Supreme Court’s final paragraph describing the abuse of discretion standard for reviewing departures undercut much of its rhetoric about appellate court deference. The Court here indicated that some departure decisions must be viewed as making “a legal determination” about available grounds for departure and then stressed that a “district court by definition abuses its discretion when it

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208 *Koon*, 518 U.S. at 96 (quoting U.S. Sentencing Guidelines Manual § 1A4(b) (1995)).

209 Id. at 100.
makes an error of law." Accordingly, the Court explained, "whether a factor is a permissible basis for a departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point." In this way, the Court indicated that, despite its adoption of an abuse of discretion standard, the "legal" aspect of departure decisions would still merit close scrutiny through appellate review.

Significantly compounding the mixed messages in the articulation of departure standards was the Court's even more puzzling application of these standards. To begin, it is unclear why the Supreme Court even decided to apply its newly announced standards in *Koon*. After concluding that the court of appeals had applied the wrong standard of review, the Court might simply have remanded the case to the Ninth Circuit to allow reconsideration of the district court's departures under the proper standard. In other cases during the same term in which the Supreme Court altered a legal standard (including a case clarifying Fourth Amendment review standards released just two weeks before *Koon*), the Court decided it should remand to give the lower courts the first chance to apply the new standard.

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210 Id.
211 Id.
212 See Stith, supra note 207, at 14-16 (noting that *Koon*'s discussion of the "legal" aspect of departure decisions indicates that a "reviewing court should not apply a deferential standard to the basic issue that arises in every departure case"); see also Lee, supra note 206, at 4, 29-47 (contending that *Koon* in fact calls for a "sliding scale of deference" in departure cases, which implicates "differing degrees of deferential review depending on the nature of the inquiry," including *de novo* review of some departure issues).
213 See Frank O. Bowman, III, *Places in the Heartland: Departure Jurisprudence After Koon*, 9 FED. SENTENCING REP. 19, 19 (1996) (noting the "conflicting signals the Court gave" through its close review of the district court's departure decision following its adoption of a seemingly deferential review standard); Harris & Berman, supra note 195, at 6 (discussing the "disparity between the Court's rhetorical embrace of deference and its highly non-deferential behavior"); Lee, supra note 206, at 39 ("The Court's instruction that appellate courts review district court departure decisions under an abuse of discretion standard seems inconsistent with its own searching scrutiny of the district court's departure decision."); Stith, supra note 207, at 14 (noting that *Koon*'s "proclamations about the extent of deference due sentencing judges are difficult to reconcile with the reasoning and holdings stated elsewhere in the decision.").
214 Cf. Lee, supra note 206, at 38 ("After the *Koon* Court's lengthy defense of the need for appellate courts to defer to district court departure decisions, one might have expected the Court to end the discussion with a remand, instructing the Ninth Circuit to defer to the district court's departure decision.").
In any event, the Supreme Court's decision in *Koon* to apply its new departure standards certainly did not add clarity to its ruling. The district court in *Koon*, relying on Guidelines section 5K2.10, had departed downward five offense levels based on its conclusion that the victim's "wrongful conduct contributed significantly to provoking the offense behavior." The district court also relied on the combination of four other factors to depart downward an additional three levels. The Supreme Court, following its trumpeting of district court discretion and appellate court deference in departure cases, proceeded to reject two of the five grounds relied upon by the district court. And three Justices wrote separately, contending that the Court should have gone even further and rejected all but the one departure ground that was expressly encouraged by the Guidelines as a basis for departure in section 5K2.10.

Moreover, the majority's methodology in resolving these matters was at best inconsistent and at worst nonsensical. Only paragraphs after asserting that district courts are better able than appellate courts to judge whether certain circumstances are atypical of a particular offense, the Court rejected the district court's conclusion that the defendants' expected loss of employment and tenure were "unique burdens flow[ing] from their convictions." Yet, in its next breath, the Court accepted two other grounds for departure—based on the defendants' susceptibility to abuse in prison and successive prosecutions—with little more explanation than reliance on these factors was

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217 The four reasons combined by the district court for the additional three-level reduction were: (1) the defendants' susceptibility to abuse in prison, (2) the defendants' collateral employment consequences, (3) the absence of a need to protect the public from further criminal activity by the defendants, and (4) the burdens resulting from the defendants' successive state and federal prosecutions. See *Koon*, 833 F. Supp. at 787-91. Collectively, the district court's departure decisions allowed it to move from a guidelines sentencing range of seventy to eighty-seven months imprisonment to a range of thirty to thirty-seven months, and the court imposed a final sentence of thirty months. See id. at 792.


219 See id. at 114-18 (Souter, J., concurring in part and dissenting in part); id. at 118-19 (Breyer, J., concurring in part and dissenting in part). Justice Stevens appeared to be the only member of the Court who fully accepted the Court's assertions about discretion and deference, as he wrote a brief, separate opinion indicating that he did not think the district court had abused its discretion in any way. See id. at 114 (Stevens, J., concurring in part and dissenting in part).

220 Id. at 109-11.
"not beyond the cognizance of the District Court" and involved "just the sort of determination that must be accorded deference by the appellate courts."

In short, despite the apparent effort in Koon to endorse and foster a more flexible approach to departures, the Court ultimately sent equivocal messages about departure authority. The Court's bold statements about discretion and deference were undercut by restrictive language within its articulation of the applicable departure standards and by the rejection of several grounds upon which the district court had departed. Though portions of the opinion certainly had the potential to liberalize the law and practice of departures, other aspects of the decision gave observers reason to conclude that Koon would "not change[] matters significantly, and perhaps not at all."

c. Failing to Address the Extent of Departures

While the Supreme Court in Koon sent a mixed message about the scope of departure authority, it sent no explicit message at all concerning the extent of departures. As discussed in Part II, the Commission and the lower courts before Koon had largely treated the extent of any allowed departure as an afterthought. The Supreme Court in Koon ignored this issue altogether.

Notably, nowhere in the Supreme Court's broad discussion of departure authority and appellate review did the Court mention the portion of § 3742 that instructs appellate courts to determine whether a sentence outside the applicable guideline range "is unreasonable." Moreover, the Koon Court gave no consideration to the extent of the district court's departures in its assessment of the grounds relied upon for them. This omission is especially notable in the context of the Supreme Court's affirmation of the district court's five-level downward

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221 Id. at 112.
222 Id.
223 Stith, supra note 207, at 14; see also Robinson, supra note 207, at 901 (forecasting that the "likely effect of Koon is quite limited").
224 See supra text accompanying notes 130-35.
225 18 U.S.C. § 3742(e) (1994); see also supra note 119 (discussing the appellate review provisions of the SRA).
departure based on the victim's misconduct in provoking the offense behavior. Though this departure had the effect of reducing the defendants' sentences by as much as three years (over forty percent), the Supreme Court did not even formally state, let alone discuss, why the extent of this departure was reasonable.

In sum, the Supreme Court's *Koon* decision gave unclear guidance as to the scope of district court discretion and appellate court deference concerning when judges can depart from the Guidelines. It gave no guidance as to the standards for district courts to decide and for appellate courts to review how much judges should depart when allowed to depart.

2. Confusion and Disparities in the Lower Courts

The Supreme Court's decision in *Koon* has brought sound and fury, but little real change, to the application of departure authority in the lower courts. *Koon* is now always cited and often discussed in lower court departure decisions. But, because of *Koon*'s opaque discussion of departure law, it has had little substantive impact on the federal sentencing landscape other than to exacerbate doctrinal confusion and sentencing disparities in the realm of departures.

a. When Judges Can Depart

As detailed in Part II, even before *Koon*, courts' varied understandings of the scope of departure authority and the Commission's "heartland" concept produced differences in departure attitudes and outcomes from circuit to circuit. *Koon*'s muddled discussion of district court discretion and appellate court deference has deepened these disparities in the application of departure authority. Post-*Koon* decisions reveal that *Koon* has liberalized the use of departure authority only in courts already receptive to departures, while it has barely

227 The calculated guidelines sentencing range for the defendants before any departures was seventy to eighty-seven months' imprisonment based on a final offense level of twenty-seven and criminal history category I. See United States v. Koon, 833 F. Supp. 769, 791 (C.D. Cal. 1993), aff'd in part and vacated in part, 34 F.3d 1416 (9th Cir. 1994), aff'd in part and rev'd in part, 518 U.S. 81 (1996). A five-level departure to offense level twenty-two served to reduce the applicable sentencing range to forty-one to fifty-one months. See U.S. SENTENCING GUIDELINES MANUAL 309 (1998).

228 The Supreme Court simply concluded its discussion of this departure by stating that the district court "did not abuse its discretion in departing downward for King's misconduct in provoking the wrong." *Koon*, 518 U.S. at 105; see also id. at 113 (concluding the majority opinion by stating that the five-level downward departure for victim misconduct was "well within the sound discretion of the District Court").

229 See supra notes 121-29, 149-52 and accompanying text.
changed the status quo in other circuits. Despite Koon's effort to enhance departure authority, those circuits traditionally hostile to departures have continued their restrictive approach. Meanwhile, those circuits traditionally open to departures have relied upon Koon to be even more deferential in their review of departures. Thus, paradoxically, Koon has done little to alleviate the problem of undue rigidity under the Guidelines in most jurisdictions, but, in a few jurisdictions, Koon seems to have contributed to a converse problem of undue flexibility.

In a comprehensive early review of Koon’s impact based on official data, a group of Commission staffers reported that Koon had not significantly altered lower courts’ approaches to or rates of departure. This analysis revealed that, because of Koon’s poor explanation of what aspects of a departure decision should be reviewed closely, circuits were able to conduct either deferential or strict review of decisions to depart by defining the issue in whatever terms would facilitate the form of review desired. Circuits traditionally unfriendly to departures, such as the Fourth and Sixth Circuits, typically deemed the appropriateness of various departures as involving legal questions requiring strict review. They, in turn, continued to disallow many departures. At the same time, circuits traditionally friendly to departures, such as the Second and Ninth Circuits, stressed the factual nature of the departure decision to apply a more deferential form of review and thereby approved departures in many settings.

Other commentators have confirmed that Koon has primarily fortified circuits’ existing approaches to departures. Researcher Dana Shoenberg, examining departures based particularly on family ties and responsibilities, found that “the Koon decision has in fact little effect on such departures,” because its “equivocal message left left cir-

231 See id. at 286 (explaining that “the circuits are finding in [Koon] what they need to continue their departure jurisprudence in the direction it was already headed”).
cuit courts leeway to . . . continue reviewing cases as closely as they choose.”234 Similarly, Professor Ian Weinstein has found in his review of circuit case law that “Koon has changed the rhetoric of departure jurisprudence . . ., but it has done little to change outcomes.”235 In his examination of downward departure decisions following Koon, Weinstein discovered that a number of circuits have actually “applied the elastic abuse of discretion standard as a general rule to reverse every downward departure.”236 At the same time, “one court has affirmed every downward departure it has reviewed,” while other circuits “use the language of individualized, discretionary sentencing when they affirm, and write of the importance of uniform sentencing when they reverse district court decisions to depart downward from the Guidelines.”237

The Commission’s most recent data on departure rates confirm these variations in departure practices and spotlight the seriousness of the inter-circuit disparity that has developed in the wake of Koon. In most circuits, the rate of downward departure (based on grounds other than cooperating with the prosecution in the investigation of others238) has remained quite low. In the Fourth Circuit, for example, only 3.6% of all cases in fiscal year 1998 involved a downward departure.239 Similarly, only 6.4% of all sentences in the Sixth Circuit involved a downward departure, while the percentage in the Seventh

236 Id. at 526–27 (emphasis added).
237 Id. at 527 (footnotes omitted).
238 As noted earlier, the general use of “substantial assistance” departures granted pursuant to Guidelines section 5K1.1 implicates distinct issues. See supra note 86. There may well be, however, some jurisprudential and statistical relationships between cooperation departures and other departures. See Francesca D. Bowman, Has Koon Undermined the Guidelines?, 9 Fed. Sentencing Rep. 32, 32–33 (1996) (suggesting relationship between number of substantial assistance departures and other departures); Frank O. Bowman, III, Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on “Substantial Assistance” Departures Follows a Decade of Prosecutorial Indiscipline, 29 Stetson L. Rev. 7, 59–63 (1999) (discussing interplay of different means of departing from the Guidelines).
Circuit was 4.8%, and in the Eleventh Circuit it was 5.2%. These departure rates are not considerably different from the rates in these circuits before the Supreme Court’s decision in Koon. Accordingly, it appears that in these jurisdictions Koon has done little to alleviate the problems of undue rigidity in the guidelines scheme.

Meanwhile, in other circuits, there has been a far greater number of downward departures. During 1998, in the Second Circuit 23.4% of all cases involved downward departures, while in the Ninth Circuit a whopping 29.6% of sentences involved such departures. The large percentage of departures in these jurisdictions has prompted a few observers to question whether Koon has now contributed to undue sentencing flexibility in some quarters. Ninth Circuit Judge Alex Kozinski, for example, has expressed concern that departures “are coming to be the norm rather than the exception,” and he has urged the Sentencing Commission to “consider whether the frequency with which departures are now being granted by district courts is consistent with the basic premise of consistency and uniformity.”

One might reasonably dispute whether the high downward departure rates within the Second and Ninth Circuits are now creating problems of undue sentencing flexibility or are simply helping to remedy continuing difficulties with the Guidelines’ rigidity. What cannot be disputed, however, is that the remarkable contrast in downward departure rates from circuit to circuit itself raises concerns about regional disparities under the Guidelines. The goal of sen-

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241 See U.S. SENTENCING COMM’N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 26 (1997); see also Hofer et al., supra note 230, at 284–90 & tbl.1 (documenting the consistency of low departure rates in numerous circuits before and after Koon).
242 See 1998 SENTENCING STATISTICS, supra note 239, at 53, 55.
244 Kozinski, supra note 243, at 67.
245 Many participants in guidelines sentencing within the Second Circuit express positive views on the system because of the openness of the Circuit to departures. See Deborah Pines, Ten Years Later, Federal Sentencing Guidelines Go Down Easier, N.Y. L.J., Nov. 3, 1997, at 1, 6. But cf. id. at 6 (quoting Southern District U.S. Attorney Mary Jo White as stating that flexibility in the Second Circuit has “gone beyond what’s appropriate” and is undermining the Guidelines’ aim of ending disparity).
246 Interestingly, the percentage of upward departures does not vary much across circuits. The greatest number of such departures during fiscal year 1998 was in the First Circuit, where they came into play in two percent of all cases. See 1998 SENTENCING STATISTICS, supra note 239, at 53–55.
tencing consistency cannot be well served when a defendant in the Ninth Circuit is nearly ten times more likely to benefit from a downward departure than a defendant in the Fourth Circuit. If nothing else, these figures suggest that *Koon*’s most tangible impact has been to heighten the extent of inter-circuit disparity concerning when judges can depart from the Guidelines.\(^\text{247}\)

b. How Much Judges Should Depart

The Supreme Court’s failure to address the extent of departures in *Koon* has also produced doctrinal confusion and perpetuated sentencing disparities in the lower courts. Because the Supreme Court did not discuss in any way how much judges should depart when having authority to do so, circuit courts are divided over whether *Koon*’s adoption of an abuse of discretion standard should alter their prevailing approaches to reviewing the extent of departures.\(^\text{248}\)

A few circuits have expressly held that *Koon* did not impact their prior methodology for assessing the extent of departures.\(^\text{249}\) A num-

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\(^\text{247}\) It certainly should not be overlooked that, both before and since *Koon*, there have been significant inter-district disparities in the application of departure authority. *See* 1998 *SENTENCING STATISTICS*, *supra* note 239, at 53; *see also* Gelacak et al., *supra* note 33, at 360–63 (discussing the "large variation in departure practice among district courts within circuits" before *Koon*). As Professors Michael Gelacak, Ilene Nagel, and Barry Johnson note, "large variations in departure practice within circuits... cannot be explained by variations in the appellate caselaw" and suggest "the existence of a sentencing ‘ethos’ within some districts that is resistant to efforts to impose national uniformity." *Id.; see also* Farabee, *supra* note 164, at 591–632 (examining departure practices in two districts and reporting differences in departure attitudes and outcomes that were not merely a reflection of circuit case law).

\(^\text{248}\) *See* HUTCHISON ET AL., *supra* note 74, at 1421 ("Several courts have questioned whether their approach to reviewing the extent of departures should be modified in light of *Koon*.").

\(^\text{249}\) *See* United States v. Horton, 98 F.3d 313, 319 (7th Cir. 1996) (holding that *Koon* did not change its pre-*Koon* doctrine that district courts should make analogies to guidelines to explain the extent of departures); United States v. Cali, 87 F.3d 571, 579–81 (1st Cir. 1996) (indicating that *Koon* did not change appellate review standards concerning the extent of departures); *see also* United States v. Barajas-Nunez, 91 F.3d 826, 834 (6th Cir. 1996) ("Although *Koon* has changed the standard of review to an abuse of discretion standard, the rationale for requiring an explanation of reasons
ber of other courts have reached this conclusion implicitly by continuing to rely on their pre-Koon cases and standards for reviewing the extent of a departure. However, the Ninth Circuit has held that Koon overruled its previous requirement that district courts gauge the extent of a departure by drawing analogies to the Guidelines. Thus, at least one court has concluded that Koon now requires an even more deferential review of how much district courts choose to depart when authorized to do so.

In the end, this doctrinal split is a dispute over style more than substance. As detailed in Part II, before Koon lower courts gave relatively little attention to the extent of departures; the circuits stressed that they should show great deference on this issue and regularly affirmed even very large departures as long as the district courts provided some minimal rationale for their extents. Unsurprisingly, the Supreme Court’s failure to address the extent of the departures in Koon has not significantly altered these dynamics. The appellate courts continue to affirm departure sentences in many cases without giving any significant consideration to the extent of the departures. Even when applying pre-Koon precedents that call upon district courts to somehow link a departure’s extent to the Guidelines, the circuits still stress the deference due to the district court and find departures of all sizes “reasonable” based on even nominal justifications for their extent.

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251 See United States v. Sablan, 114 F.3d 913, 917–19 (9th Cir. 1997) (en banc) (overruling United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991) (en banc)).

252 See supra notes 140–48 and accompanying text.

253 See, e.g., United States v. Threadgill, 172 F.3d 357, 373–78 (5th Cir. 1999), cert. denied, 120 S. Ct. 172 (1999); Adelman, 168 F.3d at 87; United States v. Owens, 145 F.3d 923, 929 (7th Cir. 1998); United States v. Gunby, 112 F.3d 1493, 1502–03 (11th Cir. 1997); United States v. Galante, 111 F.3d 1029, 1034–37 (2d Cir. 1997); United States v. Carter, 111 F.3d 509, 514 (7th Cir. 1997); United States v. Valdez, 103 F.3d 95, 98–99 (10th Cir. 1996); United States v. Beasley, 90 F.3d 400, 402–04 (9th Cir. 1996); United States v. Taylor, 88 F.3d 938, 948 (11th Cir. 1996).

Consequently, because *Koon* has left unchanged or even mini-
mized the already minimal restraints on how much judges depart,
there continues to be considerable variation in the extent of depar-
tures. As was true before *Koon*, departures of varying extents have
been upheld even though premised on seemingly similar grounds.\(^2\)
Likewise, very sizeable upward and downward departures are still be-
ing affirmed on a number of grounds\(^2\) and often based on facts that
appear to be not too dissimilar from cases disallowing a departure.\(^2\)
Thus, after *Koon*, significant disparities continue not only among cases
that involve departures, but also between those cases that involve de-
partures and those that do not.

Put simply, then, *Koon* failed on its own terms. The Supreme
Court deserves credit for its apparent effort to remedy the restrictive-

\(^{255}\) For large variations in upward departures on similar offense-related grounds,
compare *United States v. Davis*, 170 F.3d 617, 623–25 (6th Cir. 1999) (upholding eight-
level upward departure for extreme psychological harm to victim), *cert. denied*, 120 S.
Ct. 151 (1999), with *United States v. Oliver*, 118 F.3d 562, 566–67 (7th Cir. 1997) (up-
holding two-level departure on similar facts). For large variations in upward depar-
tures based on criminal history, compare *United States v. Lowe*, 106 F.3d 1498, 1503
(10th Cir. 1997) (approving a large departure), with *United States v. Melgar-Galván*, 161
F.3d 1122, 1124 (7th Cir. 1998) (approving a one-level departure). For large varia-
tions in downward departures on similar offender-related grounds, compare *United
States v. Galante*, 111 F.3d 1029, 1034–36 (2d Cir. 1997) (upholding departure to a
term of probation from a sentencing range of forty-six to fifty-seven months based on
family circumstances), with *United States v. Gauvin*, 173 F.3d 798, 806–08 (10th Cir.

\(^{256}\) See, e.g., *Melvin*, 187 F.3d at 1321–24 (approving fifteen-level upward departure
from range of twenty-one to twenty-seven months to 120 months’ imprisonment); *Da-
viss*, 170 F.3d at 623–25 (affirming upward departure from range of thirty-seven to
fifty-months to a sentence of 118 months); *United States v. Nevels*, 160 F.3d 226,
230–31 (5th Cir. 1998) (approving a seven-level upward departure), *cert. denied*, 525
U.S. 1185 (1999); *United States v. Morrison*, 153 F.3d 34, 52–54 (2d Cir. 1998) (af-
firming fourteen-level upward departure); *Owens*, 145 F.3d at 929 (approving down-
ward departure to statutory minimum amounting to a forty-eight-month departure
from low end of the range); *Galante*, 111 F.3d at 1036 (affirming thirteen-level down-
ward departure to time served (eight days) plus twenty-four months home detention);
*United States v. Hardy*, 99 F.3d 1242, 1253 (1st Cir. 1996) (approving upward depar-
ture from range of thirty-three to forty-one months to 120 months’ imprisonment).

\(^{257}\) Compare *Owens*, 145 F.3d at 929 (approving large downward departure based on
family circumstances), *Galante*, 111 F.3d at 1034–36 (same), with *United
States v. Archuleta*, 128 F.3d 1446, 1449–52 (10th Cir. 1997) (reversing a departure
based on similar facts); compare *Hardy*, 99 F.3d at 1253 (upholding a large upward
deporture based on criminal history), with *United States v. Tejeda*, 146 F.3d 84, 87–88
(2d Cir. 1998) (reversing a departure based on similar facts); compare *Davis*, 170 F.3d
at 623–25 (upholding a large upward departure based on extreme psychological
harm to victim), with *id.* at 627–29 (reversing a departure for separate defendant
based on facts that district court thought were similar).
ness of the Guidelines’ departure jurisprudence and thereby to achieve a better balance in sentencing discretion under the Guidelines. But lower court case law and statistics reveal that the Koon decision has not significantly changed departure attitudes or outcomes, except perhaps to exacerbate prior disparities in the application of departure authority.258

B. Hindering Principled Judicial Contributions to Sentencing Law

Unfortunately, the problems with the Supreme Court’s decision in Koon run deeper than its failure to achieve a better balance in judicial sentencing discretion under the Federal Sentencing Guidelines. The Koon Court, apparently failing to appreciate the broader purposes of departure authority, ultimately put forward a shallow conception of departures and eschewed purpose considerations in departure decision-making. As a result, the Koon decision aggravates a misguided departure jurisprudence by further hindering the role of departures in fostering principled judicial contributions to sentencing law under the Guidelines.

1. A Shallow Conception of Departure Authority

As stressed in Part I, sentencing reformers and the SRA’s drafters expected departures to contribute more to a guidelines system than

258 As noted before, the very perception of the Guidelines’ rigidity before Koon prompted some sentencing participants to craft plea agreements or strike other bargains to avoid the strict application of the Guidelines. See supra text accompanying notes 153–58. Consequently, if the Supreme Court’s decision in Koon at least creates the perception of increased sentencing discretion and flexibility, it may help alleviate some of the disparity problems resulting from the Guidelines’ circumvention. Yet, the low rate of departures in most circuits gives reason to suspect that Koon has not radically changed the tendency of some sentencing participants to use circumvention of the Guidelines as a means to achieve justice in particular cases. See Weinstein & Turner, supra note 154, at 298 (“Whatever the effect of Koon, injustices under the guidelines often have been, and continue to be, avoided by a variety of circumventions and tinkering around the margins.”); see also Douglas A. Berman, A Year in the Life of the Guidelines: The Supreme Court Speaks, the Commission is Quiet and Federal Sentencing Continues Largely Unchanged, 9 FED. SENTENCING REP. 280, 281 (1997) (suggesting “Koon’s impact has been muted largely because the sentencing system had already developed mechanisms for dealing with troublesome cases well before the Supreme Court wrote favorably about district courts’ discretion to depart”); cf. Schulhofer & Nagel, Guideline Circumvention, supra note 153, at 1302 (concluding from pre-Koon cases that “participants sometimes choose evasion over overt departure simply because the former route is easier and entails no accountability”). See generally infra text accompanying note 298 (discussing the value of a refocused departure jurisprudence as a way to minimize circumventions of the Guidelines).
simply balancing judicial sentencing discretion. Through articulation and review of reasons for departing, judges would share—with each other and with the Sentencing Commission—case-specific insights on sentencing policy and practice and thereby contribute to the development of principled and purposeful sentencing law. But the Supreme Court’s decision in Koon undermined this broader role for departures under the Federal Sentencing Guidelines. The Court’s account of the “heartland” and “abuse of discretion” standards embraced a conception of departures as mere gap-fillers in the guidelines system and thus devalued departure authority as a means for judicial contribution to the evolution of the sentencing law under the Guidelines.

Consider first the “heartland” concept as articulated in Koon. Seizing upon language in the Guidelines Manual’s introduction, the Court asserted that each guideline captures “a heartland of typical cases” and thus it is only “[a]typical cases [that] were not ‘adequately taken into consideration’” by the Commission. Consequently, continued the Court, only “factors that may make a case atypical provide potential bases for departure.” But, as Professor Kate Stith has effectively highlighted, this entails that departure authority is available only in cases that are “atypical” . . . [and] prohibit[s] departures based on anything other than the “atypicality” of the case at hand. There is no room to question the reasonableness of the Commission’s judgments about just punishment in the “typical” (or “heartland”) case, and no room to question any determination the Commission has made regarding the proper (and improper) grounds for departure from the guidelines ranges.

In other words, by confining the use of departure authority to atypical cases, Koon restricts the possibility for departures to foster judicial involvement through a common-law sentencing dialogue in all Guidelines cases. Departures are conceived and described by the Supreme Court in Koon merely as a means to achieve individualized sentences in “atypical” cases—which, the Court highlights, lest we for-

259 See supra text accompanying notes 43–47.
261 Id. at 94; see also id. at 100 (“What the district court must determine is whether the misconduct that occurred in the particular instance suffices to make the case atypical.”).
262 Stith, supra note 207, at 16 (emphasis added); see also STITH & CABRANES, supra note 5, at 101–02 (discussing the limitations on the use of departure authority retained by the Koon decision).
get, are expected to be "highly infrequent." Koon's articulation of the heartland concept thus embraces the notion that departures should only serve and only be seen as a means to deal with gaps in the Commission's Guidelines. To again borrow the words of Professor Stith, the Supreme Court in Koon confirmed the "hegemony of the Sentencing Commission" by confining departures to the "atypical" cases and by failing to give "judges a role in determining a just punishment . . . in all cases." In this way, the Supreme Court's development of the "heartland" concept devalued and thwarted departures as a means for significant judicial contribution to sentencing law under the Guidelines.

The same shallow conception of departures as mere gap-fillers is also reflected in the Supreme Court's development of the abuse of discretion review standard in Koon. The Supreme Court supported its adoption of this standard by claiming that sentencing facts are so "multifarious, fleeting, special, [and] narrow" that they "utterly resist generalization." The Court asserted that, because a "district court's departure decision involves the consideration of unique factors that are little susceptible . . . of useful generalization, . . . de novo review is unlikely to establish clear guidelines for lower courts." In this way, and also by emphasizing "the factual nature of the departure in-

263 Koon, 518 U.S. at 96 (quoting U.S. Sentencing Guidelines Manual § 1A4(b) (1995)).
264 Stith, supra note 207, at 17; see also Miller & Freed, supra note 128, at 235–37 (arguing the SRA's departure standard should be understood as "provid[ing] the test for imposing the appropriate sentence in every case").
265 Professors Marc Miller and Ronald Wright make a compelling argument that it is the very "heartland" concept itself, and not simply the Supreme Court's elaboration in Koon, that defeats effective judicial contributions to sentencing law under the Guidelines. See Miller & Wright, supra note 113, at 728, 765–800. Discussing the difficulties created by the heartland concept even before the Koon decision, they explain:

The problem with the heartland concept was its high level of generality. For any given crime or type of offender, there was no way to know what exact factors brought a case within the heartland. Judges could only guess about what sort of case fell within the heart, and presumed that most guideline sentences mirrored prior judicial practice. As a result, judges never became seriously involved in developing a common law of sentencing. They never played an important role in improving the supposedly evolutionary guidelines.

Id. at 728.
267 Id.
The Supreme Court suggested that departure determinations are principally fact-driven, case-by-case decisions that have no broader purpose or impact than to achieve an individualized sentence in the case at hand.269

But the very notion of sentencing facts as resistant to “generalization” cuts against the very project of the Federal Sentencing Guidelines,270 while the suggestion that departure determinations cannot establish “guidelines” cuts against departure authority’s role as a mechanism for judicial contributions to the development of sentencing law under the Guidelines. Though sentencing reformers and the SRA drafters recognized that sentencing guidelines cannot and should not try to completely codify every variation of offense and offender, they called for a guidelines system precisely because they thought sentencing could and should be governed by principled “generalizations” rather than be entirely subject to the “multifarious, fleeting” judgments of hundreds of different sentencing judges. Moreover, as detailed in Part I, Congress expected and desired not only the Sentencing Commission but also federal judges to be involved in developing these “generalizations,” and judges were to do so primarily through articulating and reviewing the reasons that seemed to necessitate a departure from the Commission’s Guidelines.271 Yet, the Supreme Court’s adoption and defense of an abuse of discretion review standard for departure determinations seems to misapprehend both the ability and the importance of departures as a means for judicial contribution to the “generalizations” of the Federal Sentencing Guidelines.272

268 Id.
269 See Weinstein, supra note 235, at 522 (discussing Koon’s “choice to treat [departure decisions] as a case-specific, or factual matter”); see also Johnson, supra note 70, at 1743 (criticizing Koon for suggesting that the departure determination is “ad hoc, fact-bound [in] nature”).
270 See Harris & Berman, supra note 193, at 6 (noting that “generalization is the entire project of the guidelines”); cf. Weinstein, supra note 235, at 524–25 (criticizing Koon for failing “to distinguish between the [pre-Guidelines] tradition of complete secondary (non-reviewable) discretion and the post-SRA regime of reviewable primary (decision-making) discretion,” and discussing the problems resulting from the fact that Koon “fosters continued debate about the way things were done under the old law, when it should refocus on the question of how discretion should be exercised under the new law”).
271 See supra text accompanying notes 62–77.
272 Professor Barry Johnson makes this point effectively in his recent critique of Koon, with particular emphasis on the Supreme Court’s “devalu[ing of] the proper institutional role of appellate review of departures.” Johnson, supra note 70, at 1724. Professor Johnson complains that Koon’s adoption of a deferential review standard undermines the efforts of the courts of appeals to develop a “body of legal sentencing
In the end, it is unlikely that the *Koon* Court really believed that courts *could not* make generalizations or establish guidelines for lower courts through departure determinations. Much of the early departure jurisprudence, as well as the very Ninth Circuit decision being reviewed in *Koon*, plainly demonstrated that appellate courts could make generalizations and establish guidelines for lower courts through decisions in departure cases. Moreover, consider the Court’s response to the Government’s arguments that certain factors relied upon by the district court were wholly impermissible as departure factors:

Those arguments, however persuasive as a matter of sentencing policy, should be directed to the Commission. Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance. . . . [F]or the courts to conclude a factor must not be considered under any circumstances would be to transgress the policymaking authority vested in the Commission.

This very statement reveals that the Supreme Court recognized that the federal courts *could* make generalizations through departure decisions, but that the Court’s real point was that the courts *should not* make categorical generalizations through departure determinations that preclude the consideration of certain sentencing factors.

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273 The Ninth Circuit had, for example, reversed one ground on which the district court departed by ruling that “a downward departure based on public outrage over the crime that was committed is contrary to the Guidelines’ goals of promoting respect for the law and imposing sentences that reflect the seriousness of the crime.” *United States v. Koon*, 34 F.3d 1416, 1456 (9th Cir. 1994), aff’d in part and rev’d in part, 518 U.S. 81 (1996). Though one might reasonably dispute this substantive sentencing judgment by the Ninth Circuit, one cannot reasonably dispute that the Ninth Circuit, by precluding reliance on public outrage as a basis for departure, made a “generalization” that provides guidance for lower courts. Making a similar point, Professor Barry Johnson calls the *Koon* Court’s “generalization” claims “demonstrably inaccurate,” and he substantiates his point by documenting that the pre-*Koon* “departure case law is replete with examples of the kind of appellate-driven jurisprudential development that *Koon* suggests is not possible.” Johnson, *supra* note 70, at 1738–41.


275 See *Miller & Wright*, supra note 113, at 783 (discussing this portion of *Koon* and noting that the Court’s “language suggests that appellate courts—including, presuma-
On this point, the *Koon* decision finally merits praise. The Supreme Court was faithful to the role of departure authority when it prudently and properly explained that the federal courts should not in departure cases make *categorical* rules to limit the consideration of certain sentencing factors. The broader role of departures is to enable judges to provide *case-specific* contributions to the development of sentencing law, and thus departure decisions should not be announcing *system-wide* rules that restrict or seriously thwart potential sentencing considerations.

Unfortunately, as detailed below, the Supreme Court carried this sound pronouncement one unsound and harmful step further. In what seems to be one of the most significant and yet most overlooked passages in *Koon*, the Supreme Court went beyond clarifying that courts should not be making system-wide declarations in departure cases to suggest that they should not even be making principled or purposeful determinations in departure cases.

2. Keeping Departures and Departure Jurisprudence Purposeless

The Government in *Koon* argued for the impermissibility of certain factors as the basis for a departure by pointing to the SRA’s articulation of the purposes of sentencing in § 3553(a)(2). As the Supreme Court explained the argument, “the Government interprets § 3553(a)(2) to direct courts to test potential departure factors against its broad sentencing goals and to reject, as a categorical matter, factors that are inconsistent with them.” Reiterating that courts should not be deciding what sentencing factors should be “ruled out on a categorical basis,” the Supreme Court rejected the notion that “§ 3553(a)(2) directs courts to decide for themselves . . . whether a given factor ever can be an appropriate sentencing consideration.” In the same sequence, however, the Court also parsed the language of § 3553(a) being relied upon by the Government to make the following assertion: “The statute says nothing about requiring each potential

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276 See *Koon*, 518 U.S. at 108.
277 Cf. Miller & Freed, *supra* note 128, at 236 (criticizing courts for making categorical sentencing judgments under the Guidelines and stressing that the language of the SRA’s departure standard gives “the courts responsibility for weighing the care and sensitivity with which the Commission’s guidelines address individualized circumstances on a case-by-case basis”).
278 See *Koon*, 518 U.S. at 106.
279 Id. at 108.
280 Id.
departure factor to advance one of the specific goals [of punishment set forth in § 3553(a)(2)]. So long as the overall sentence is 'sufficient, but not greater than necessary, to comply' with the above-listed goals, the statute is satisfied.\textsuperscript{281}

To the extent that the Supreme Court's reference to "the statute" was only to § 3553(a), it is on solid ground here, since nothing in that section of the SRA speaks to departure decision-making at all. But, to the extent the suggestion is that nothing in the SRA requires "each potential departure factor to advance one of the specific goals" of punishment, the Court's assertion seems much more questionable. As stressed in Part II, the SRA's departure standard of § 3553(b) requires a court to find not only that there exists a factor "not adequately taken into consideration by the Sentencing Commission," but also that this factor "should result in a sentence different from that described [in the Guidelines]."\textsuperscript{282} This component of § 3553(b)—described above as its prescriptive requirement—does seem to at least suggest, if not to require, that courts examine "each potential departure factor" to see if departing on the basis of that factor would "advance one of the specific goals" of sentencing set forth in the SRA.

Thus far, lower courts appear to have given a broad reading to this part of \textit{Koon} to conclude that departure decision-making need not in any way incorporate the purposes of sentencing set forth in the SRA. The Seventh Circuit has stated that \textit{Koon} "rejected the limitation on sentencing discretion" that "a departure from the guidelines range, in order to be allowable, must be consistent with the statutory sentencing goals."\textsuperscript{283} Similarly, the Sixth Circuit has expressly rebuffed the claim that "in making the determination that a downward departure is warranted, one or more of the statutory sentencing goals (deterrence, incapacitation, retribution and correction) must be implicated."\textsuperscript{284} In other words, the circuit courts have interpreted \textit{Koon} to mean that the SRA's elaboration of the purposes of sentencing need not play any role in departure decision-making.

In this way, the \textit{Koon} decision appears to both endorse and fortify the narrow focus of departure jurisprudence on the descriptive com-

\textsuperscript{281} Id. (quoting 18 U.S.C. § 3553(a) (1994)).

\textsuperscript{282} 18 U.S.C. § 3553(b) (1994) (emphasis added); \textit{see also supra text accompanying notes 93–94 (discussing the two components of the SRA's departure standard)}.

\textsuperscript{283} United States v. Pullen, 89 F.3d 368, 370 (7th Cir. 1996); \textit{see also United States v. Carter, 122 F.3d 469, 473 (7th Cir. 1997)} (stating that "the \textit{Koon} Court actually rejected a limitation on sentencing discretion by holding that a departure from the guidelines does not always have to be consistent with the four goals" of punishment set forth in the SRA).

\textsuperscript{284} United States v. Coleman, 188 F.3d 354, 359–60 (6th Cir. 1999) (en banc).
ponent of the SRA's departure standard. Though the Government pushed too far by arguing for courts to declare categorical limits on departure factors, the basic premise of its argument was sensible and sound for promoting purpose considerations as an integral part of departure decision-making. But, rather than recognize the value and importance of judges considering the purposes of sentencing when contemplating departures, the Supreme Court eschewed such normative considerations. In so doing, the Court essentially ensures that departure decisions will continue to involve only descriptive deliberation and continue to lack prescriptive deliberation. As a result, the Koon decision, like the departure jurisprudence that preceded it, undermines the development of principled sentencing law within the Guidelines by allowing for purposeless departure decisions in individual cases and a purposeless departure jurisprudence across the range of cases.

The Koon Court's own application of its adopted departure standard highlights these very problems. The Court's review and assessment of the departure factors relied upon by the district court was ipse dixit and unenlightening—and has proven confusing to lower courts—in large part because the Court only engaged in descriptive deliberation. Considering each departure factor, the Court simply proceeded to make a variety of abstract judgments (or simply suppositions) about what the Commission considered and about the heartland of the applicable Guidelines. Lacking throughout the Court's analysis of the proffered grounds for departure was any serious consideration of purpose. As Professor Barry Johnson has noted,

285 Significantly, Justice Souter in his separate opinion in Koon did not overlook the prescriptive component of the SRA's departure standard, and he expressly brought normative considerations into his analysis of the district court's stated grounds for departure. See Koon, 518 U.S. at 114–18 (Souter, J., concurring in part and dissenting in part). Quoting the full language of the SRA's departure standard, Justice Souter asserted that "both Congress and the Commission envisioned that departures would require some unusual factual circumstance, but would be justified only if the factual difference 'should' result in a different sentence. Departures, in other words, must be consistent with rational normative order." Id. at 115. Justice Souter then explained why he thought a departure based on the defendants' susceptibility to abuse in prison would amount to a "moral irrationality" and why he thought it would be "normatively obtuse" to permit a departure based on the defendants' successive prosecutions. Id. at 115–18; see also infra text accompanying note 312 (discussing Justice Souter's approach to departure review).

286 See Miller & Wright, supra note 113, at 784–93 (criticizing the Koon Court's analysis of the specific departure grounds at issue and highlighting that the "Supreme Court used the same techniques as other federal courts to give heart to the heartland: it created presumptions about the guidelines as a whole, and about the work of the Commission, and then made conclusory assertions about particular guidelines").
"[n]owhere does the Court consider whether the[ ] factors [relied upon by the district court] reflect appropriate penal policy, or whether they are consistent with the structure and purposes of Guidelines sentencing."287

Lower courts, unfortunately, have followed suit. Nearly all departure cases continue to analyze proposed departure factors through the lens of specific guidelines provisions, as courts try to determine whether a particular factor was considered by the Sentencing Commission. The post-Koon case law has no shortage of elaborate judicial debates over "heartlands" and "atypicality" and "extraordinariness."288 But still absent in all this case law is the significant normative analysis that the prescriptive part of the departure standard seems to require and that a principled and evolutionary guidelines system needs. Consequently, the day-to-day practice of sentencing under the Guidelines still fails to bring thoughtful judicial contributions to sentencing lawmaking. Departure decision-making still has yet to foster the development of a meaningful "common law of sentencing" to aid the principled evolution of the guidelines system.

287 Johnson, supra note 70, at 1721-22; see also Hofer, supra note 70, at 9-11 (noting that only the separate opinion of Justice Souter brought normative considerations to the analysis of the heartland concept).

288 See, e.g., United States v. Stevens, 197 F.3d 1263, 1266-70 (9th Cir. 1999) (discussing at length "the heartland of the offense of possessing child pornography and the offenders who commit it" (quoting United States v. Stevens, 29 F. Supp. 2d 592, 599 (D. Alaska 1998) (brackets omitted), vacated, 197 F.3d 1263 (9th Cir. 1999))); United States v. Contreras, 180 F.3d 1204, 1208-16 (10th Cir. 1999) (debating, majority and dissenting opinions, the heartland covered by a guidelines discussion of coercion and duress and the significance of parental influence), cert. denied, 120 S. Ct. 243 (1999); United States v. Allery, 175 F.3d 610, 613 (8th Cir. 1999) (debating, between the majority and dissent, the heartland for sexual abuse crime and whether the offense was "atypical because of the minimal amount of force used"); United States v. Leahy, 169 F.3d 433, 438-43 (7th Cir. 1999) (discussing at length the heartland of Guidelines used to sentence a defendant convicted of "knowingly possessing a toxin, specifically, ricin, for use as a weapon"); United States v. Sanchez-Rodriguez, 161 F.3d 556, 561-67 (9th Cir. 1998) (debating, by the majority and dissent, the heartland of drug distribution guidelines and coming to different conclusions as to whether a "$20 heroin sale was a typical, ordinary heartland event"); United States v. Woods, 159 F.3d 1132, 1134-35 (8th Cir. 1998) (discussing at length the heartland for money laundering offenses); United States v. Hemmingson, 157 F.3d 347, 360-64 (5th Cir. 1998) (discussing at length whether "money-laundering for purposes of concealing a corporate contribution to a defeated candidate" were atypical or instead fell within the heartland of the money-laundering guidelines); United States v. Galante, 111 F.3d 1029, 1032-39 (2d Cir. 1997) (debating, majority and dissenting opinions, what sorts of family circumstances should qualify as "extraordinary"); see also Miller & Wright, supra note 113, at 793 (noting that "Koon has sparked something of a heartland revival").
In sum, the *Koon* decision's problems run deeper than its failure to refocus departure jurisprudence to achieve a better balance in judicial sentencing discretion. The Court's shallow conception of departures as gap-fillers and its eschewing of purpose considerations in departure decision-making further undermine principled and purposeful judicial contributions to the development of sentencing law under the Guidelines.

IV. HARMONIZING THEORY AND PRACTICE: IMPROVED GUIDELINES SENTENCING THROUGH A REFOCUSED DEPARTURE JURISPRUDENCE

The foregoing review of both the purposes and problems of departure authority under the Federal Sentencing Guidelines makes clear the need to refocus departure jurisprudence. The Supreme Court's work in *Koon* failed to put departure jurisprudence on an improved path. As detailed in Part III, the decision appears to have aggravated many of the worst aspects of an already troubled jurisprudence. A new direction is needed so that departure authority might ultimately achieve its goals of balancing judicial sentencing discretion and fostering principled and purposeful judicial contributions to an evolving federal guidelines sentencing system.

Helpfully, the foregoing review also illuminates the keys toward developing an improved departure jurisprudence. In order to better balance judicial sentencing discretion under the Guidelines, departure decisions should focus principally on the extent of departures rather than on the threshold decision to depart. And, in order to better foster principled and purposeful judicial contributions to the Guidelines, departure decision-making should focus primarily on the prescriptive component of the SRA's departure standard and on the purposes of punishment set forth in the SRA.

A. Balancing Discretion by Focusing on the Extent of Departures

It is often said that an excessive number of departures can threaten a guidelines system's efforts to achieve greater sentencing consistency and uniformity. But this claim is not entirely accurate, especially in the context of the Federal Sentencing Guidelines.

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289 See, e.g., Gelacak et al., *supra* note 33, at 303 (“If judges depart from the Guidelines too frequently or for inappropriate reasons, they may defeat the SRA’s purpose of eliminating unwarranted sentencing disparity.”); Lee, *supra* note 206, at 3 (asserting that “frequent departures could undermine the goal of achieving sentencing uniformity”); Nagel, *supra* note 7, at 939 (discussing “the potential disparity introduced by excessive judicial 'departures' from the guidelines”); see also sources cited *supra* note 34.
Rather, it is only excessively large departures that pose a real threat of serious sentencing disparities under the Guidelines. Consequently, it is actually far more important for the Guidelines to regulate closely the extent of departures than the threshold decision to depart.

This important reality can be best understood by way of an example. Consider the hypothetical case of a defendant convicted of armed bank robbery who, after various guidelines enhancements and adjustments, is assigned a final offense level of thirty. Assuming that this defendant is a first-time offender and thus comes within criminal history category I, his applicable sentencing range according to the Guidelines' Sentencing Table would be 97–121 months of imprisonment. Because a district judge has complete discretion to select a sentence from within that range, this defendant's sentence can vary as much as two years (or twenty-five percent) even in the absence of a departure. If the sentencing judge finds this defendant especially sympathetic, she can impose the minimum sentence of ninety-seven months' imprisonment. If she finds him especially unsympathetic, she can impose the maximum of 121 months. As an original Commissioner once put it, the sentencing ranges in the Guidelines' Sentencing Table—which each provide a maximum possible sentence that is twenty-five percent (or at least six months) greater than the minimum possible sentence—mark out the "tolerable level of disparity acceptable to Congress" under the Guidelines.

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290 I am loosely drawing this example from a guidelines calculation exercise provided by the Sentencing Commission which appears on its webpage at U.S. Sentencing Commission, Robbery Exercise, available at http://www.uscc.gov/training/robbryex.pdf (last modified Oct. 15, 1997). For a basic review of the steps involved in calculating a guidelines sentence, see Haines et al., supra note 116, at 12–13.


292 Nagel, supra note 7, at 933. The SRA specifically dictates that "if a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established . . . shall not exceed the minimum of that range by more than 25 percent or six months." 28 U.S.C. § 994(b)(2) (1994).

Significantly, though the Sentencing Commission could conceivably formulate guidelines that specify an exact sentence for each offense and offender, the Sentencing Table has always set forth the widest ranges authorized by the SRA by having the longest term of imprisonment in each sentencing range twenty-five percent greater than the shortest term. See U.S. SENTENCING GUIDELINES MANUAL 309 (1998). Some commentators have suggested that sentencing ranges this broad provide judges in nearly all cases with sufficient discretion to individualize sentences. See Bowman, supra note 84, at 712–13 (stressing that the size of ranges entail that "twenty-five percent of the sentence will rest on the sentencing judge's virtually unreviewable assessment of individualized factors"); see also U.S. SENTENCING COMM'N, supra note 20, at 25–26 (stressing that sentencing ranges provide "considerable latitude for judges" to consider various aggravating and mitigating factors); Marvin E. Frankel, Sentencing
Now consider the potential impact of a small departure. If the judge believes she might have reasons to depart downward and moves two levels down the Guidelines' Sentencing Table to reach offense level twenty-eight, the applicable sentencing range becomes seventy-eight to ninety-seven months' imprisonment. The final outcome in such a case would be a sentence of no less than seventy-eight months of imprisonment instead of the ninety-eight months that likely would have been ascribed in the absence of a departure. Thus, the decision to go below the low end of the applicable guidelines range through a two-level downward departure (which would take the sentence from ninety-eight months down to seventy-eight months) produces in percentage terms no greater difference in the defendant's final sentence than would the converse decision to select the highest possible sentence within the applicable guidelines range (which would take the sentence from ninety-eight months up to 121 months). Put another way, potentially conflicting decisions about the appropriateness of this two-level departure would produce no more significant sentencing disparity than potentially conflicting decisions about the appropriateness of selecting a sentence at the low or high ends of the applicable sentencing range.

The example is meant to highlight that, given the Sentencing Commission's construction of the Sentencing Table with overlapping sentencing ranges, small departures (that is, departures of two levels or less) create no greater disparity concerns than the unregulated discretion that district judges already have to select sentences from within applicable sentencing ranges. Put more simply, small departures do not transgress what Congress seems to consider a "tolerable" level of disparity in sentencing.

Guidelines: A Need for Creative Collaboration, 101 Yale L.J. 2043, 2050 (1992) ( intimating that the Guidelines' ranges are sufficiently broad to provide judges with ample opportunity to individualize sentences).


294 Presumably a judge considering a downward departure would sentence at the bottom of the applicable Guidelines sentencing range in the absence of a departure. Interestingly, Commission data reveals that the vast majority of sentences under the Guidelines are ultimately set at the minimum of the applicable sentencing ranges. See 1998 Sentencing Statistics, supra note 239, at 60.

295 Though the above example involves a downward departure to a lower offense level, the same principles and dynamics apply to upward departures and also to departures based on a defendant's criminal history category. The Sentencing Commission constructed the Sentencing Table in such a way that a movement of two "boxes" in any direction will produce no greater difference in the sentence than already allowed by the applicable sentencing range. See U.S. Sentencing Guidelines Manual 309 (1998).
Large departures, of course, are a much different matter and do pose a serious risk of undermining the SRA's interest in reducing sentencing disparities. For our hypothetical defendant, if the judge instead opted for an eight-level downward departure to reach offense level twenty-two, the applicable sentencing range becomes forty-one to fifty-one months' imprisonment.\footnote{See id.} The likely final outcome in such a case would be a sentence cut by more than half and a term of imprisonment almost five years shorter than the ninety-eight months that would have been ascribed in the absence of a departure. This very significant difference clearly exceeds the "tolerable" level of disparity countenanced by Congress.

Once these dynamics are appreciated, the prevailing approach to the granting and review of departures seems quite peculiar. As detailed before, courts currently focus on the threshold decision to depart and give relatively little attention to the extent of allowed departures.\footnote{See cases cited supra notes 252-57.} Circuit courts' review of decisions to depart is rigorous (and remains so in most circuits even after \textit{Koon}), while their review of the extent of departures is highly deferential (and may be even more so after \textit{Koon}). But it is the extent of departures, rather than the threshold decision to depart, that presents the real threat of significant sentencing disparity; this approach is backwards. The extent of any departure is what should be given the most attention and the most rigorous review, because it is that choice, rather than simply the threshold decision to depart, that creates the greatest risk of serious disparities under the Guidelines. In other words, because the structure of the Guidelines' Sentencing Table makes the size of any departure of much greater overall significance, a jurisprudential focus on the extent of departures would be far more sensible than the current focus on the threshold decision to depart.

Beyond its logic, there would be considerable benefits from refocusing departure jurisprudence to be highly discretionary and deferential concerning the threshold decision to depart, but rigorous in its examination and review of the extent of departures. Most critically, such an approach to departures could help achieve a balance in judicial sentencing discretion that has heretofore proved elusive within the guidelines scheme. Because this changed focus would provide sentencing judges with broad discretion to depart, it should greatly alleviate concerns and complaints about the overall rigidity of the Guidelines. Once aware that they can readily break from the Guidelines' structure to consider any sentencing factor that seems
pertinent and important, judges can no longer reasonably contend that the guidelines system completely deprives them of the discretion needed in each case to achieve an individualized and just sentencing outcome. Under this revised approach, judges will come to recognize that they are not simply "judicial accountants" operating a "mechanistic scheme."

Greater authority to depart should also lessen both the pressure and willingness of sentencing participants to circumvent the Guidelines. The need to resort to guidelines evasion to achieve "hidden" departures will largely be eliminated because overt departures (at least small ones) will be a much more significant, accepted, and regular part of sentencing decision-making. Moreover, by ensuring that all departure decisions are in fact overt, greater accountability and consistency can be achieved throughout the guidelines system because both the appellate courts and the Commission can observe and assess what facts and factors are really influencing front-line sentencing actors.

At the same time, any disparity concerns stemming from a robust use of departures should be kept in check by having district courts attentive to, and reviewing courts closely examining, the extent of departures. The sentencing ranges established by the Commission will still have a powerful gravitational force; departures will likely become somewhat more frequent, but relatively few will be very sizeable. As long as the extent of departures are a matter of serious attention and review, the bulk of sentences will still cluster closely around the Commission's sentencing ranges.

Critically, refocusing departure jurisprudence on the extent of departures does not mean judges should be allowed to depart for any reason or that small departures should escape review. District judges should still be required to justify their decisions to depart (and, as explained in the next Section, required to do so with reference to purposes of sentencing). But, of critical importance, the larger the departure, the better must be the justification. Such an approach certainly seems to resonate with § 3742, which instructs appellate courts to review departures to determine if the sentence outside the Guidelines "is unreasonable." The larger the departure from the applicable sentencing range, the less "reasonable" it seems unless supported by an ever more weighty justification. In this way, both the grant and

298 Cf. Schulhofer & Nagel, Guideline Circumvention, supra note 153, at 1301–03, 1313–14 (suggesting that defects in the existing departure mechanism are a root cause of Guidelines evasion and encouraging greater use of overt departures to remedy problems stemming from "hidden" departures through circumvention).

the review of departures will not be focused simply on the (less important) threshold questions of whether the case at hand seems to call for a sentence different than the applicable guidelines sentence. Instead, the focus will be more fully on the (much more important) issues of just why and how much the case at hand seems to call for a sentence different than the applicable guidelines sentence.300

B. Developing Principled Sentencing Law Through Purposeful Departures

Because of the prevailing jurisprudence's focus on the descriptive portion of the SRA's departure standard, departure cases now focus on "heartlands," "atypicality," and "extraordinariness," rather than the purposes of punishment. But just as the structure of the Guidelines' Sentencing Table makes a focus on the extent of departures more sensible, the very language of the SRA, considered together with the institutional realities of guidelines sentencing, makes a focus on the prescriptive component of the SRA's departure standard more sensible than a focus on its descriptive component. Indeed, the fact that courts have come to focus on the descriptive component of the SRA's departure standard is as surprising as it is troubling.

Recall that the descriptive component of the departure standard turns on whether factors have been "adequately taken into consideration by the Sentencing Commission."301 It seems reasonable to expect that, in the course of adjudicating specific cases with particularized facts, courts would readily discover countless factors that the Commission did not "adequately" consider. The Commission, after all, operates from an ex ante system-wide perspective; it has created guidelines by examining sentencing outcomes in the aggregate without directly considering any of the individual human beings who have violated federal law.302 In sharp contrast, judges operate from an ex post, case-

300 Professor Kate Stith and Judge José Cabranes astutely observe that in those few settings in which the Guidelines explicitly encourage departures, courts often do "discuss issues of culpability and just punishment in the particular case." STITH & CABRANES, supra note 5, at 99. That these cases are among the "most thoughtful and significant" decisions during the Guidelines era, id., is both telling and unsurprising. It is in this small class of cases that courts (encouraged by the Commission's express instructions) move quickly beyond their usual obsession with the threshold decision to depart and instead reason and make judgments concerning the (more important) issue relating to the departure's extent.


302 See Freed, supra note 60, at 1694 (highlighting that "the Commission neither sees offenders nor decides cases"); see also LOIS G. FORER, A RAGE TO PUNISH 169 (1994) (noting that "commissions can deal only with generalities and norms; they cannot act upon specific cases and actual individuals"); Alschuler, supra note 83, at 906-07 (noting that "sentencing commissions have not considered cases [only]. . . .
specific perspective; they ascribe sentences by individually considering and passing judgment on the real persons who actually committed offenses. Though the human realities of sentencing are especially significant for trial judges who interact with defendants first-hand, appellate judges also have a contextualized experience with sentencing that is different from the experience of the Sentencing Commission.304

Given these institutional dynamics, it is truly puzzling why the federal courts have been so ready and willing to find in so many cases that any Commission consideration of a factor (or even the likely consideration of a factor) constitutes “adequate” consideration thereby precluding a departure on that basis.305 Consider, for example, the matter of family ties and responsibilities. The Sentencing Commission’s ex ante, system-wide assertion that such circumstances are “not ordinarily relevant”—which is set forth by the Commission without any serious justification or explanation—seems a far cry from “ade-

aggregations of cases”). Specifically, the original Commission developed the initial Guidelines by, in its words, “taking an empirical approach,” that relied primarily upon “data drawn from 10,000 presentence investigations . . . in order to determine which [sentencing] distinctions are important in present practice.” U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. 3, at 1.4 (1987); see also U.S. SENTENCING COMM’N, SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 16-39 (1987) (explaining Commission’s empirical approach to the initial Guidelines).

303 See Jack B. Weinstein, Some Reflections on Seven Lean Years of Guidelines Sentencing, 8 FED. SENTENCING REP. 12, 12-13 (1995); Süth & Cabranes, supra note 6, at 1253; Freed, supra note 60, at 1728.

304 See Schulhofer & Nagel, Guideline Circumvention, supra note 153, at 1298-303 (discussing the difference between the “macro” sentencing perspective of the Commission and the “micro” sentencing perspective of sentencing judges).

305 See cases cited supra note 128; see also Miller & Wright, supra note 113, at 770 (noting the tendency of “federal circuit courts . . . to categorically reject district court reliance on a large number of factors because the Commission ‘must have’ or ‘certainly’ or ‘obviously’ or ‘surely’ or ‘of course’ considered the factor at issue’); Linder, supra note 128, at 1144-47 (lamenting the willingness of courts to find “Commission consideration of a circumstance . . . ‘adequate’ even where there is scant evidence to support that conclusion”).

306 Professors Marc Miller and Ronald Wright have argued that the Sentencing Commission’s general failure to explain or adequately account for any of its guidelines’ determinations gives courts reason to conclude that no factor has truly been “adequately” considered by the Commission. See Miller & Wright, supra note 113, at 800-02; see also Miller & Freed, supra note 128, at 236 (making a similar point). In a similar vein, Professor Albert Alschuler argued right after the Guidelines became law that the failure of the Sentencing Commission to give an account of its view of the “normal” cases covered by the Guidelines might permit a court to depart based on the Commission’s “general failure adequately to consider aggravating and mitigating cir-
quate” consideration of the endless variation of real-life family dynamics that influence and impact the lives and crimes of a range of federal offenders. Or, better yet, consider the underlying facts and conviction in Koon. The Rodney King case was a singular event not only in federal law, but in all of modern American history. How can it be sensibly said that the Sentencing Commission ever considered—let alone “adequately” considered—the innumerable unique aspects of this remarkable case?

The point here is not to suggest that the different institutional positions of the federal judiciary and the Sentencing Commission mean that a judge could conclude that every possible factor in every possible case was not “adequately” considered by the Commission and thus presents a ground for departure. Rather, my point is to suggest that the descriptive component of the SRA’s departure standard is neither intended, nor well-designed, to operate as the central limit or the primary focus of departure decisions. Instead, it is the prescriptive component of the SRA’s departure standard—the requirement that a court find an aggravating or mitigating circumstance “that should result in a sentence different from that described”307 in the Guidelines—that is intended and well-designed for this role. This requirement, which calls upon a sentencing court to assess why and how it believes particular factors in the case at hand normatively justify a sentence outside the Guidelines’ prescribed range, should be the focus of departure decision-making. Litigants and judges should not be spending their time and energies contemplating and debating whether particular factors in particular cases are outside heartlands or are atypical or extraordinary. They should instead be spending their time and energies debating whether particular factors in particular cases “should result” in a sentence outside the Guidelines because they serve the purposes of punishment set forth in the SRA. After all, as stressed in Part I, the list of sentencing purposes repeatedly referenced in the SRA appears in the Act’s instructions to judges concerning the “Factors To Be Considered in Imposing a Sentence.”308 Thus, to have departure decision-making focused on whether a particular factor “should result” in a sentence outside the Guidelines seems to fulfill the SRA requirement “that the judge consider what impact, if

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308 Id. § 3553(a).
any, each particular purpose should have on the sentence in each case."

Beyond its harmony with the language and spirit of the SRA, refocusing departure jurisprudence on the prescriptive component of the SRA's departure standard would have considerable benefits because such an approach would finally foster the development of principled sentencing law under the Guidelines. Judges would no longer be bogged down in abstract and banal debates over heartlands and extraordinariness; instead, the focus would be on whether factors in the case at hand might normatively justify a sentence above or below the sentencing range specified by the Guidelines. Put another way, departure cases would no longer involve only "descriptive deliberation," but they would involve serious "prescriptive deliberation" with courts contemplating and discussing from their case-specific perspective exactly why they think particular factors should result in a sentence outside the Guidelines. Such a refocused departure jurisprudence would ensure purposeful departure decisions in individual cases, and it would produce a purposeful departure jurisprudence across the range of cases. Departures might then finally be successful in fostering judicial contributions, through the development of a "common law of sentencing," to the principled evolution of the guidelines system.

In this context, it is critical to realize that, at some level, judges are probably already engaging in just the sort of normative analysis being urged here. As noted before, though the existing jurisprudence has developed and formal decisions have been rendered without significant consideration of sentencing purposes, underlying concerns and judgments about culpability, crime control, and the traditional purposes of punishment seem to be influencing departure rulings and outcomes. But such normative considerations remain unarticulated and undeveloped because they are currently buried under the cover of descriptive deliberation or entirely hidden through the process of guidelines circumvention. In the end, this proposal to refocus departure jurisprudence on the prescriptive component of the SRA's departure standard is perhaps ultimately nothing more than a suggestion to make overt and subject to discussion what has been covert and unstated for too long.

310 See supra text accompanying note 177.
C. Making it Happen

Fortunately, even though the Supreme Court’s Koon decision did not light the way toward an improved departure jurisprudence, it did not entirely foreclose the possibility that lower courts could find their own way. Indeed, the Supreme Court’s obvious efforts to give district courts more discretion to depart and its adoption of an abuse of discretion review standard, if carried forward the right way, might serve as an important first step on the path toward an improved departure mechanism. One can still hope that the lower courts will ultimately come to honor those parts of Koon that promote discretion and deference on the threshold decision to depart and then turn their focus and energies toward regulating the extent of departures, so as to guard against possible unwarranted disparities and thereby create a truly balanced departure authority. One can also hope that lower courts will recognize, notwithstanding Koon’s apparent holding that purpose considerations are not statutorily required, that the prescriptive component of the SRA’s departure standard still calls for serious and explicit normative analysis in departure decision-making so as to produce a truly purposeful departure authority.

Nurturing the hope that the lower courts might find their own way to an improved departure jurisprudence are those few court decisions—some before and some since Koon—that seem to appreciate (implicitly, if not explicitly) the importance of focusing on the extent of departures and of bringing purpose considerations into departure analysis.\(^{311}\) Such hope may be further fostered by Justice Souter’s separate opinion in Koon, in which he stressed the prescriptive component of the SRA’s departure standard and asserted that departures “must be consistent with rational normative order.”\(^{312}\) Though Justice

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Souter's opinion focuses on the threshold decision to depart and seems unduly willing to second-guess a district court's sentencing judgment, his opinion at least serves as a helpful example of the meaningful judicial contributions to sentencing that follow from bringing normative considerations into an analysis of grounds for departure.

In the end, probably only false hope supports the notion that the federal courts will themselves get departure jurisprudence back on track. The lower courts significantly contributed to the very jurisprudential problems at issue here, and it is only the rare case in which courts manage to break from the prevailing jurisprudence's focus on the threshold decision to depart and on the descriptive component of the SRA's departure standard. Moreover, as noted in Part III, most lower courts have relied on Koon to continue moving departure jurisprudence in the wrong direction.313

Thus, in the end, the best hope for an improved departure jurisprudence requires a return to where this story started—the Sentencing Commission. As detailed in Part II, the Commission is largely responsible for getting departure jurisprudence headed in the wrong direction by initially putting forward a narrow and restrictive conception of departure authority.314 Thus, the Commission has a unique responsibility, in addition to being uniquely positioned, to put departure authority back on the right track.

Fortunately, the timing and opportunity for bold and thoughtful Commission action on departures seems just right. For the last few years, the Sentencing Commission was a crippled agency because of a shortage of Commissioners.315 But late last year, the political stalemate ended that had kept Commissioner positions unfilled, and now there is a full slate of seven new Commissioners able, and hopefully ready and willing, to take the steps necessary to improve the federal sentencing system.316

313 See supra text accompanying note 288.
314 See supra text accompanying notes 89–109.
316 See News Release, Judge Murphy Named to Chair United States Sentencing Commission—Seven New Commissioners Confirmed (Nov. 12, 1999), reprinted in 12 FED. SENTENCING REP. 122 (1999); see also id. ("Many challenges lie ahead for us as commissioners, and I know that all of us are eager to roll up our sleeves and get started." (Statement of Sentencing Commissioner Chair Diana Murphy)).
A major step the Sentencing Commission now should take would be to codify in the Guidelines a revised approach to departures. Specifically, the Commission should rewrite those portions of the Guidelines Manual that address departure authority and urge courts to focus departure decision-making and review, not on the threshold decision to depart, but rather on the extent of departures. In the same vein, these provisions should also be rewritten to urge courts to focus departure decision-making and review, not on the descriptive component of the SRA's departure standard, but rather on its prescriptive component.

The Commission should clarify and stress that, although it has considered many sentencing factors in the abstract, it has not and could not give truly adequate consideration to a great many of the case-specific contextualized situations that district courts necessarily encounter when sentencing actual defendants in individual cases. Emphasizing the soundest component of the Koon decision, the Commission must reiterate that courts ascribing Guidelines sentences are not and should never be in the business of creating categorical limits on the consideration of sentencing factors. The Commission should explain that the courts' business is to contemplate and craft balanced and purposeful departures in individual cases and thereby produce a balanced and purposeful departure jurisprudence across the range of cases. This might just be achieved if the Commission can explain, and district and circuit courts take to heart, that departure decision-making should be concerned primarily with the extent of departures and focused on the purposes of punishment.

Conclusion

A misguided and harmful departure jurisprudence is certainly not the only problem with the Federal Sentencing Guidelines. There has now been well over a decade of constructive criticisms of the

317 To its credit, the Sentencing Commission has explained from the outset that it was essentially unable to create a "single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision," U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. 4(b), at 1.7 (1987), and also that the circumstances "that may warrant departure... cannot, by their very nature, be comprehensively listed and analyzed in advance," and thus controlling decisions as to precisely when a departure is warranted "can only be made by the court at the time of sentencing." Id. at ch. 5, pt. K, introductory cmt. 2, at 5.36. But this critical message has been lost on most courts—in part because of the many ways in which the Commission has also suggested it has adequately considered most factors. See supra text accompanying notes 98–104. Thus, this critical point must be made again, more clearly and more emphatically.
Guidelines that provide the new Sentencing Commissioners with plenty of reform agenda items.\textsuperscript{318} But the Commission, as well as the courts, must recognize that a troubled departure jurisprudence constitutes the most profound and most damaging problem within the guidelines system. Beyond serving as a critical linchpin in the effort to balance judicial sentencing discretion, departure authority should also serve as an engine propelling a guidelines system's progressive and principled evolution. But, under the Federal Sentencing Guidelines, this engine has been misfiring from the outset. The Commission or even the lower courts, perhaps aided by the Supreme Court's noble but unsuccessful efforts in \textit{Koon}, need to give departure authority a tune-up.

There is still reason to believe that a well-functioning departure authority—which is balanced by focusing on the extent of departures and purposeful by focusing on the fundamental goals of punishment—could help drive the Federal Sentencing Guidelines toward the ideal sentencing system envisioned by sentencing reformers. How nice it would be if one enduring legacy of the Rodney King case was that it provided a necessary jumpstart to departure authority and thereby helped restart federal law's movement toward a more effective, principled, and just sentencing system.