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UNITED STATES v. JOHNSON:* THE SECOND
CIRCUIT OVERCOMES THE SENTENCING
GUIDELINES' MYOPIC VIEW OF "NOT ORDINARILY
RELEVANT" FAMILY RESPONSIBILITIES OF THE
CRIMINAL OFFENDER

*Karen R. Smith***

INTRODUCTION

A federal judge faced with the weighty task of sentencing a criminal defendant must consider recommendations from diverse competing quarters. Prosecutors, defense counsel and probation officers dissect the offender's past transgressions; each of them lobbies for a sentence deemed "appropriate" in light of the crime. To that end, the judge conscientiously sorts out the circumstances of the particular crime and then attempts to sentence similarly situated offenders to similar amounts of punishment. Yet, while such uniformity is appealing, it masks a troubling issue. Should the judicial determination of what is an "appropriate" sentence ever take into account the extraordinarily punitive impact a custody sentence will have on the offender's family?

It might seem intuitive that a nonviolent, first-time offender, who is the sole financial and emotional support for her family, should be eligible at least for a minimal sentence or even probation. A federal judge, however, does not have unfettered discretion to fashion a sentence that responds humanely to the parent-offender's family circumstances. A federal judge must conform her sentencing practices to a series of recommended sentencing ranges promulgated by the Federal Sen-

* 964 F.2d 124 (2d Cir. 1992).

** Professor of Law, Southwestern University School of Law. I am indebted to my colleague Professor Myrna Raeder for her insightful comments. I also want to acknowledge United States Probation and Parole Officers Maria McBride, Tony Garoppolo, Christine Sutton and Nancy Reims for their generous assistance. A special thanks goes to my research clerk, Susan Bliziotis, for her creativity, legal analysis and commitment to this project.

tencing Commission ("Commission").¹ Moreover, while a federal judge freely can reject the sentencing recommendations of the prosecution, defense and probation department, that judge cannot reject with impunity the Commission's promulgations.

Since the era of Federal Sentencing Guidelines ("Guidelines") began in 1987,² federal district court judges have found themselves in the unenviable position of having their sentencing practices monitored by both cautious appellate courts and the formidable Commission. A paradox arises from the contradictory standards by which district court sentencing decisions are now evaluated: sentencing decisions should not deviate unnecessarily from the restrictions imposed by the Guidelines, yet sentencing decisions should explore uncharted areas involving unique sentencing issues. While the Commission has publicly welcomed the participation of district courts in developing and refining acceptable sentencing practices, this participation is hardly a partnership.³ A district court judge may feel encouraged to explore the outer boundaries of the new Guidelines' frontiers, yet simultaneously feel constrained by the Guidelines' choke collar. Not surprisingly, the "lead but follow" directive from the Commission to the federal judiciary has been confusing. While many district court judges pick their

¹ The United States Sentencing Commission is an independent agency in the judicial branch composed of seven voting and two non-voting *ex officio* members. At least three members must be federal judges and all members serve six-year terms.

² This era began in 1984 with the passage of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-86 (1988) and 28 U.S.C. §§ 991-98 (1988)).

³ The Commission has extended an invitation in the following manner: "Accordingly, the Commission refines and modifies the [G]uidelines in light of the district and appellate court consideration of the [G]uidelines research, congressional enactment of new statutes, and input from federal criminal justice practitioners." U.S. SENTENCING COMMISSION, 1992 ANNUAL REPORT 5 (1992).

The relationship between the district courts, appellate courts and the Commission has been described by Chief Justice Breyer of the First Circuit Court of Appeals as a partnership. *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993). Chief Judge Breyer, a former Sentencing Commissioner, envisions the partnership as one "in which each partner enjoys a different institutional strength." *Id.* at 950. Chief Judge Breyer's partnership model, however, is more aspirational than real. As this Article will demonstrate, the appellate courts, including the First Circuit, have often reversed district court departure findings despite the district courts' superior sentencing vantage point and experience in forming a "judgment as to when certain kinds of circumstances seem better handled by judicial discretion and how courts ought to exercise that discretion." *Id.*

way through the Guidelines' sentencing thicket with great caution, others who preside in urban areas have embraced the evolving area of downward departures from the applicable Guidelines range with fervor.⁴ Indeed, trail-blazing Guidelines interpretation by district courts has created a downward departure jurisprudence which courts of appeal and, more particularly, the Second Circuit has upheld whole-heartedly.⁵

⁴ Senior Judge Jack B. Weinstein of the United States District Court Eastern for the District of New York has been both critical of and creative with the Guidelines structure. See Jack B. Weinstein, *A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines*, 5 FED. SENTENCING REP. 6 (1992) [hereinafter Weinstein, *Trial Judge's Reflections*]; Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1 (1987) [hereinafter Weinstein, *First Impression*]. Judge Weinstein has authored numerous opinions which place him in the forefront of the evolving downward departure jurisprudence. See, e.g., *United States v. Ekwunoh*, 813 F. Supp. 168 (E.D.N.Y. 1993) (defendant's actual, not hypothetical, state of mind must be carefully determined at sentencing when applying drug quantity provisions under the Guidelines); *United States v. Gaviria*, 804 F. Supp. 476 (E.D.N.Y. 1992) (downward departure granted based upon culturally instilled subservience and physical abuse); *United States v. McGee*, 802 F. Supp. 843 (E.D.N.Y. 1992) (downward departure warranted because of defendant's responsibility for the welfare of child in her custody); *United States v. Cotto*, 793 F. Supp. 64 (E.D.N.Y. 1992) (downward departure based upon combination of defendant's near retardation, vulnerability and efforts at rehabilitation); *United States v. Pokuua*, 782 F. Supp. 747 (E.D.N.Y. 1992) (downward departure for potential permanent loss of custody of children); *United States v. Stoffberg*, 782 F. Supp. 17 (E.D.N.Y. 1992) (granting § 5K2.0 departure based upon substantial assistance to Congress and request for consideration by Chief Counsel of the Committee on Foreign Affairs of the House of Representatives); *United States v. Agu*, 763 F. Supp. 703 (E.D.N.Y. 1991) (downward departure based upon likelihood of deportation despite statutory right to citizenship for serving in United States armed forces); *United States v. Velasquez*, 762 F. Supp. 39 (E.D.N.Y. 1991) (downward departure based upon mitigating circumstance of metastasized cancer).

A sampling of other district courts' innovative downward departure theories that have developed in urban settings include: *United States v. Hon*, No. 89 CR 0052, 1989 WL 59613 (S.D.N.Y. May 31, 1989) (downward departure appropriate because Commission did not consider availability of extraordinary civil remedies available to companies who are "victimized" by counterfeit goods). In *United States v. Patillo*, 817 F. Supp. 839 (C.D. Cal. 1993), Judge J. Spencer Letts identified defendant's assistance to his Probation Officer during the Los Angeles riots as an event which "speaks to his tremendous character, and which deserves award in sentencing. [The defendant] provided substantial assistance to authorities during the riots, ensuring the personal safety of the Probation Officer. The Guidelines do not adequately consider this type of assistance by defendants." *Id.* at 846.

⁵ See *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992) (district court has power to depart downward where extreme increase in base offense-level occurred when the application of a cross reference provision in Guidelines raised imprisonment range from 12-18 months to 210-262 months), *petition for recert.*

Representative of this evolving jurisprudence is the 1992 Second Circuit case *United States v. Johnson*.⁶ In *Johnson*, the Court of Appeals for the Second Circuit seized upon a tiny foothold found in the language of policy statement U.S.S.G. section 5H1.6⁷ to scale a Guidelines barrier that tends to prevent judges from considering the consequences of sentencing upon a defendant's family. The court upheld the downward departure of ten levels, which the District Court for the Southern District of New York (Patterson, J.) had granted to the defendant, Cynthia Johnson, based upon her "extraordinary" family responsibilities.⁸ A close inspection of the *Johnson* opinion, however, reveals that the Second Circuit has not yet defined with exactitude the criteria by which a defendant may qualify for this elusive downward departure. Given the limited leeway for sentencing innovation granted to federal courts by the Commission, it may prove prudent for the Second Circuit to be bold in its departure decisions but *ambiguous* in its reasoning to justify those departures. The factual particulars that made Cynthia Johnson's parental situation seem "not ordinary" to the Second Circuit could have been rejected easily by other circuits or, worse, repudiated by the vigilant Commission through its Guidelines amendment process. As a result, accep-

filed, (U.S. June 23, 1993) (No. 92-9190); *United States v. Alba*, 933 F.2d 1117 (2d Cir. 1991) (district court has authority to depart downward where defendant was not aware of his involvement in a drug transaction until shortly before the incident and where incarceration in accordance with Guidelines might result in destruction of an otherwise strong family unit); *United States v. Sharpsteen*, 913 F.2d 59 (2d Cir. 1990) (remanded record for reconsideration because of ambiguous of sentence concerning defendant's family ties and responsibilities); *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990) (upheld downward departure based on finding that defendant's vulnerability to victimization in prison presented an extraordinary situation).

⁶ 964 F.2d 124 (2d Cir. 1992).

⁷ The United States Sentencing Commission *Guidelines Manual* [hereinafter U.S.S.G.] § 5H1.6 (Policy Statement), entitled *Family Ties and Responsibilities and Community Ties* states: "Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine."

⁸ The district court in *Johnson* decreased the offense level by two levels because the crime was more accurately classified as a theft than a bribery. The district court then subtracted one additional level because the proceeds of the crime were shared with a co-defendant. Finally, the district court deducted ten more levels because defendant Cynthia Johnson was "solely responsible for the upbringing of four young children." *Johnson*, 964 F.2d at 126.

tance or rejection of a downward departure may hinge more a court's rhetoric than upon the factual particulars presented to it. Thus, the true message of *United States v. Johnson* may have been hidden between the lines by the Second Circuit.⁹

Part I of this Article provides an overview of the interaction between the Commission and the federal judiciary. Part II then explores how the Second Circuit's approach to section 5H1.6 offender characteristics departures as expressed in *Johnson* compares with previous Second Circuit decisions and with those of other circuits. Finally, Part III examines the critical role played by the federal probation officer who gathers the background facts that ultimately may lead to a downward departure. As this Article will explore, the theoretical framework of the Guidelines departure mechanism fails in practice if the probation officer who prepares the presentence report cannot readily identify the criteria that form the basis for downward departures. Indeed, the absence of clear criteria in the area of family ties and responsibilities places the presentence writer in a quandary about how to differentiate between the offender family circumstances considered "extraordinary" by the Guidelines and those which are ordinary and, therefore, irrelevant. This Article concludes with an evaluation of a residual question raised by the cryptic approach taken in *Johnson*: if the Second Circuit is speaking in code in *United States v. Johnson* as this Article suggests, will all interested parties be able to decipher it?

⁹ The federal judiciary clearly is wary of the power of the Commission to eliminate judicially-created departures. The Commission views its relationship to the judiciary in the following way: "By monitoring when courts depart from the [G]uidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the commission, over time, will be able to refine the [G]uidelines to specify more precisely when departures should and should not be permitted." U.S.S.G. ch. 1, pt. A4(b).

This invitation is viewed with caution in some quarters but not in all. Judge Edward R. Becker of the Third Circuit observed, "In sum, there is abundant evidence that the Sentencing Commission is engaged in a dialogue with the courts and frequently responds when judges depart or articulate their concerns about their inability to depart. It is to be hoped that judges will continue to articulate their concerns forthrightly and often." Edward R. Becker, *Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime*, FED. PROBATION, Dec. 1991, at 10, 12.

I. FEDERAL SENTENCING GUIDELINES, THE UNITED STATES SENTENCING COMMISSION AND THE FEDERAL COURTS: AN UNEASY ALLIANCE

Prior to November 1987, district court judges enjoyed a relatively unrestricted power to grant probation and to impose custody sentences within the generous parameters of the maximum sentences affixed to statutes by Congress. While the sentencing discretion exercised by a district court could be reviewed by appellate courts, great latitude and deference were shown by appellate courts in upholding sentences imposed within statutory limits.¹⁰ Moreover, district court judges were not required to reveal the reasoning supporting their sentences and, in fact, risked reversal if a stated reason was later declared improper.¹¹ With the advent of the Comprehensive Crime Control Act of 1984¹² and the concomitant creation of

¹⁰ See *United States v. Grayson*, 438 U.S. 41, 49 (1978); *United States v. Tucker*, 404 U.S. 443, 446-47 (1972). Prior to enactment of the Guidelines, sentencing procedure had to comply with Rule 32 of the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 32. Often pre-Guidelines case law focused upon the due process aspects of notice to the defendant and the defendant's right to address the court at sentencing. "Even a defendant convicted of the most heinous crime ha[d] the right to address the court prior to sentencing and thus apologize for or explain his or her conduct." *Boardman v. Estelle*, 957 F.2d 1523, 1525 n.2 (9th Cir.) (quoting *In re Gustafson*, 650 F.2d 1017, 1027 (9th Cir. 1981)), *cert. denied*, 113 S. Ct. 297 (1992); see also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1975); *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

In *Mistretta v. United States*, 488 U.S. 361 (1989), Justice Blackmun, writing for the majority, summarized the pre-Guidelines discretion of federal sentencing judges.

Both indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society. It obviously required the judge and the parole officer to make their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation. . . . This led almost inevitably to the conclusion on the part of a reviewing court that the sentencing judge "sees more and senses more" than the appellate court; thus, the judge enjoyed the "superiority of his nether position," for that court's determination as to what sentence was appropriately met with virtually unconditional deference on appeal.

Id. at 363-64.

¹¹ See *U.S. v. Barker*, 771 F.2d 1362, 1368 (9th Cir. 1985) (national origin of defendant and the need to send a "message" held to be improper bases for sentences).

¹² Pub. L. No. 98-473, 98 Stat. 1976, (codified at 18 U.S.C. § 3353 (1985)).

the United States Sentencing Commission, district court judges found their sentencing discretion greatly restricted and ultimately scrutinized by the equivalent of a "federal sentencing review board" which reports to Congress. Since Congress and not the judicial branch exercises actual control over the Commission, the Commission is in effect a judicial watchdog agency that watches its nominal master.

The Commission was charged by Congress¹³ with the task of designing "guidelines" to provide "certainty and fairness" in meeting the sentencing purposes of deterrence, incapacitation, just punishment and rehabilitation.¹⁴ To this end, Congress warned, the Guidelines should avoid "unwarranted sentencing disparity" among offenders with "similar characteristics convicted of similar criminal conduct."¹⁵ The Commission was also instructed to permit sufficient judicial flexibility to account for relevant aggravating and mitigating factors.¹⁶ With

¹³ The constitutionality of the Sentencing Commission was upheld by the Supreme Court in *Mistretta*, 488 U.S. at 361. The Supreme Court held that Congress had not violated the separation of powers doctrine by placing the Commission in the judicial branch, where substantial decisions and judicial rulemaking have traditionally been carried out by judges. Additionally, "Congress's delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet Constitutional requirements." *Id.* at 374. An inference may be drawn from the holding in *Mistretta* that the Sentencing Commission is in effect, an autonomous judicial agency. District courts and courts of appeal seemingly have drawn that same conclusion following *Mistretta* and have adapted their sentencing practices to the Guidelines' structure with varying degrees of success. A recurring criticism is that the majority of courts of appeal do not challenge the applicability of the Guidelines to the sentencing decisions made by the lower courts. In *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, Daniel J. Freed chastised the acquiescence exhibited by the courts of appeal:

Many appeals court judges have adapted a strict enforcement approach, holding district courts accountable to unquestioned guidelines, but not holding the commission and its guidelines accountable to the [Sentencing Reform Act]. . . . Courts of appeals have acted more like super-sentencing commissions. They have assumed the role of protectors and elaborators of the guidelines, rather than the role of sentence reviewers, who, as 18 U.S.C. § 3742 suggests, defer to the knowledge and firsthand experience of the sentencing judge.

101 YALE L.J. 1681, 1747 (1992).

¹⁴ 28 U.S.C. § 991(b)(1)(B) (1988); U.S.S.G. ch. 1, pt. A2.

¹⁵ See 28 U.S.C. § 991(b)(1)(B).

¹⁶ Theoretically, meting out just punishment is also a goal of the Sentencing Reform Act. See 18 U.S.C. § 3553(a)(2)(A) (1988). As United States Sentencing Commissioner Ilene H. Nagel commented,

while every effort was made to treat like offenders alike, less attention

these objectives in mind, the Commission digested empirical data gleaned from reviewing pre-Guidelines sentencing practices, as reflected in 10,000 presentence investigations performed by the United States Parole Commission.¹⁷ The Commission, however, "did not simply copy estimates of pre-Guidelines practice as revealed by the data."¹⁸ In fact, the Commission intentionally modified the sentencing ranges to reflect the sentencing philosophy preached by Congress instead of that actually practiced by district courts.¹⁹ Thus, rather than simply codifying actual judicial sentencing practices into "the Guidelines," the Commission consciously set out to accomplish a degree of behavior modification regarding certain judicial sentencing practices. The sentencing guidelines forged from this process were submitted to Congress on April 13, 1987, and became effective on November 1, 1987.²⁰

The sentencing process as outlined by the Sentencing Reform Act of 1984 and formalized by the Commission's Guide-

was given in the first set of guidelines, partly because of time constraints, to the possibility of over or under-defining like offenders. That is, the emphasis was more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment.

Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 934 (1990). Federal judges, however, seemingly respond to those differences in offenders and look for Guideline avenues by which to individualize sentences to reflect these palpable differences.

¹⁷ U.S.S.G. ch. 1, pt. A3, p.s.

¹⁸ *Id.* ch. 1, pt. A, intro. comment.

¹⁹ Areas of modification included departing from the prevalent judicial practice of "punishing economic crime less severely than other apparently equivalent behavior." The Commission also increased penalties for drug cases. *Id.* ch. 1, pt. A3, p.s. As Daniel Freed noted:

in enacting the [Sentencing Reform Act], Congress clearly sought to increase to increase the level of imprisonment for certain crimes. It identified those crimes in [28 U.S.C. § 994], instructing the Commission, for example, to specify prison terms "at or near the maximum" for career offenders who commit crimes of violence or drug offenses, and to assure 'substantial' terms of imprisonment for other designated crimes. At the same time, however, Congress also sought to reduce unnecessary imprisonment in other kinds of cases. First offenders were one explicit illustration

See Freed, *supra* note 13, at 1706.

²⁰ The Commission modestly observed that these Guidelines are "a practical effort toward the achievement of a more honest, uniform, equitable proportional, and therefore effective sentencing system." U.S.S.G. ch. 1, pt. A3, p.s. The Federal Sentencing Guidelines apply only to offenses committed on or after November 1, 1987. *Id.* ch. 1, pt. A, intro. comment. 5 (historical note).

lines seeks to "rationalize the federal sentencing process."²¹ Such rationalization is achieved through reference to a sentencing matrix. The sentencing court is expected to identify appropriate sentencing ranges (expressed in increments of months) for any federal crime by referring to the *Guidelines Manual* and its related Policy Statements and Commentary.²² Although labelled "Guidelines," this reference table and accompanying Policy Statements and Commentary have been more mandatory than advisory in their application.²³ If a defendant's case history contains sentencing factors that are unusual, the sentencing court may impose a sentence at the lower end of the range or may "depart" from Guidelines altogether and impose a sentence outside the Guidelines range.²⁴ Such deviation, however, must be justified as Guidelines sentences, if appealed, might be reviewed by either prosecution or defense. Sentencing outside the applicable Guidelines range

²¹ *Id.* ch. 1, pt. A3, p.s. This rationalized sentencing process was forged through philosophical compromises. See Stephen J. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

²² 18 U.S.C. § 3553(b) (1988).

²³ It is often the thankless role of the circuit courts to remind the district courts of the new sentencing limitations created by the Guidelines. As the Seventh Circuit observed in vacating a sentence granting a downward departure apparently based upon the defendant's employment record and family circumstances,

[t]here would have been no problem with the district judge's exercise of his seasoned discretion were it not for the strictures imposed by the [G]uidelines, but we cannot ignore them anymore than may the district judge. But for the [G]uidelines, the sentence imposed by Judge Dillin may have been the most understanding and thoughtful way to possibly rehabilitate the defendant and without unnecessary harm to his family, but it cannot be affirmed on the record now before us.

United States v. Eiselt, 988 F.2d 677, 681 (7th Cir. 1993).

Congress itself has contributed to the impression that the Guidelines era has wrought harsh sentencing consequences. However, Congress passed laws creating mandatory minimum sentences for drug offenses which have been incorporated into the overall sentencing scheme by the Commission. As Judge William W. Schwarzer noted, "mandatory minimum sentencing statutes operate concurrently with the [G]uidelines and, indeed, formed the basis for the Commission's [G]uidelines for drug-related offenses. Thus, it is impossible to disentangle the effects of mandatory minimum statutes from those of the sentencing [G]uidelines." William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405, 405 (1992).

²⁴ "The Commission intends the sentencing courts to treat each [G]uideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." U.S.S.G. ch. 1, pt. A4(b).

will not be reviewed on appeal, however, if such deviation is agreed to by the prosecution and defense.²⁵

Given the weighty task of applying the appropriate guidelines to each defendant's situation, a sentencing court must rely upon the objective factual investigation performed by the United States Probation Office. Clearly, the sentencing court may not search out the operative Guidelines sentencing facts on its own, nor may it rely exclusively upon the biased advocacy of a prosecutor or defense attorney. The court relies upon the Probation Office to prepare an objective and complete presentence investigation report. Yet even the arguably objective presentence report may not fully reflect information crucial to a Guidelines sentencing decision.²⁶ Roadblocks may be placed

²⁵ While an agreement can be struck between prosecution and defense "off the record," it is more likely that such an agreement will be formalized. Specifically, motions by the government pursuant to § 5K1.1 and 18 U.S.C. § 3553(e) allow the court to depart downward based upon a defendant's substantial assistance in the investigation or prosecution of another. In 1992, the Commission tabulated reasons given for downward departures by sentencing courts and found that 71.6% of them were awarded for "substantial assistance." 1992 ANNUAL REPORT, *supra* note 3, at 125.

The downward departure for substantial assistance can create a frustrating and troubling sentencing disparity in drug conspiracy cases. Often the lowly "mule" defendant who has gained the least from the drug activity also knows the least and cannot provide substantial assistance to the government. As a result, higher-ranking drug lieutenants or chiefs may receive lower Guidelines sentences than the arguably less culpable mules because of downward departures granted under § 5K1.1.

Thus if all participants—judge, prosecutor and defense counsel—ignore the prescribed Guidelines range and bestow a charitable sentence upon a sympathetic defendant, such benevolent collusion can produce well-meaning yet disparate sentencing patterns in spite of the Guidelines. This perception of disparity arises because the offense conduct and offender characteristics of different defendants appear so similar that a difference in sentencing result cannot be explained within the Guidelines structure. See, e.g., *United States v. Velasquez*, 762 F. Supp. 39 (E.D.N.Y. 1991) (Government agreed not to contest a court ruling that defendant's cancer was a "mitigating circumstance" where a defendant conspired to possess with intent to distribute in excess of 500 grams of cocaine and faced 151 to 188 months in prison. The defendant was sentenced to five years' imprisonment).

²⁶ The difficulty in getting the actual case facts has been noted by commentators. As Senior Eighth Circuit Judge Heaney stated, "The prosecutor controls the flow of information about the offense to the probation office, which prepares the presentence investigation report and recommends the sentencing range. I cannot over-emphasize this point: probation officers simply do not have the resources to independently investigate the cases assigned to them. Consequently, the prosecutor controls the sentencing information that the probation office compiles in the presentence investigation report." Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 776-77 (1992).

by the joint efforts of prosecutors and defense counsel who contrive to sanitize stipulated facts about a defendant's criminal conduct in order to minimize the Guidelines' impact.²⁷ Similarly, roadblocks may be placed by the Guidelines' investigative structure because of its lack of emphasis on ferreting out bases for downward departures. Without question, the presentence investigation and the facts determined through that process have a far-reaching impact upon the Guidelines' ultimate objective of eliminating unwarranted sentencing disparity.²⁸

Sentencing practices that do occur within the radar range of the Commission are reviewed and tabulated.²⁹ The Commission modifies the Guidelines based upon its evaluation of the sentencing results. As the Commission has observed, "by monitoring when courts depart from the [G]uidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the [G]uidelines to specify more precisely when departures should and should not be permitted."³⁰ The Commission's Guidelines amendment power³¹ is a swift mech-

²⁷ The issue of how to blunt the impact of the "relevant conduct" guideline provision often motivates defense counsel to engage in active plea negotiation. Guidelines § 1B1.3 permits sentencing courts to consider a defendant's uncharged misconduct even though the misconduct is not part of either the factual basis to a Rule 11 guilty plea or presented to a jury. Daniel J. Freed observed that the issue of relevant conduct

exacerbate[s] discrimination between well-represented defendants, for whom a careful bargain fixes the parameters for a predictable sentence, and less fortunate defendants who inadequately represented, enter an untutored plea unaware of the relevant conduct consequences that may follow.

Ironically, the relevant conduct guidelines *reduces* visibility and candor in sentencing. It signifies that facts presented to the judge or jury do *not* place guidelines boundaries on the sentence, and that the rules governing how far relevant conduct may be stretched are in fact leading sophisticated practitioners to bargain over how much unadjudicated information will be *withheld* from the court.

Freed, *supra* note 13, at 1714-15.

²⁸ See *infra* Section III.

²⁹ The Commission has published Annual Reports for the years 1989-1992 in addition to other special reports. The Report implements the congressional directive periodically to "review and revise, in consideration of comments and data coming to its attention, the [G]uidelines promulgated pursuant to the provisions of this section." 28 USC § 994(o) (1988).

³⁰ U.S.S.G. ch. 1, pt. A.

³¹ The Commission sends its proposed amendments to Congress annually on or

anism, used to refine and reshape Guidelines sentencing practices.³² An edifying example of how the Commission routes out Guidelines heresy is the history of Policy Statement section 5H1.12, an amendment made effective November 1, 1992. Section 5H1.12 states that "lack of guidance as a youth and similar circumstance indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable [G]uidelines range."³³

after the beginning of a regular session of Congress, but not later than the first day of May. 28 U.S.C. § 994(o). Such Guidelines amendments become effective automatically after the expiration of a 180-day Congressional review period or at a later date set by the Commission, unless Congress provides otherwise by law. 28 U.S.C. § 994. In 1992, 36 amendments proposed by the Commission became effective November 1, 1992. On April 29, 1993, the Commission submitted twenty-two amendments to Congress. Amendments to the Sentencing Guidelines, 58 Fed. Reg. 27, 148 (1993).

³² In fact, in *Braxton v. United States*, 111 S. Ct. 1854 (1991), the Supreme Court avoided intervening in inter-circuit conflicts over the meaning of a proviso within § 1B1.2(a) of the *Guidelines Manual* "because the [Sentencing] Commission had already undertaken [an amendment] proceeding [to] eliminate circuit conflict over the meaning of § 1B1.2(a)." *Id.* at 1858. The Supreme Court clarified that it is the Commission's role to eliminate conflicts among the circuits with respect to the interpretation of the Guidelines. *Id.* at 1857-58.

³³ U.S.S.G. § 5H1.12, p.s. Undeniably § 5H1.12 was promulgated in May 1992 to eliminate the recent Ninth Circuit Guidelines precedent established in *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991). In *Floyd*, the district court based its novel departure theory on the fact that most of the defendant's prior offenses, which placed him in a high criminal history Guidelines range, were attributable to his youth. This basis for departure was upheld by the sympathetic Ninth Circuit panel, which then fashioned a "youthful lack of guidance" basis for departure—a basis that had not been reflected in the Guidelines. The youthful lack of guidance approach of the *Floyd* decision has been criticized. Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guideline*, 66 U.S.C. L. REV. 621, 655 (1992); see also *United States v. Haynes*, 985 F.2d 65-69 (2d Cir. 1993) ("While we express—as did the district court—sympathy for their families, we are unable to protect youthful lack of guidance generally as a reason for downward departure, particularly, in the instant case where its elements were not present."). The Commission, however, eradicated this deviant departure theory within one year of its formulation. The Commission offered a terse explanation for the abolition of this basis for downward departure. "Reason for Amendment: This amendment provides that the factors specified are not appropriate grounds for departure." Amendments to the Sentencing Guidelines, 57 Fed. Reg. 20,160 (1992).

Consider Guidelines § 5H1.11, in which the Commission undercut the downward departure granted by the Sixth Circuit in *United States v. Turner*, 915 F.2d 1574 (6th Cir. 1990). Section 5H1.11 states that "[m]ilitary, civic, charitable, or public service; employment-related contributions, and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. § 5H1.11, p.s. (effective Nov. 1, 1991). The Commission gave the following reason for the Amendment of § 5H1.11:

The Supreme Court has manifested resistance to the task of refereeing Guidelines-interpretation disputes, thereby leaving district and circuit courts with no forum in which to challenge the wisdom of the Commission's Guideline amendments.³⁴ The Supreme Court recently underscored the

[t]his amendment expresses the Commission's intent that the factors set forth a §§ 5H1.1-5H1.6 are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, but that unless expressly stated, these policy statements do not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range. The language within these sections is revised for clarity and consistency.

Amendment to the Sentencing Guidelines, 56 Fed. Reg. 22,779 (1991).

In this same passage, the Commission included indirect comment on another novel basis for departure developed in the Second Circuit: "[This amendment] sets forth the Commission's position that physical appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." *Id.* at 22,780. It is noteworthy that in *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), Judge Cardamone, writing for the majority, concluded that a downward departure was warranted because

it is plain that the Commission did not consider vulnerability to the extent revealed in this record—where the only means for prison officials to protect [the defendant] was to place him in solitary confinement. Hence the peculiar vulnerability found by the district court was a circumstance not taken into account by the Commission.

Id. at 602. Judge Cardamone also stated that "to the extent the § 5H1 factors of physical, mental and emotional condition were relied upon, such reliance was justified by the extraordinary situation faced by [the defendant]." *Id.* at 603.

The *Lara* court baited the Commission in somewhat flamboyant Second Circuit fashion by observing: "[t]he [Guidelines] legislative history reflects that it was not Congress' aim to straitjacket a sentencing court, compelling it to impose sentences like a robot inside a Guidelines glass bubble, and preventing it from exercising discretion, flexibility or independent judgment." *Id.* at 604.

³⁴ While acknowledging that a principal purpose for granting *certiorari* is to resolve inter-circuit conflicts over the meaning of federal law, the Supreme Court in *Braxton v. United States* noted that the Court is not the "sole body that could eliminate such conflicts. Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations." *Braxton v. United States*, 111 S. Ct. 1854, 1857 (1991). In *Braxton*, the Supreme Court paid great deference to the Commission's congressionally granted authority to "decide whether and to what extent its amendments reducing sentences will be given retroactive effect." *Id.* at 1858. Thus, the impression left by this language is that the Supreme Court will not rush in to rectify Guidelines issues without allowing the Commission considerable time to sort out and settle Guidelines controversies.

Such "judicial restraint" leaves certain Supreme Court justices frustrated. In dissenting to the denial of a petition for writ of *certiorari* in *Kinder v. United States*, 112 S. Ct. 2290 (1992), Justice White expressed his impatience with the Court's refusal to address the Fifth Amendment implications of denial of acceptance of responsibility under U.S.S.G. § 3E1.1 as it relates to uncharged conduct.

Commission's supremacy in its power struggle with the federal judiciary in *Stinson v. United States*.³⁵ In *Stinson*, the Court clarified the weight and binding authority of the Policy Statements and Guidelines Commentaries promulgated by the Commission. The Court used *Stinson* as an opportunity to address the Commission-judiciary detente by focusing on the narrow issue of whether the Commentary accompanying the Guidelines had a binding effect upon a court's sentencing decision. Speaking on behalf of the unanimous *Stinson* Court, Justice Kennedy clearly marked off the boundaries of the Commission's authority: "We decide that commentary in the *Guidelines Manual* that interprets or explains a Guideline is authoritative unless it violates the Constitution or a Federal statute, or is inconsistent with, or a plainly erroneous reading of that Guideline."³⁶ Adding a pinch of salt to an open wound, the Court argued that

Amendments to this Guideline have not amended the split between the circuits. In any event, this is not a question of the mere application or simple interpretation of this Guideline, but is instead a recurring issue of constitutional dimension, where the varying conclusions of the Courts of Appeals determines the length of sentence actually imposed. I would also grant certiorari on this issue.

Id. at 2293 (citation omitted).

Interestingly, on May 11, 1992, the Commission proposed an amendment to § 3E1.1 which allowed for one additional level reduction for acceptance of responsibility when defendant has provided assistance to the government in investigating her/his own misconduct. The amendment proposed replacing "offense and related conduct," which has been found to cause confusion, with the term "offense," and provides guidance as to the meaning of this term in the context of the guideline. It therefore appears that the Commission has addressed in some way the conflict over acceptance of responsibility for uncharged conduct.

By the same token, the Supreme Court has not completely withdrawn from Guidelines clarifications as it granted *certiorari* and decided two cases with Guidelines implications during the 1992-1993 term. In *United States v. Dunnigan*, 113 S. Ct. 1111 (1993), a unanimous Court held that § 3C1.1, permitting a sentencing enhancement for a defendant's perjury at trial, was constitutional because such an enhancement "is consistent with our precedents and is not in contravention of the privilege of an accused to testify in her own behalf." *Id.* at 1119. Similarly, in *Smith v. United States*, 113 S. Ct. 2050 (1993), the Supreme Court decided the meaning of the phrase "use of a firearm during and in relation to a drug trafficking crime" pursuant to 18 U.S.C. § 924 (c)(1). "In fact, if we entertain for the moment the dubious assumption that the Sentencing Guidelines are relevant in the present context, they support [the majority's position]." *Id.* at 2055.

³⁵ 113 S. Ct. 1913 (1993).

³⁶ *Id.* at 1914. The Supreme Court had previously ruled that Policy Statements are binding. See *Williams v. United States*, 112 S. Ct. 1112, 1119 (1992).

the commentary be treated as an agency's interpretation of its own legislative rule. . . . The functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of [the equivalent of legislative] rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce.³⁷

The result in *Stinson* clashes with the position taken by the Second Circuit, which has championed diminution of the reliance on Guidelines, Policy Statements and Commentary in sentencing. As recently as February 1993, the Second Circuit in *United States v. Merritt*³⁸ dismissed the Commission policy statements as merely "hortatory or explanatory, rather than imperative. Policy Statements are not subject to formal legislative review and are not promulgated in compliance with the provisions of the Administrative Procedure Act, and, accordingly, they do not have the same degree of lawful authority as a guideline."³⁹ Yet the position ultimately taken by the *Stinson* Court in May 1993 regarding the significance of Guidelines Commentary leaves little doubt that Guidelines Policy Statements can no longer be dismissed as readily as the Second Circuit had urged.

Therefore, after *Stinson*, the federal judiciary finds itself bound by Guidelines Policy Statements and Commentary which it does not generate and cannot appeal. While some commentators agitate for a more discriminating scrutiny of the applicability of the Guidelines,⁴⁰ others exhort mastery of the Guidelines' "unguided" departure mechanism.⁴¹ The Second Circuit decision in *United States v. Johnson*⁴² is an example of the latter approach which, as the next section of this Article

³⁷ *Stinson*, 113 S. Ct. at 1919.

³⁸ 988 F.2d 1298 (2d Cir. 1993).

³⁹ *Id.* at 1308.

⁴⁰ See Freed, *supra* note 13, at 1746 ("[T]he themes of Commission accountability, sentencer flexibility, and a statutory duty to depart offer abundant opportunities for district courts to take affirmative action to sentence justly and depart from flawed guidance."); see also Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992).

⁴¹ Gerald Bard Tjoflat, *The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel*, FED. PROBATION, Dec. 1991, at 4; see Becker, *supra* note 9, at 10.

⁴² 964 F.2d 124 (2d Cir. 1992).

suggests, has not been replicated throughout the other circuits.

II. *UNITED STATES V. JOHNSON*: A WAYSTATION ON THE SECOND CIRCUIT'S EXCELLENT ADVENTURE IN DOWNWARD DEPARTURES BASED UPON "NOT ORDINARILY RELEVANT" OFFENDER CHARACTERISTICS

A. *The Guidelines and Downward Departures*

While the Commission formulated "simple," workable guidelines covering all federal crimes,⁴³ it also recognized that the individuals who commit these crimes do so in markedly different ways. More importantly, a sentencing judge has direct contact with a human being, as opposed to a mere sentencing statistic.⁴⁴ Consequently, the Commission itself noted that "it is difficult to prescribe a single set of guidelines that encompass the vast range of human conduct potentially relevant to a sentencing decision."⁴⁵ Therefore, the Commission included departure mechanisms within the operation of its Guidelines to accommodate varying sentencing factors. These departures are characterized as either "guided" or "unguided," depending upon whether the Commission anticipated the factual variables and commented on them in the Guidelines. These variables can increase or decrease punishment for the basic offense. Thus, guided departures consist of factual variables surrounding the commission of the crime that are spelled out in the Guidelines (e.g., an upward departure is possible for bank robbery involving a high speed chase or a loaded weapon).⁴⁶ "Unguided departures" may be premised upon either any factual variables

⁴³ The Guidelines are "simple" only in the sense that the sentencing matrix involves *only* 43 offense levels and 6 criminal history categories. The Commission deliberately sought "workability" as a Guidelines goal, because a "sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect." U.S.S.G., ch. 1, pt. A3.

⁴⁴ As Judge Jack B. Weinstein observed, "[M]ost find it extremely difficult to look into the eye of another human being and punish him or her severely, particularly when the family is standing by, about to suffer more than the defendant." Weinstein, *First Impression*, *supra* note 4, at 10.

⁴⁵ U.S.S.G. ch. 1, pt. A4(b).

⁴⁶ For example, the Commentary to § 2G1.1 (*Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct*) recommends a downward departure of eight levels where the criminal conduct did not involve a commercial purpose. *Id.*

not expressly defined in the Guidelines or any departure grounds mentioned but not considered adequately by the Commission.⁴⁷ Sentencing courts, in searching out relevant sentencing facts that qualify as a basis for departing from the applicable Guidelines range, need only avoid sentencing factors that the Commission has removed from consideration such as race, sex, national origin, creed, religion and socio-economic status.⁴⁸

Downward departure jurisprudence is the collective body of sentencing decisions under the Guidelines in which downward departures have been granted. In 1992 there were 141 downward departures granted for family ties and responsibilities, constituting 1.8% of the 7653 reported downward departures.⁴⁹ The greatest number of downward departures, 5478 (71.6%), were granted for a defendant's substantial assistance in the prosecution of others, while 607 downward departures (7.9%) resulted from plea agreements. This disproportionately high percentage of downward departures based upon a defendant's willingness to cooperate with government agencies has been constant throughout the Guidelines era⁵⁰ and lends support to criticism that acute sentence disparity remains despite the Guidelines sentencing process.⁵¹ The Commission

⁴⁷ U.S.S.G. § 5K2, p.s.

⁴⁸ *Id.* § 5H1.10, p.s.

⁴⁹ This number reflects an increase over the 110 downward departures (representing 2% of all departures) granted in 1991. In 1990 there were 38 cases (3.8%) of downward departures. See 1992 ANNUAL REPORT, *supra* note 3, at 125 (Table 49); U.S. SENTENCING COMMISSION, 1991 ANNUAL REPORT 137 (Table 53); U.S. SENTENCING COMMISSION, 1990 ANNUAL REPORT 72 (Table R).

⁵⁰ See 1992 ANNUAL REPORT, *supra* note 3, at 125 (Table 49); 1991 ANNUAL REPORT, *supra* note 52, at 137 (Table 53); 1990 ANNUAL REPORT, *supra* note 52, at 72 (Table R).

⁵¹ In summarizing their research findings concerning the impact of plea bargaining and substantial assistance motions by government prosecutors in three different cities, Professors Nagel and Schulhofer observed:

The principal problem with guideline circumvention is that circumvention, unlike overt downward departure, is hidden and unsystematic. It occurs in a context that forecloses oversight and obscures accountability . . . Substantively, the kind of circumvention we have studied and identified is simply a covert vehicle for downward departure. As with other departures, the resulting sentence may be appropriate or inappropriate, justified or unjustified.

Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 557 (1992).

Table for 1992 also shows that 266 (3.5%) of downward departures granted by district courts were for "general mitigating circumstances," and that 343 cases (4.5%) of downward departures were for undisclosed "other" reasons.⁵² Although district courts have used the departure mechanisms to varying degrees, the Second Circuit has embraced the unguided downward departure with considerable enthusiasm. It consistently has granted downward departures from applicable Guidelines ranges for reasons other than substantial assistance to the government. When the downward departure practices of all the circuits are compared, the Second Circuit ranks second only to the Ninth Circuit in granting downward departure motions for non-substantial assistance reasons.⁵³ While the Second and Ninth Circuits are in the forefront of exploring the Guidelines departure frontier, these circuits do not share the same departure philosophies.⁵⁴ A primary area of divergence between the downward departure jurisprudence of the Ninth and Second Circuits is highlighted by the Second Circuit's decision in *Johnson*.⁵⁵ The following discussion explores the *Johnson*

The danger of circumvention through the "covert" substantial assistance departure is that it can be arbitrary and based upon personality quirks. The "value" of one's assistance is measured exclusively by the prosecutor from whom the defendant seeks the requisite § 5K1.1 motion. Moreover, a defendant must "perform" in order to have his or her assistance weighed and measured by the prosecutor. A less than enthusiastic appraisal of the cooperating defendant's efforts can result in no § 5K1.1 motion from the government despite the defendant's performance of his or her end of the bargain.

⁵² The Commission places the caveat on the number tabulation that the cases reflected in the table are those for which reports on the sentencing hearing were available. Each year there are a number of cases (e.g., 62 in 1992), for which the sentencing court fails to state reasons for the departure.

⁵³ 1992 ANNUAL REPORT, *supra* note 3, 127-29 (Table 50). The Ninth Circuit granted 755 (12.2%) of its downward departures for reasons other than substantial assistance in 1992 whereas the Second Circuit granted 263 (8.9%) of its downward departures for bases other than substantial assistance. *Id.*

⁵⁴ The Ninth Circuit has developed a downward departure jurisprudence keenly receptive to a defendant's demonstration of unusual personal characteristics, especially when a defendant has been victimized. Thus the Ninth Circuit has upheld departures for aberrant criminal behavior based upon a defendant's entire life, *United States v. Fairless*, 975 F.2d 664 (9th Cir. 1992); *United States v. Takai*, 930 F.2d 1427, 1434 (9th Cir.), *superseded by*, 941 F.2d 738 (9th Cir. 1991), extraordinary childhood abuse, *United States v. Roe*, 976 F.2d 1216 (9th Cir. 1992), or a unique combination of factors, *United States v. Cook*, 938 F.2d 149 (9th Cir. 1991).

⁵⁵ 933 F.2d 1117 (2d Cir. 1991).

opinion, its consistency with Second Circuit precedent such as *United States v. Alba*⁵⁶ and *United States v. Sharpsteen*⁵⁷ and how the *Johnson* approach is antithetical to that taken by the Ninth Circuit in similar factual settings.⁵⁸

B. *United States v. Johnson*

In December 1990, the government charged Cynthia Johnson along with her co-worker, Cheryl Purvis, with one count of conspiracy, nine counts of bribery and fourteen counts of theft of public monies.⁵⁹ These charges arose out of Johnson's and Purvis's activities as payroll clerks at the Department of Veterans Affairs Hospital in New York.⁶⁰ Johnson and Purvis devised a scheme to inflate paychecks and take "kickbacks" from other hospital workers who benefitted from the inflated paychecks.⁶¹ Ms. Purvis, who masterminded the scheme, mentioned her successful plan and ultimately solicited Ms. Johnson's and another clerk's participation in it.⁶² Within a short period of time, Johnson and Purvis had recruited other workers and demanded a percentage of the inflated payroll checks.⁶³ This scheme lasted fifteen months, during which 100 unauthorized pay adjustments were made, resulting in more than \$154,000 in illegal over-payments.⁶⁴

⁵⁶ 964 F.2d 124 (2d Cir. 1992).

⁵⁷ 913 F.2d 59 (2d Cir. 1990).

⁵⁸ The Ninth Circuit has been remarkably conservative in interpreting § 5H1.6 in light of its more creative approach to downward departures in general. In *United States v. Berlier*, 948 F.2d 1093, 1096 (9th Cir. 1991), the court seemed satisfied that "[t]he Commission considered family ties, was aware that those ties could be affected by prison sentences, and declared that family ties ordinarily should not be a factor in departing from Guideline Sentences." The Ninth Circuit's chilly response to this downward departure theory makes it ill-advised to pursue it in that circuit, especially when other downward departure theories are more warmly received. See cases cited *supra* notes 55, 56 & 57.

⁵⁹ *United States v. Purvis*, 762 F. Supp. 535, 536 (S.D.N.Y. 1991).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *United States v. Johnson*, 964 F.2d 124, 126 (2d Cir. 1992).

⁶³ *Purvis*, 762 F. Supp. at 537.

⁶⁴ Brief for Appellant U.S. at 3-6 (Statement of Facts), *Johnson*, 964 F.2d at 124 (Nos. 91-1515(L), 1541) [hereinafter Appellant's Brief]. It should be noted that appellee Johnson contradicts the loss attributable to this scheme, setting the figure at \$89,222. Brief for Appellee at 3, *Johnson*, 964 F.2d at 124 (No. 91-1515(L), 1541) [hereinafter Appellee's Brief]. The Second Circuit adopted the appellee's figure. See *Johnson*, 964 F.2d at 126.

The government engaged in pretrial negotiations with thirteen of the employees who had participated and benefitted from the scheme.⁶⁵ Before the indictment was filed against Johnson in December 1990, the government filed a criminal complaint against Purvis and Johnson charging them with theft pursuant to 18 U.S.C. section 641.⁶⁶ Cynthia Johnson, who was pregnant at that time with her sixth child, offered to testify against co-defendant Purvis.⁶⁷ The government rebuffed her offer, refusing to extend the section 5K1.1 requisite substantial assistance downward departure motion to her under any circumstances.⁶⁸ The December 1990 indictment that was subsequently filed contained a new count of bribery.⁶⁹ Neither Cynthia Johnson nor Cheryl Purvis testified at the trial; following a nine day jury trial, both were convicted of all

⁶⁵ Appellee's Brief at 6. In the brief filed with the Second Circuit in *Johnson*, Appellee detailed the preferential charging treatment afforded to other payroll clerks and recipients of the stolen funds. Appellee cited two payroll clerks who arguably were just like Purvis and Johnson, but were "granted deferred prosecution by the U.S. Attorney's Office, even though they shared in the stolen money, [and] they could have stopped the scheme at the very start." *Id.* at 3. The United States Attorney's office granted deferred prosecution to three others and referred another co-venturer case to state authorities who declined prosecution. Misdemeanor pleas were offered to five other employees who received from \$5813 to \$16,194 in the scheme. Each one ultimately received a sentence of probation. Two others were prosecuted by way of felony information which, Appellee's counsel asserted, did not contain the dollar amounts actually stolen by these co-conspirators. Both received probation sentences. Appellee's counsel also noted that the government did make § 5K1.1 motions on behalf of the seven co-workers who had agreed to testify for the government. *Id.*

⁶⁶ *Johnson*, 964 F.2d at 126 (referring to the district court opinion).

⁶⁷ *Id.*

⁶⁸ Appellant, the government, took great exception to the contention that it had "improperly rejected" Johnson's offer to cooperate and withheld a § 5K1.1 motion. The prosecutor defended its position arguing that the district court had found that "the culpability of Johnson and Purvis vastly exceeded that of the other Hospital workers." Reply Brief for Appellant at 3, *Johnson* (Nos. 91-1515(L), 1541). Citing the great difference between Johnson's and Purvis's culpability and that of the other hospital workers, the Government extended deferred prosecution agreements to those who received less than a certain monetary amount. The prosecutor also observed that even the other seven hospital workers who were prosecuted faced lower sentencing even before their co-operation was taken into account. *Id.*

The government unequivocally denied that it had arbitrarily refused Johnson's cooperation, advancing as its justification her lack of candor because she claimed "to be ignorant of the conspiracy until the spring of 1990," some three months later than the government believed she in fact knew of it. *Id.*

⁶⁹ *Id.* at 5.

counts presented to the jury.⁷⁰ Cynthia Johnson appeared for sentencing before Judge Robert P. Patterson on August 19, 1991, following the preparation of a presentence investigative report ("PSR") by the Probation Department. The PSR determined that Johnson's criminal conduct and history implicated an offense level of 23 and criminal history category 1, a Guidelines range of forty-six to fifty-seven months.⁷¹ The PSR, however, did not recommend any departure from the forty-six to fifty-seven month Guidelines range applicable to level 23.⁷²

Judge Patterson, over defense objection, adopted the calculation in the PSR and arrived at a base offense level of 23.⁷³ The district court then utilized the Guidelines' downward departure mechanism and arrived at a 13-level reduction in the offense level.⁷⁴ Over government objection, Judge Patterson found that Johnson's crime "more closely resembled theft than bribery" and, thus, subtracted two levels.⁷⁵ The court deducted one more level because the proceeds of the crime were shared with Purvis. The court then departed 10 levels because Cynthia Johnson's family circumstances were "not ordinary."⁷⁶ Judge Patterson made the following findings in support of his departure decision:

The defendant is a single mother . . . Her [institutionalized] daughter, age 21 is . . . the mother of a six-year old child who currently resides with the defendant. Also residing with the defendant in Florida is her son, Lamont, and two children aged six and five, as well as her youngest child, who is five months old. The father of this child is unemployed and resides in Queens, New York . . . There are no signs of use [of] drugs or alcohol, and she [Johnson] apparently has no mental or emotional health problems."⁷⁷

The court sentenced Cynthia Johnson to six months of home

⁷⁰ *Id.* at 1-7.

⁷¹ PSI ¶ 44, PSI Addendum at 1.

⁷² Appellant's Brief at 7-8. The government noted in its brief that the base level of 10, the PSI added 2 levels for more than one bribe and 5 levels for receiving bribes totalling over \$40,000. Four additional levels were added for Johnson's role as a leader and organizer. In an addendum to the PSI, the Probation Office also added a two-point adjustment because Johnson had instructed hospital employees not to cooperate.

⁷³ *Johnson*, 964 F.2d at 126 (referring to the district court opinion).

⁷⁴ *Id.* at 125.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

detention followed by three years of supervised release, and ordered her to pay restitution of \$27,973.⁷⁸

The district court again noted Cynthia Johnson's family circumstances at the sentencing of co-defendant Purvis on August 27, 1991. Although the PSR also had recommended a forty-six to fifty-seven month Guidelines range, the district court did not impose the 2 point obstruction or impeding the administration of justice adjustment as he had in Johnson's case, but instead departed 3 offense levels and sentenced Purvis to twenty-seven months in custody, followed by two years supervised release and restitution.⁷⁹ Judge Patterson commented at Purvis' sentencing about the obviously different treatment co-defendant Johnson had received. "I did feel that those children being without a mother for an extended period of time was a hardship on them, not on her, hardship on them, and that was extraordinary grounds for departure."⁸⁰ Thus the inescapable conclusion is that the primary difference between the sentences received by Purvis and Johnson was Johnson's family circumstances. The difference in punishment also begs the question of whether the sentencing court created an unwarranted sentencing disparity by misapplying a downward departure mechanism. In short, did Cheryl Purvis receive the brunt of the punishment for a crime that she and Cynthia Johnson had committed together simply because Purvis alone lacked family ties significant enough to spare her from prison?⁸¹

The government appealed the 13-level downward departure in *Johnson* and the Second Circuit rose to the Guidelines challenge.⁸² Setting the tone for the reasoning that would fol-

⁷⁸ *Id.*

⁷⁹ Appellant's Brief at 10-11; U.S.S.G. § 3C1.1.

⁸⁰ *Johnson*, 964 F.2d at 130.

⁸¹ The co-defendant's situation in *Johnson* presents a most troubling departure issue, as it involves similarly situated defendants. If Johnson is viewed alone, the departure might seem reasonable in light of her family responsibilities. If Johnson is viewed next to Purvis, the grant of a downward departure to Johnson seems to be a sentencing windfall.

Ilene H. Nagel expressed concern about the danger of excessive judicial departures: "[t]he relevance of this to the disparity issue is that to the extent that the departure provision is abused, disparity . . . may reappear; in this manifestation, both uniformity and proportionality would be compromised." Nagel, *supra* note 16, at 939.

⁸² 964 F.2d at 128.

low, Chief Judge Oakes, writing for Judges Cardamone and Pierce, began the opinion in a provocative way:

The United States Sentencing Guidelines do not require a judge to leave compassion and common sense at the door to the courtroom. The government asks us, on this appeal, to reverse a sentencing judge's exercise of downward flexibility on behalf of an infant and three young children who depend entirely upon the defendant for their upbringing.⁸³

Although the lenient result ultimately reached in *Johnson* was clearly foreshadowed by the language of the very first sentence of the opinion, the Second Circuit nonetheless grappled with, rather than ignored, the overarching Guidelines structure. The court first addressed the weight and significance of section 5H1.6, which, the government asserted on appeal, precluded a downward departure on the basis of family circumstances alone.⁸⁴ The court noted that although the Policy Statements embodied in section 5H1.6 cannot be dismissed out of hand, they are meant simply to aid courts, and that courts must not give such statements undue weight.⁸⁵ The court reasoned, moreover, that "courts must carefully distinguish between the Sentencing Guidelines and the policy statements which accompany them and employ policy statements as interpretive guides to, not substitutes for, the Guidelines themselves."⁸⁶ Having indulged in an expression of disdain at being bound by Policy Statements promulgated by an agency but not necessarily submitted to and ratified by Congress itself,⁸⁷ the court focused on 18 U.S.C. section 3553(b) and its relationship to

⁸³ *Id.* at 124-25.

⁸⁴ *Id.* at 126.

⁸⁵ *Id.* at 127.

⁸⁶ *Id.*

⁸⁷ This attack upon the legitimacy of Policy Statements should be reviewed in light of the Supreme Court's latest pronouncements in *Stinson v. United States*, 113 S. Ct. 1913 (1993). The *Johnson* court based its attack on policy statements upon the support found in the Eleventh Circuit's decision in *United States v. Stinson*, 957 F.2d 813, 815 & n.2 (11th Cir. 1992) ("[We] must be mindful of the limited authority of the commentary, because the commentary is never officially passed upon by Congress."), *vacated*, 113 S. Ct. 1913 (1993). This distinction is one that the Supreme Court itself ignored. *But see Stinson*, 113 S. Ct. at 1919 ("amended commentary is binding on the federal courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the commission from adopting a conflicting interpretation that satisfies the standard set forth today").

U.S.S.G. Policy Statement section 5H1.6. The court conceded that policy statement section 5H1.6 demonstrates that the Commission "took ordinary family responsibilities into account when formulating the Guidelines." In a telling passage describing what the court viewed as "ordinary family responsibilities," the *Johnson* court commented:

The Sentencing Commission understood that many defendants shoulder responsibilities to their families, their employers, and their communities. Disruption of the defendant's life, and the concomitant difficulties of those who depend on the defendant, are inherent in the punishment of incarceration. The Commission made this clear by explaining that such disruption of the defendant's exercise of responsibility, as a general matter, should not be cause for downward departure⁸⁸

The critical word characterizing the "ordinary" consequences of incarceration is the predictable "disruption" of the normal routines of family and work obligations. In addition to "disruption," the *Johnson* court distinguished "ordinary" from other noteworthy circumstances: "[T]he Commission, in formulating the Guidelines, was aware that incarceration may *undermine* family responsibilities."⁸⁹ Thus, while "disrupting" and "undermining" the family unit constitutes the "ordinary" consequences of incarceration, the *Johnson* court nevertheless concluded that "[s]ection 5H1.6's phrasing confirms that the commission's understanding that ordinary family circumstances do not justify departure but extraordinary family circumstances may."⁹⁰

The *Johnson* court structured its defense of the district court's downward departure decision around the "extraordinary" nature of Cynthia Johnson's family circumstances and Second Circuit precedent acknowledging the existence of extraordinary family circumstances. That the district court arrived at this downward departure by assessing the impact of

⁸⁸ 964 F.2d at 128 (2d Cir. 1992).

⁸⁹ *Id.* at 128 (emphasis added).

⁹⁰ *Id.* at 129 (citation omitted). This arguably false distinction between "ordinary" and "extraordinary" family circumstance is troubling. The Guidelines prohibition against using "ordinary" family responsibilities as a grounds for departure precludes only the ordinary, but neither explicitly nor implicitly demands the "extraordinary" to overcome the presumptive bar. Much like the logical paradigm of "A" and "not A," the court seems to demand proof that in order to avoid "A," one must prove "B," instead of proving that the phenomenon is "not-A."

incarceration upon Johnson's immediate family was certainly not lost on the Second Circuit. Chief Judge Oakes quoted the sentencing court's obviously family-focused rationale:

In view of the special circumstances of the defendant—I shouldn't say 'defendant,' I should say of the 'defendant's family,' which as the court sees it, is a family in which the mother is the sole link between the children, the six-month old child . . . and having the father in Queens who does not contribute to the support of the five- and six-year old children, . . . having the father who does not contribute to their support, a 17 year-old boy having a father who does not contribute to his support, and a six year-old grandchild whom the mother is unable to keep because of the circumstances of her having another child, at the age of 21, and living in an institution . . . I'm going to reduce the level.⁹¹

Citing *United States v. Alba*,⁹² the *Johnson* court underscored the similarities between defendant John Gonzalez's plight in *Alba* and that of Cynthia Johnson.⁹³ As will be demonstrated shortly, however, the family structures in *Alba* and in *Johnson* were certainly not identical.

C. *Second Circuit Precedent: United States v. Alba*

In *United States v. Alba*, defendant John Gonzalez pleaded guilty to conspiracy to distribute, and to possess with the intent to distribute, cocaine in violation of 21 U.S.C. sections 841(a)(1) and 846. After receiving a reduction for his minimal role in the offense and for his acceptance of responsibility, Gonzalez faced a Guidelines sentencing range of forty-one to fifty-one months. The district court ultimately departed downward and sentenced Gonzalez to six months in a halfway house, followed by two years of supervised release and fined him fifty dollars.⁹⁴ What swayed the district court to depart downward—a decision that the Second Circuit ultimately up-

⁹¹ *Id.* at 129-30.

⁹² 933 F.2d 1117 (2d Cir. 1991).

⁹³ *Johnson*, 964 F.2d at 129. In *Alba*, 933 F.2d at 1117, the government appealed the sentencing factors applied to defendant John Gonzalez. The court of appeals remanded for re-sentencing because it could not determine whether or not the district court had relied upon the two *proper* grounds or the two *improper* grounds for downward departure. *Id.* at 1118. Therefore the caption of the case is "*United States v. Alba*" although the actual litigant was John Gonzalez.

⁹⁴ *Alba*, 933 F.2d at 1118.

held on appeal—was Gonzalez's family situation. The *Alba* court concluded: "the record amply supports the conclusion that [Gonzalez's] family circumstances were extraordinary."⁹⁵ The "extraordinary circumstances" recognized by the court were that:

Appellee has been married for 12 years. He, his wife and their two daughters, aged four and 11, live with his disabled father—who depends on Gonzalez to help him get in and out of his wheelchair—and his paternal grandmother. He had longstanding employment at the time of the events which gave rise to this case. He worked two jobs to maintain his family's economic well-being, and was aptly described as a man who works hard to provide for his family. Clearly his is a close-knit family whose stability depends on Gonzalez' continued presence.⁹⁶

The Second Circuit concluded that a downward departure, under all the circumstances of Gonzalez's family, was not an abuse of discretion. The *Alba* court observed that "the sentencing court had found that incarcerating Gonzalez in accordance with the Guidelines might well result in the *destruction* of an otherwise strong family unit and that circumstances are sufficiently extraordinary in this case to support a downward departure."⁹⁷ Thus, the Second Circuit again focused upon the destruction of a family unit, and not merely its disruption.

An evaluative standard such as "destruction of the family" may well suffice as a meaningful way to distinguish "ordinary" from "not ordinary" family circumstances and thereby assist those who prepare PSRs and sentencing courts in sorting out the meaning of section 5H1.6.⁹⁸ "Destruction" of the lives of

⁹⁵ *Id.* at 1122.

⁹⁶ *Id.*

⁹⁷ *Id.* (emphasis added).

⁹⁸ Some circuit courts interpret § 5H1.6 to mean that family responsibilities are relevant in determining whether to impose restitution and fines. Courts following this approach assert that "unlike the guideline policy statement on departures for substantial assistance, § 5H1.6 contains no language suggesting that this list is merely illustrative rather than exhaustive. Section 5H1.6 contains no suggestions that departures may be based on family considerations whenever they strike judges as particularly compelling." *United States v. Thomas*, 930 F.2d 526, 530 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991). Other courts view departures from the applicable guideline range appropriate in "extraordinary" cases. *See United States v. Gaskill*, 991 F.2d 82 (3d Cir. 1993); *United States v. Mogel*, 956 F.2d 1555 (11th Cir.), *cert. denied*, 113 S. Ct. 167 (1992); *United States v. Duarte*, 901 F.2d 1498, (9th Cir. 1990).

The Second Circuit may be isolated in the extreme position it expressed in

dependents is a threshold, albeit a very high one, that defendants can advance in the sentencing court, thereby providing an avenue for consistency in treatment. A review of various circuit courts' interpretations of section 5H1.6, however, reveals inconsistent treatment of offenders who seek downward departures under that Guidelines provision. This inconsistency is compounded by the fact that circuit courts infrequently supply an adequate description of the actual family circumstances present in the record to support downward departure requests by defendants. This paucity of detail may be a deficiency in the lower court record or it may reflect a rhetorical device used by circuit courts to make the family circumstances seem mundane. Nevertheless, the minimal factual description makes it difficult to ferret out a set of factors that constitute "not ordinary" or "extraordinary" grounds for downward departure for family responsibility or circumstances.

D. *Section 5H1.6 and Other Circuits*

The cases that greatly restrict the application of section 5H1.6 to rare family circumstances seem to view parent-child separation due to incarceration as an "ordinary," if not a self-evident, fact of life. For example, in *United States v. Chestna*,⁹⁹ the First Circuit reviewed the district court's refusal to grant a downward departure to May Lou Chestna despite the "unique circumstances of her family responsibilities."¹⁰⁰ The *Chestna* opinion described the defendant as a single mother who, at the time of sentencing, had three children ages thirteen, eleven and four. After sentencing, Ms. Chestna had her

United States v. Merritt, 988 F.2d 1298, 1309 (2d Cir.), *cert. denied*, 113 S. Ct. 2933 (1993):

Thus, the nearly total absence of categorization of offender characteristics to be found in the Guidelines does not mean that the Commission sought to overrule or disregard Congress' instruction that offender characteristics should play a role of major significance in the determination of sentence Rather, the absence of Guideline's commands for defendant characteristics represents the Commission's wise judgement that it is far more difficult to quantify the effect that such characteristics should have on individual sentences, than it is to prescribe relative values to a variety of offenses.

⁹⁹ 962 F.2d 103, 104 (1st Cir.), *cert. denied*, 113 S. Ct. 334 (1992).

¹⁰⁰ *Id.* at 104.

fourth child. The court noted that "[a]ll of defendant's children are being cared for by family members during defendant's incarceration."¹⁰¹ The First Circuit characterized Chestna's family circumstances (i.e., her "single parent" status and the fact that she was the "mother of four") as unique, yet nevertheless declined to characterize her status as an "idiosyncratic" circumstance, distinguishing her case from the 'mine-run.'"¹⁰² Similarly, in *United States v. Mogel*, the Eleventh Circuit described Darlene Mogel's situation as that of someone who "has two minor children to support, and a mother that lives with [her]."¹⁰³ The court nevertheless disallowed a downward departure based upon such a showing.

Circuits that describe a defendant's situation as "single parent status," but without focusing on the interrelationship of child and parent, also tend to find such a situation to be "not extraordinary" and, therefore, not worthy of a downward departure.¹⁰⁴ These cases characteristically reason that single parenthood is not unique. As the Fourth Circuit in *United States v. Brand*¹⁰⁵ observed:

A sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children. It is apparent that in many cases the other parent may be unable or unwilling to care for the children, and that the children will have to live with relatives, friends, or even in foster homes Although there doubtless are circumstances in which unique family responsibilities might justify a downward departure, those circum-

¹⁰¹ *Id.* at 104-05.

¹⁰² *Id.* at 105 (referring to *United States v. Aguilar-Peña*, 887 F.2d 347, 349-50 (1st Cir. 1989)). Interestingly, however, the First Circuit recently distinguished its *Chestna* holding in *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993), and remanded *Rivera* to the district court to consider a downward departure for the single-mother defendant of three children under six years of age. The *Rivera* opinion, written by Chief Judge G. Breyer, a former United States Sentencing Commissioner, acknowledged that district courts have power to depart in unusual cases where family circumstances are out of the ordinary and that such a determination is entitled to deference on appeal. *Id.*

¹⁰³ 956 F.2d 1555, 1557 (11th Cir.), *cert. denied*, 113 S. Ct. 167 (1992). No other information about Mogel's situation is presented in the opinion.

¹⁰⁴ See *United States v. Cacho*, 951 F.2d 308 (11th Cir. 1992); *United States v. Carr*, 932 F.2d 67 (1st Cir.), *cert. denied*, 112 S. Ct. 112 (1991); *United States v. Headley* 923 F.2d 1079 (3rd Cir. 1991); *Mogel*, 956 F.2d at 1555; *United States v. Johnson*, 908 F.2d 396 (8th Cir. 1992) (superseded by statute as stated in *United States v. Manichio*, 989 F.2d 438 (11th Cir. 1993)).

¹⁰⁵ 907 F.2d 31 (4th Cir.), *cert. denied*, 498 U.S. 1014 (1990).

stances are not present here. Mrs. Brand's situation, though unfortunate, is simply not out of the ordinary.¹⁰⁶

Implicit in this holding is the premise that single parenthood does not excuse one from the duty to provide for all contingencies such as debilitating illness, lengthy hospitalization, death or even incarceration. Accordingly, having to provide for children does not render one's circumstances extraordinary. Therefore the question "who will take care of my kids?" constitutes an "ordinary" routine concern which society expects a single parent to handle.

This judicial sentencing attitude masks a troubling disparity. Incarceration appears to wreak greater destructive consequences upon inmate mothers than upon inmate fathers. Statistical data strongly suggests that incarcerated mothers, as opposed to fathers, rarely have the option of leaving their children with the other parent for caretaking.¹⁰⁷ Moreover, the "single parent" cases have predominately involved female defendants. Perhaps this explains the difficulty district court judges have resisting their instinct to grant lenient sentences in such circumstances. Such leniency is often expressed by departing to a Guidelines range where brief removal from the home situation or restricted home detention are permissible.¹⁰⁸ In cases where the other parent will be present in the

¹⁰⁶ *Id.* at 33.

¹⁰⁷ In a 1991 survey of inmates in Federal correctional facilities conducted by the Bureau of Prisons [hereinafter "BOP"], there were 4222 women in BOP custody and 49,784 men. Of the inmates with children under 18 years of age, 90.5% of the males' children lived with the other parent while only 33.3% of the female inmates' children lived with their fathers. Additionally, 54% of the children of inmates lived with grandparents, 36% lived with other relatives, 6.8% lived with friends and 4.6% were in foster care.

¹⁰⁸ The BOP has compiled sentences data in the area of gender and race that bear on this issue. In 1992, downward departures for family ties and responsibilities were granted in 32 cases or .09% of all downward departures; for black males in 7 cases or .04% of all downward departures; and for Hispanic males in 18 cases or 1.2% of all departures. On the other hand, white female offenders received downward departures for family ties and responsibilities in 34 cases or 5.1% of all downward departures; black females in 26 cases or 6.4% of all downward departures and Hispanic females in 16 cases or 6.3% of all downward departures.

These statistics are noteworthy because of the marked differences in percentages when viewed by gender, especially in light of the general reluctance to accept family ties and responsibilities as a basis for downward departure outside the Second Circuit. Professor Myrna Raeder discusses this gender disproportionality

household while the convicted parent is incarcerated, courts generally have been unresponsive to motions for downward departure based on claims of extraordinary family responsibility.¹⁰⁹ For example, the Sixth Circuit in *United States v. Brewer*¹¹⁰ and the Ninth Circuit in *United States v. Miller*¹¹¹ each noted in passing that the female defendants had stable family relationships and supportive spouses, making it easy for both courts to deny downward departures.¹¹² Male defendants fare no better pleading this departure basis while involved in intact relationships.¹¹³

In contrast to the circuit decisions disallowing downward departures pursuant to section 5H1.6, there are cases in which such downward departures have been upheld. Characteristic of this line of cases are opinions with strong positive conclusions about the "extraordinary" nature of the family circumstances described. Nevertheless, no mathematical formula regarding the necessary number of dependents or degree of hardship emerges as the unifying departure standard. In *United States v. Peña*,¹¹⁴ the Tenth Circuit upheld the downward departure from a Guidelines range of 27 to 33 months imprisonment to probation and six months in a community treatment center. Irma Peña, who had been found guilty of possession of less than 50 kilograms of marijuana, was described as a

and its consequences in *Gender and Sentencing: Single Moms, Battered Women and Other Sex-Based Anomalies in the Gender Free World by the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905 (1993).

¹⁰⁹ The majority of circuits have viewed the pregnancy of the offender or the infancy of the offender's dependent children as not ordinarily relevant for sentencing purposes beyond granting a stay pending the child's birth, see *United States v. Johnson*, 908 F.2d 396 (8th Cir. 1990); *United States v. Pozzy*, 902 F.2d 133, 138 (1st Cir.), cert. denied, 498 U.S. 943 (1990), or staggering the surrender dates of co-defendant parents in order to provide parental coverage for a four-year-old child, *United States v. Carr*, 932 F.2d 67, 72 (1st Cir. 1991).

¹¹⁰ 899 F.2d 503, 509 (6th Cir. 1990).

¹¹¹ 991 F.2d at 552 (9th Cir. 1993).

¹¹² Notably both *Brewer* and *Miller* drew dissenting opinion from judges who did not accept the majority's contention that the psychological damage or dire consequences of removing mothers from young children was ever considered by the Commission in formulating § 5H1.6.

¹¹³ See *United States v. Berlier*, 948 F.2d 1093 (9th Cir. 1991); *United States v. Daly*, 883 F.2d 313, 319 (4th Cir. 1989), cert. denied, 496 U.S. 927 (1990), and reh'g denied, 498 U.S. 116 (1991); cf. *United States v. Alba*, 933 F.2d 1117 (2d Cir. 1991).

¹¹⁴ 930 F.2d 1486 (10th Cir. 1991).

single parent of a two-month old child and . . . the sole support for herself and her infant child. In addition, she has been steadily employed for a long time and is providing for the financial support of her 16-year old daughter, who, herself, is a single parent of a two-month old child. Therefore, should the defendant be incarcerated for an extended period of time, two infants would be placed at a potential risk.¹¹⁵

The court concluded that the district court had made the departure decision on proper grounds under the circumstances.

In *United States v. Gaskill*,¹¹⁶ the Third Circuit held that the district court had not appreciated the unusual circumstances before it and remanded the case for resentencing. Faced with the delicate task of distinguishing *Gaskill* from the negative precedent established in *United States v. Headley*, which involved a single-mother defendant, the *Gaskill* court noted that *Headley* involved a situation in which the nature of the crime produced "the applicable guidelines range [of] 17.5 years. Thus, inevitably the children were destined to be consigned to foster care even if the sentence were substantially reduced."¹¹⁷ The *Gaskill* court then detailed the compelling nature of Gaskill's caretaking responsibilities for his mentally disturbed elderly wife, portraying a life held together almost exclusively by the dutiful defendant-husband: "All household chores, other than cooking, are performed by the defendant who also must administer her proper medication. She spends sixteen hours a day in bed Dr. Houseknecht described the medication necessary to control flare-ups of Mrs. Gaskill's condition and her total dependence on the defendant."¹¹⁸ The court concluded that the record presented by Gaskill, who pled guilty to fraudulent use of social security numbers, was "quite out of the ordinary" because of, among other things,

the degree of care required for the defendant's wife, the lack of close

¹¹⁵ *Id.* at 1494 (quoting district court opinion).

¹¹⁶ 991 F.2d 82 (3d Cir. 1993).

¹¹⁷ *Id.* at 85 (citing *United States v. Headley*, 923 F.2d 1079, 1082-83 (3d Cir. 1991)). The court also commented that in *Headley*, the defendant-mother was less than an exemplary role model: "[T]here would be some question whether the best interests of the children would be served by allowing them to remain under the care of the defendant who had exposed them to the atmosphere of large scale drug dealings. In that case, family ties were not an appropriate bases for a downward departure." *Id.*

¹¹⁸ *Id.*

supervision by any family member other than the defendant, the risk to the wife's well-being, the relatively brief—in one sense—imprisonment sentence called for by the Guidelines computation, the lack of any end to be served by imprisonment other than punishment, the lack of any threat to the community—indeed, the benefit to it by allowing the defendant to care for his ailing wife—are all factors that warrant departure.¹¹⁹

While the *Gaskill* facts may appear “out of the ordinary,” they are arguably no more so than those present in *United States v. Thomas*,¹²⁰ a 1991 Seventh Circuit case in which a downward departure for extraordinary family circumstances was denied. Defendant Mattie Lou Thomas was involved in the possession of almost four kilograms of heroin. Because of her cooperation pursuant to 18 U.S.C. section 3553(e), the government had requested a six-year sentence, less than the otherwise mandatory ten-year prison sentence required under the Guidelines. The district court judge granted a downward departure and sentenced Thomas to probation.¹²¹ The Seventh Circuit vacated the sentence based upon the district court's improper section 5H1.6 interpretation.¹²² The court noted that Thomas had “extremely burdensome family responsibilities,” including the fact that “[e]ach of Thomas's three adult children is mentally disabled Thomas [was] also the legal guardian of a four year-old grandson. She care[d] for her children alone; Thomas last saw her husband in 1984.”¹²³ Yet applying its strict and somewhat idiosyncratic interpretation of section 5H1.6, the court held these facts about her family responsibilities to be “not ordinarily relevant” in a non-probation case such as *Thomas*. Therefore, the motion for a downward departure was denied.¹²⁴

E. “Extraordinary” Circumstances and Case Rhetoric

A review of the caselaw in the area of downward departures based upon “extraordinary” family responsibilities sug-

¹¹⁹ *Id.* at 86.

¹²⁰ 930 F.2d 526 (7th Cir. 1991).

¹²¹ *Id.* at 527.

¹²² *Id.* at 528.

¹²³ *Id.*

¹²⁴ *Id.* at 531.

gests that outcomes turned primarily upon the rhetoric used by the sentencing court, not the factors presented by the defendant. Thus, unwarranted disparity arguably arises because sentence outcomes seemingly depend upon talented advocacy, rather than upon consistent, predictable offender characteristics. Yet this conclusion-driven approach couched in laudatory descriptions of offender-parents toiling heroically to support multi-generations of family may well be "extraordinary" in the eyes of a Second Circuit panel. The analytical problem, however, lies in the inescapable conclusion that this "approach" is little more than a visceral response to some unidentified factual clues which may not be predictable in every case. Moreover, the inherent pitfall in the "extraordinary vs. ordinary" departure approach is the uncertainty of just *what* family circumstances qualify one for such a departure. The *Johnson* court, as did the *Alba* court before it, spent considerable time detailing the family structures and the defendant's central role in each family unit. However, the court failed to emphasize a critical conclusion common to both *Alba* and *Johnson*: removal of the defendant would lead to "destruction," not disruption, of the family. It is this key phrase, and perhaps ultimate moral standard that reveals the true departure criterion underlying *Johnson*. Moreover, it is unclear how out of the "ordinary" these family structures are in relation to greater society, the offender class itself or the prison population.¹²⁵ While the defendants

¹²⁵ A threshold question is begged by this theme of "not ordinary" that runs through § 5H.1 offender characteristic departures. What is the baseline experience or community against which the court is to measure what is "ordinary?" The argument can be made that without some reference point by which to measure, sentencing courts will resort to personal family experiences or other arbitrary sources.

In *United States v. Brewer*, 899 F.2d 503 (6th Cir.), *cert. denied*, 498 U.S. 844 (1990), the court chose the reference point of "bank embezzlers" in reviewing the applicability of a downward departure for two female bank tellers who had embezzled \$28,000:

The district court failed to point out why the defendants' community support or family ties were 'substantially in excess' of those generally involved in other bank teller embezzlement cases, especially those cases which occur in small town settings Many bank tellers who defraud national banks have long tenured employment, enjoy community support, have families to raise and support, or other family responsibilities. We have serious doubt that these factors are sufficiently 'unusual' to warrant departure.

Id. at 508-09.

Should determination of the extraordinary nature of the circumstance be

in *Alba* and *Johnson* were highly responsible family members, it would be difficult to predict whether any other defendants' situations could duplicate the *Alba* and *Johnson* facts sufficiently to warrant a downward departure pursuant to section 5H1.6. Without some benchmark for what criteria must be met before his or her family circumstances will be deemed "extraordinary," a defendant's only hope may be to receive the same panel that heard the *Alba* and *Johnson* cases.¹²⁶

Compare, for example, the facts of the Second Circuit case *United States v. Alba*¹²⁷ with those of the recent Ninth Circuit case *United States v. Miller*.¹²⁸ Both defendants were living in apparently loving, intact marriages with two young dependent children. Neither defendant had prior convictions and both faced Guidelines ranges above 12 months. The *Alba* defendant, John Gonzalez, received a downward departure and confinement in a half-way house for six months because of his "extraordinary" family responsibilities under section 5H1.6. The Ninth Circuit vacated Rachelle Miller's downward departure because her situation was not "extraordinary" within the meaning of section 5H1.6.¹²⁹ The dissent in *Miller*, citing *Alba*, chastised the majority for ignoring the district court's findings:

The district court here found the Miller family circumstances "unique." Rachelle Miller provided substantial emotional and physical support to [her] young children, the youngest of which was actually born while the case was pending, and incarceration would place

gauged by the outside world or the prison population? In *United States v. Martinez-Guerrero*, 987 F.2d 617 (9th Cir. 1993), Judge Ferguson, writing in concurrence, mused about the appropriate standard for inquiry regarding the blindness of the defendant who sought a downward departure under § 5H1.4 (extraordinary physical impairment): "[T]he proper finding involves a determination of whether the defendant's impairment is sufficiently extraordinary to permit downward departure from the otherwise applicable guidelines sentencing range. Thus, conditions that might be entirely ordinary or widespread in the world outside of prison may still constitute extraordinary physical impairments under § 5H1.4." *Id.* at 621.

¹²⁶ It is noteworthy that Chief Judge Oakes and Judges Cardamone and Mahoney heard *United States v. Alba* and Chief Judge Oakes and Judges Cardamone and Pierce heard *United States v. Johnson*. It may well be sufficient to have Judge Cardamone on the panel: he authored the opinion in *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), and sat on the panel that decided *United States v. Sharpsteen*, 913 F.2d 59 (2d Cir. 1990).

¹²⁷ 933 F.2d 1117 (2d Cir. 1991).

¹²⁸ 991 F.2d 552 (9th Cir. 1993).

¹²⁹ *Id.* at 556-57 (Tang, J., concurring in part and dissenting in part).

the children at potential risk. The majority apparently concluded out of hand that because Miller is not the sole caretaker of her children, "extraordinary family circumstances" cannot be established as a matter of law. Surely we do not wish to convey to district courts that it is not important to keep families intact or that children (especially infants) may not require the added stability of two parents. Clearly, whether "extraordinary family circumstances" exist depend on the court's knowledge of the defendant and her family—a factual matter within the province of the district court. The district court was not clearly erroneous in its determination.¹³⁰

It is disturbing, then, that the Second Circuit granted John Gonzalez's downward departure motion because "his is a close-knit family whose stability depends on Gonzalez's continued presence,"¹³¹ while the Ninth Circuit denied Rachelle Miller's motion despite the district court's express findings that she provided needed physical and emotional support for her young family. It is equally disturbing that unwarranted sentencing disparity will continue to arise simply because district courts do not couch their downward departure decisions in sufficiently extreme language. It is significant that in *Miller*, the Ninth Circuit majority suggested that it might have reached a different result had the record "support[ed] a finding that the children . . . would be exposed to a substantially greater risk of harm than can normally be expected when there is an extended forced separation from one parent."¹³² What the proof of that "substantially greater risk of harm" might entail is not explained. This absence of criteria is characteristic of the "extraordinary" nature of the proof needed to defeat the presumption in section 5H1.6 that a defendant's family circumstances are probably "ordinary" and, therefore, irrelevant to the sentencing decision. But without guidance, district courts must grope for the operative language that will satisfy critical appellate courts which demand only the "extraordinary."

Among the circuits, the Second Circuit seems the most receptive to the development, even encouragement, of downward departure jurisprudence in this area. The *Johnson* and *Alba* cases taken together demonstrate that the Second Circuit sets a threshold for the "extraordinary" that can be met by

¹³⁰ *Id.* at 556.

¹³¹ *Alba*, 933 F.2d at 1122.

¹³² *Miller*, 991 F.2d at 533 n.1.

defendants who, despite their criminal nonviolent wrongdoing, have at least succeeded as parents. Thus the *Johnson* precedent makes exploration of a defendant's family circumstances a worthwhile rather than a futile exercise, would be the case in the Ninth Circuit. Moreover, the general Second Circuit receptivity to section 5H1.6 downward departures also is reflected in the district court cases where the family circumstances and parenting skills of the defendants have been pegged at the extraordinary level by the sentencing courts.¹³³ Unlike the Ninth Circuit treatment in *United States v. Miller*, the Second Circuit does not second-guess the district court's factual findings concerning the "extraordinary" nature of a defendant's circumstances. Thus the district courts and Second Circuit

¹³³ In *United States v. Mills*, Nos. 88 CR 956, 89 CR 256, 1990 WL 8081 at *2 (S.D.N.Y. Jan. 17, 1990), the district court judge departed downward for, among other factors, the extraordinary family circumstances present in the case:

Are extraordinary circumstances present in this case? I think that they are within that context of family ties and responsibilities . . . I conferred with the probation officer, Ms. Macheco. [She] has conducted a careful and thorough examination into Ms. Mills' family situation. Ms. Pacheco tells me in substance that in her experience she has never encountered a defendant so deprived of any other responsible adult who could take over for the children present in the defendant's care.

It is not unusual for a defendant convicted of a crime to have children in his or her care. What's unusual is the [sic] for practical purposes total absence of responsible adults in a position to come forward and replace the defendant if the defendant is incarcerated. That in and of itself is an unusual circumstance. Surely it is unusual in my own experience as a sentencing judge.

Id.; see also *United States v. McGee*, 802 F. Supp. 843 (E.D.N.Y. 1992) (departure for welfare of 11-year-old nephew who had been abused and was dependent upon defendant for therapeutic environment); *United States v. Arize*, 792 F. Supp. 920 (E.D.N.Y. 1992) (departure due to unknown pregnancy and potential for permanent loss of custody of children if imprisoned for more than two years); *United States v. Pokuuaa*, 782 F. Supp. 747 (E.D.N.Y. 1992) (departure due to health of defendant mother and unborn child); *United States v. Handy*, 752 F. Supp. 561 (E.D.N.Y. 1990) (single parent of three teenage children and exceptionally promising future of the two older children would be threatened by mother's incarceration). Compare *United States v. Sessa*, 821 F. Supp. 870, 873 (E.D.N.Y. 1993), in which Judge Weinstein gave no downward departure in sentencing defendants convicted of racketeering and related offenses:

The close-knit and loving relationships of these defendants with their children, their spouses or their paramours do not take precedence over their continuing evil power and their urge to commit serious crimes. The court regrets the pain caused defendant's relatives by the harsh sentences that must be imposed; it is defendant's voluntary criminal acts that are responsible for their punishment.

Id.

seem to be "in sync" regarding the standard of proof required for "extraordinary." Such a clear philosophical alliance between the Second Circuit and the district court logically must discourage prosecutors from appealing even borderline downward departures granted under section 5H1.6.

Underlying the Second Circuit's departure philosophy is a premise that is not shared by all other circuits about the creation of the Guidelines. Indeed, central to understanding its downward departure jurisprudence is that the Second Circuit seems highly skeptical about what the Commission may have considered in formulating the offender characteristics policies contained in Chapter 5H1. As 18 U.S.C. section 3553(b) provides, departures are permitted when "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Commission in formulating the Guidelines that should result in a sentence different from that described."¹³⁴

To be sure, little is known about what exactly was considered by the Sentencing Commission in the area of offender characteristics and whether that consideration was adequate.¹³⁵ Circuit courts have interpreted the very existence of a pronouncement that offender characteristics are "not ordinarily relevant" as adequate proof that due consideration was given by the Sentencing Commission.¹³⁶ The Second Circuit,

¹³⁴ 18 U.S.C. § 3553 (1985).

¹³⁵ In *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, Judge Stephen Breyer commented that:

One important area of [trade-off] compromise concerns 'offender' characteristics. The Commission extensively debated which offender characteristics should make a difference in sentencing; that is, which characteristics were important enough to warrant formal reflection within the Guidelines and which should constitute possible grounds for departure. Some argued in favor of taking past arrest records into account as an aggravating factor Others argued that factors such as age, employment history, and family ties should be treated as mitigating factors As a result, the current offender characteristics rules look primarily to past records of convictions The rules do not take formal account of past arrest records or drug use, or the other offender characteristics which Congress suggested that the Commission should, but was not required to, consider. In a word, the offender characteristics rules reflect traditional compromise.

Breyer, *supra* note 21, at 19-20.

¹³⁶ See *United States v. Cacho*, 951 F.2d 308, 311 (11th Cir. 1992); *United States v. Thomas*, 930 F.2d 526, 529 (7th Cir. 1991); *United States v. Sutherland*,

however, is considerably less generous in its interpretation. It apparently presumes that the Commission did not anticipate a specific sentencing factor unless it described that factor in detail in the Guidelines or Policy Statements. In *United States v. Johnson*,¹³⁷ the Second Circuit, in considering the application of section 5H1.6 to Cynthia Johnson's family situation, concluded that while the Commission designed section 5H1.6 to cover "ordinary family responsibility," it did not intend this section to cover *all* family circumstances: "[e]xtraordinary circumstances . . . are by their nature not capable of adequate consideration. They therefore may constitute proper grounds for departure."¹³⁸ Thus, because the Second Circuit had adopted a "minimalist" premise about what could have been fathomed by the Commission, it has great leeway in developing its downward departures jurisprudence.

That the Commission at least considered family circumstances is clear, but what it believed to be "ordinary" family circumstances and the ordinary and tolerable consequences of incarceration upon a family is somewhat shrouded in mystery and subject to intense speculation. For example, the Ninth Circuit in *Miller* asserted that the Commission considered that "disruption of the parental relationship when a parent is imprisoned almost always exposes children to the risk of psychological harm."¹³⁹ The First Circuit, by contrast, concluded that the "Commission was fully aware that some convicted felons are single parents of small children."¹⁴⁰ While consideration of the psychological damage to young dependents if a parent is incarcerated is a logical inference to draw, it is only an inference. It is equally likely that the Commission, after reviewing the offender profiles, considered that the majority of imprisoned offenders are males who are likely to leave their children with their mothers or other traditional caretakers.¹⁴¹ Therefore it may well have seemed unnecessary for the Commission to consider the plight of offender dependents.¹⁴²

890 F.2d 1042, 1043 (8th Cir. 1989).

¹³⁷ 964 F.2d 124 (2d Cir. 1992).

¹³⁸ *Id.* at 128.

¹³⁹ 991 F.2d 552, 553 n.1 (9th Cir. 1993).

¹⁴⁰ *United States v. Chestna*, 962 F.2d 103, 107 (1st Cir.), *cert. denied*, 113 S. Ct. 334 (1992).

¹⁴¹ See *supra* note 107.

¹⁴² Professor Myrna Raeder notes that the Sentencing Commission was and

The Commission however, was directed by Congress, to design Guidelines that would "guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties."¹⁴³ Such a directive implies that the Guidelines should not tilt in favor of incarceration for the unattached, unemployed or uneducated. Arguably, if proof of mere parenthood, standing alone, were enough to warrant a downward departure from the applicable Guidelines range and, therefore, a lesser sentence, a gnawing sense of unjust disparity would result.¹⁴⁴ Yet proof of more than merely a defendant's status as a "parent" may constitute a respectable sentencing factor. Proof of impending devastation of a family unit if parental removal occurs may well qualify as a basis for a "warranted" departure from a Guidelines range. A downward departure would permit a family to adjust to a manageable level of family disruption and avoid excessive punishment for

remains in an excellent position to study this particular issue:

It should be remembered that the Sentencing Reform Act directed the Commission "to reflect to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." Ignoring the wealth of information concerning single parenting, the disruption caused to children by incarcerating a single parent, and the rehabilitative effects of parenting violates the letter as well as the spirit of the law.

Raeder, *supra* note 108, at 958 (citing 28 U.S.C. § 991(b)(1)(c) (Supp. 1992)).

¹⁴³ S. REP. NO. 225, 98th Cong., 2d Sess. 175 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3358 (discussing Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473).

¹⁴⁴ Certainly, Cynthia Johnson's co-defendant Cheryl Purvis might complain with some credibility that she was the victim of unwarranted disparity. Professor Myrna Raeder addresses this concern:

Some will argue that the availability of such departures simply gives a break to mothers. However, since the guidelines have virtually ignored women, attention to this issue is actually an attempt to devise a rational sentencing policy for females which recognizes their separate pattern of criminality and concern about disruption to their children's lives, and inferior access to child visitation have never been viewed as criminal penalties. However, it is unrealistic to claim that women who face such issues are being punished in a manner equal to male offenders whose children remain with their mothers and who can more easily visit the male parent because he is incarcerated closer to home While a consequence-based standard for decision-making regarding family departures may not be an ideal approach to female sentencing in the abstract, given the restrictions imposed by the Guidelines it is a significant improvement over current practice.

Raeder, *supra* note 108, at 962.

the offender's crime.

The developing downward departure jurisprudence shows that only exemplary or successful parenting is considered for downward departures. While the Second Circuit in *Johnson* commented that "Judge Patterson made it clear that the departure was not on behalf of the defendant herself, but on behalf of her family," it was also clear that the court's affirmance of the departure was not because "Johnson's family circumstances decrease[d] her culpability, but that we are reluctant it wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing."¹⁴⁵ Arguably the Second Circuit views the downward departure mechanism found in section 5H1.6 as a way to avoid causing a societal harm greater than the harm caused by the offender.

This approach, however, is the antithesis of the approach taken by other circuits that do not view the offender's family as a significant part of the greater society. Therefore, those courts do not utilize any downward departure mechanism to adjust the punishment to the offender's situation. This sentencing philosophy was aptly summarized in *United States v. Brewer*: "[a]lthough a short prison term may impose hardship, '[u]nfortunately, it is not uncommon for innocent young family members, including children . . . to suffer as a result of a parent's incarceration.'"¹⁴⁶ The First Circuit in *United States v. Pozzy*¹⁴⁷ disallowed the defendant's pregnancy as a factor relevant to a downward departure. The *Pozzy* court washed its hands of the consequences of this decision by commenting: "it has been recognized since time immemorial that the sins of parents are visited upon their children."¹⁴⁸ Such an ancient moralistic approach to the consequences of offender wrongdoing may be woefully short-sighted. Commentators, on the other hand, have urged serious consideration of the long-range and avoidable harm done to the offender's minor children when incapacitation of the offender is unnecessary:

¹⁴⁵ *United States v. Johnson*, 964 F.2d 124, 129 (2d Cir. 1992).

¹⁴⁶ *United States v. Brewer*, 899 F.2d 503, 508 (6th Cir.) (quoting *United States v. Fitirman*, No. 89 CR 176-1 (N.D. Ill. June 23, 1989)), *cert. denied*, 498 U.S. 844 (1990).

¹⁴⁷ 902 F.2d 133, 139 (1st Cir.), *cert. denied*, 498 U.S. 943 (1990).

¹⁴⁸ *Id.*

An incarcerative sentence may have a distinctly different impact on a parent than it has on a non-parent. For example, in many states incarceration constitutes a ground for termination of parental rights. A two year prison sentence does not equal two years in prison accompanied by permanent loss of child custody. Justice requires considering the consequences of a sentence for the defendant's children where they lead to such different effective quantities of punishment.¹⁴⁹

Judicial scrutiny of the disproportionality of punishment is consistent with the Congress' chief purpose of revamping the federal sentencing scheme through the adoption of the Guidelines. As the Senate Judiciary Committee's Report on the Comprehensive Crime Control Act of 1983 noted, "the purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences."¹⁵⁰

The difficulty in fashioning the appropriate sentence under the Guidelines may arise because federal judges are unclear as to their new sentencing mission. The Commission did not include a discussion of the purposes of sentencing under the Guidelines. The absence of any stated purposes has led to a void, especially regarding use of departures:

[T]he Commission should still issue guidelines or policy statements to guide judges in evaluating purposes. Directions concerning purposes would help judges in deciding whether and how to depart from the guidelines, interpret guideline ambiguities, and select among different available sanctions. Though an empirical analysis may provide a useful starting point, purposes are needed to explain deviations from the empirically produced sentences.¹⁵¹

However, the Commission in its introduction to the Guidelines, justified its silence by noting that "a clear-cut Commission decision in favor of one of these [perceptions of the purposes of

¹⁴⁹ Eleanor L. Bush, *Not Ordinarily Relevant? Considering the Defendant's Children at Sentencing*, FED. PROBATION, Mar. 1990, at 15; see also Susan E. Ellingstod, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957 (1992).

¹⁵⁰ SENATE COMM. ON JUDICIARY, COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. NO. 225, 98th Cong., 1st Sess. 38, at 52 n.2 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3235.

¹⁵¹ See Miller, *supra* note 40, at 443.

criminal punishment] approaches would diminish the chance that the Guidelines would find the widespread acceptance they need for effective implementation."¹⁵² Yet Guidelines implementation without clear direction has lead the judiciary to very different Guidelines results. The majority of courts do look to the Commission for guidance regarding appropriate offender characteristics that can be considered at sentencing. The confusion among circuits regarding what was in fact considered by the Commission stems from the relative silence of the Commission itself. Undeniably, the Guidelines reflect the Commission's belief that "Congress, pursuant to its goal of reducing unwarranted sentencing disparities, intended Guidelines Sentencing to be offense-oriented, rather than offender-oriented."¹⁵³ Yet the Commission may have overreacted to the directive of Congress to design guidelines that do not rely upon inappropriate offender characteristics in meting out punishment.¹⁵⁴ The Commission has been criticized for its underdeveloped approach to offender characteristics as mitigating factors:

After all the months of study—including presumably the experience of the sentencers—the Commission produced substantially nothing to identify the terrain left for what was now "not ordinarily relevant." With that omission, the Commission put largely outside the pale a variety of factors that sentencing judges have treated over the years as mitigating circumstances. The results have included some evasion or warping of the guidelines—by judges along with prosecutors and defense counsel.¹⁵⁵

What sentencing courts struggle with is finding a principled way to reconcile the Guidelines' directives with their authority to depart in appropriate situations involving certain offender characteristics.¹⁵⁶

¹⁵² U.S.S.G. § ch. 1, pt. A, cmt. (1987).

¹⁵³ Bruce M. Selya & Matthew R. Kepp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 24 (1991).

¹⁵⁴ 28 U.S.C. § 994 (1993).

¹⁵⁵ Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2048 (1992).

¹⁵⁶ One commentator has noted:

It is true that the primary mandate of the Commission was to establish guidelines that would eliminate disparities in the sentences of similarly situated offenders, but offenders who differ from one another in their

Courts attempt to divine the significance of the Commission's mere acknowledgement of an offender characteristic that may not ordinarily be relevant. The Commission's failure or conscious decision to be vague or reticent as to its thinking in this Guidelines area stirs some commentators to urge federal courts to fill the leadership void:

Congress nowhere stated or implied that the Commission's mention of a factor in a sentencing guideline, policy statement or official commentary would be sufficient to bind a district court. It did not, as the Commission casually asserted in the original Guidelines Manual, authorize the Commission to *decide for itself* that it had adequately considered a topic. The question of adequacy was specifically delegated to courts by § 3553 (b).¹⁵⁷

As has been demonstrated in *Johnson*, the Second Circuit without hesitation has entered the breach created by the Guidelines and asserted its own authority to define "not ordinary" family ties which should warrant sentencing departures. Furthermore, the downward departure jurisprudence created by the Second Circuit greatly contributes to the body of information about meritorious offender characteristics that should not be ignored by sentencing courts. Similarly, the downward departure justifications offered by both the district and circuit courts stimulate thought about the purposes of sentencing which the Commission left unstated. That the sketchy treatment of offender characteristics under the Guidelines should be revisited was noted recently by Sentencing Commissioner Ilene H. Nagel:

The scope for legitimate consideration of *individual offender characteristics* is also ripe for reexamination. And greater use of *overt downward departures on the record* for appropriate reasons might reasonably be encouraged. We do not by any means propose a return to the days when sentences could be mitigated on the basis of social standing, reputation, good deeds, or the sense that a pillar of the community has "suffered enough" However, the scope of what is "not ordinarily relevant" could be narrowed to some extent, and some individual case circumstances might usefully be flagged as potential-

personal circumstances are *not* similarly situated. As the Court [in *Eddings v. Oklahoma*] has noted, "a consistency produced by ignoring individual differences is a false consistency."

Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1958 (1988).

¹⁵⁷ See Freed, *supra* note 13, at 1733-34.

ly valid bases for a departure in a circumscribed set of cases.¹⁵⁸

Review of the Second Circuit's departure patterns places *Johnson* in clearer perspective. Even the Commission noted the downward departure granted in *Johnson*, describing it as a case involving "atypical circumstances involving offender characteristics as basis for departure."¹⁵⁹ While the section 5H1.6 downward departure jurisprudence created by the Second Circuit may be of little comfort to a defendant such as Johnson's co-defendant Purvis, who lacked factors showing "extraordinary" circumstances, it does avoid the highly questionable Guidelines result of destruction of an offender's family.¹⁶⁰ Yet the downward departure jurisprudence created by the Second Circuit is of little value to offenders in general unless they can present mitigating circumstances which will be considered "extraordinary" or at least factors not considered in kind or to a degree by the Commission. The following section examines whether the present guidelines investigative system maximizes discovery of such critical sentencing facts.

¹⁵⁸ See Nagel & Schulhofer, *supra* note 51, at 559.

¹⁵⁹ 1992 ANNUAL REPORT, *supra* note 3, Addendum at 19. It is noteworthy that the Commission described the *Johnson* court's reasoning as being "reluctant to 'wreak' extraordinary destruction on dependents who rely solely on the defendant for their upbringing." *Id.* The Commission apparently does not characterize *Johnson* as a case involving a downward departure based upon the defendant's "parental and family responsibility." See *id.* Such departure basis has been disapproved by and so noted by the Commission in the majority of cases. See *id.* at 19A n.65.

While at first glance the downward departure upheld in *Johnson* might have been readily categorized as a "parental/family responsibility departure," a closer inspection of the *Johnson* opinion reveals the critical language may well be the reference to "extraordinary destruction on dependents." It would appear that destruction, as opposed to the routine disruption or hardship that follows when a parent leaves home for an extended period of time, may be crucial to the viability of this downward departure bases.

¹⁶⁰ It may be unfair to conclude that Johnson's co-defendant lacked any grounds for a downward departure. It is impossible to discern whether a sentence imposed within the "appropriate" Guidelines range was erroneous. "It is settled law in this circuit that a defendant generally may not appeal from a district court's decision not to depart downwardly from the applicable guidelines range because the decision is 'inherently discretionary'" United States v. Sharpsteen, 913 F.2d 59, 62 (2d Cir. 1990).

III. IMPACT OF *JOHNSON* ON THE PRESENTENCE INVESTIGATION PROCESS: LOOKING FOR DOWNWARD DEPARTURES IN ALL THE RIGHT PLACES?

Although the average federal defendant may naively believe that the district court judge alone determines the sentencing outcome in her case, it is increasingly more likely that the sentence imposed on "judgment day" is the direct outgrowth of the factual detail presented in the presentence investigative report prepared by a Probation Office. While the presentence investigative report ("PSI") has always been of assistance to the courts, its importance has been enlarged by the Guidelines sentencing scheme. As part of the Guidelines' structure, complicated assessments must be made concerning the precise nature of the offense, the manner of the commission of the crime and its impact upon the victim. The sentencing court relies heavily upon the initial case evaluation and Guidelines calculations done by the United States Probation Office. Thus the PSI makes the first and perhaps most lingering impression upon the sentencing court in its application of the Guidelines to a defendant's case.¹⁶¹

As the one person from whom mastery of the Guidelines maze is expected, the author of the PSI plays a crucial role in ferreting out and presenting the relevant facts for purposes of sentencing. In light of the requirement that sentences may be challenged on appeal if they deviate from the appropriate Guidelines range, the PSI will be instrumental in the ultimate determination of whether the Guidelines range was "appropriate" and whether any sentence deviation was justified by the facts. The PSI is unquestionably a critical first step in obtaining a sentencing result that will withstand reversal if appealed. Despite the "fact-finding" role now assigned to presen-

¹⁶¹ The PSI has consequences for the defendant even after sentencing. The PSI is used by the Bureau of Prison to classify the sentenced offender and to designate the appropriate security level facility. Information in the PSI will be used by case managers at the correctional facility to familiarize themselves with the inmate's history and program needs. The document will continue to be a reference point regarding future prison decisions concerning the inmate. The PSI is just as important following release from the custody during the period of supervised release because once the inmate is returned to the community, he or she is monitored.

tence investigators, it may be no clearer to them than to a district court judge exactly what personal information about the defendant should be relevant for purposes of sentencing under the Guidelines regime. This uncertainty arises from the approach adopted by the Guidelines. While the Commission provided concrete examples of certain factors bearing upon sentencing "adjustments,"¹⁶² the Commission gave little direction regarding downward departures.¹⁶³ Moreover the Guide-

¹⁶² The base level of the offense can be raised or lowered by use of adjustments. Chapter 3 of the *Guidelines Manual* lists adjustments such as: § 3A1.1, Vulnerable Victim (2 level increase); § 3A1.2, Official Victim (3 level increase); § 3B1.1, Aggravating Role (2,3 or 4 level increase); § 3B1.2, Mitigating Role (2,3 or 4 level decrease); § 3C1.2, Reckless Endangerment During Flight (2 level increase); § 3E1.1, Acceptance of Responsibility (2 level decrease). See generally U.S.S.G. §§ 3A1.1 to 3E1.1 (Nov. 1992).

¹⁶³ Unguided downward departures can be of two kinds: (1) if the Guidelines identify a factor as a basis for departure but do not provide specific guidance in the extent of the departure, it is unguided, or (2) if an aggravating or mitigating circumstance is of a kind or to a degree not adequately taken into consideration by the Sentencing Commission, the Probation Office's PSI, Publication 107 provides the following suggested 5-step deductive procedure for the analysis of an unguided departure:

1. List all mitigating and aggravating factors in the case.

- This step requires a comprehensive review of all of the relevant sentencing factors related to the offense conduct as well as to the behavior and background of the defendant.

2. What factors on the list do the Guidelines identify as ordinarily not a basis for departure?

- Such factors are eliminated unless they are extraordinary. This second step ensures that a factor identified by the Guidelines or case law in the circuit as an inappropriate basis for departure is not considered.

3. Of the remaining factors, are there any which the Guidelines have not considered or that exist in a degree not taken into consideration by the Sentencing Commission?

- The third step eliminates factors already taken into account by the Guidelines.

4. Does any Guideline, commentary, or policy statement authorize or support the factors identified in step 3?

- The fourth step requires a search of the *Guidelines Manual* and case law in the circuit to find any authority or support for a departure based on the identified factors in step 3. Part K of chapter five of the *Guidelines Manual* provides various grounds for departure and other guidelines, commentary, and policy statements throughout the manual also discuss circumstances that might warrant a departure.

5. Are there any factors identified in step 3 that would not warrant a change in the offense level or criminal history category if the Guidelines had taken them into account?

- The fifth step ensures that the identified departure factor would

lines have been amended and clarified through Policy Statements and Commentaries constantly over the past five years. Thus, the motivation, let alone the standard by which to identify plausible downward departure factors, must originate with the PSI writer because the *Guidelines Manual* and Commission offer negligible or belated help.

The very significance of the PSI and increased influence of the presentence writer in the Guidelines era has led to unprecedented tension between the Probation Office, defense counsel and government attorneys.¹⁶⁴ The probation officer is now seen as an adversary in the sentencing process by both defense counsel and prosecutors. Moreover, probation officers are viewed with great suspicion, even mistrust, by defense counsel, who consider the probation officer as an ally of the prosecution.¹⁶⁵ The current preception of the probation officer as more hostile toward than helpful to the offender may reflect the redefined role of presentence writer. This role places little emphasis on developing a relationship with the offender. A plausible explanation for the possible change in attitude dis-

actually warrant a change in the sentencing range. For instance, an aggravating factor may be identified that was not taken into account by the Guidelines, but if it had been considered, neither the offense level nor the criminal history category would change.

¹⁶⁴ In their survey of federal charging and sentencing practices in three districts, Professors Ilene H. Nagel and Stephen J. Schulhofer identified common patterns in all three districts. Among the issues common to these districts was the inter-agency tension:

Tension between defense counsel and probation officers runs high. Probation officers shoulder the blame for either thwarting plea agreements that circumvent the guidelines or "spooking" the AUSA's [Assistant United States Attorneys], with the result that AUSA's are reluctant to circumvent the guidelines in as many cases as defense counsel believe appropriate. The most common allegation is that probation officers are not lawyers and thus fail to appreciate problems of proof.

See Nagel & Schulhofer, *supra* note 51, at 545.

¹⁶⁵ Defense counsel related to the probation PSI writers in a more positive way before the Guidelines era:

Defense attorneys rarely requested to be present during presentence interviews. In fact[,] most placed a premium on cooperation with the officer, directing their clients to truthfully answer all questions posed by the probation officer. Many attorneys helped the officer by assisting their clients in gathering and presenting information needed for the presentence report.

Jerry D. Denzlinger & David E. Miller, *The Federal Probation Officer: Life Before and After Guidelines Sentencing*, FED. PROBATION, Dec. 1991, at 49-50.

played by some probation officers toward offenders has been offered by Tony Garoppolo of the United States Probation Department for the Eastern District of New York: "The probation officer is placed in a difficult situation. The officer supervises federal offenders, a function which increasingly calls for investigation and monitoring skills, as opposed to clinical social work expertise, since the medical model of correctional work continues its demise."¹⁶⁶ In the pre-Guidelines era, this "medical" or diagnostic model was reflected in the PSI. Probation officers were expected to diagnose the social or psychological causes of the defendant's criminal behavior, predict the likelihood such a person could be rehabilitated and suggest the means by which the sentencing court could effect that transformation through sentencing. The PSIs were narrative, contained no factual findings about the offense but often reflected a behaviorist theory.¹⁶⁷

With the restriction on sentencing alternatives under the Guidelines and its de-emphasis of offender rehabilitation, the probation officer's job focus has changed. Rule 32 of the Federal Rules of Criminal Procedure has codified this change.¹⁶⁸

¹⁶⁶ Tony Garoppolo, *Downward Departures Under the Federal Sentencing Guidelines*, 26 CRIM. L. BULL. 291, 303 (1990).

¹⁶⁷ The United States probation officer, typically educated in the behavioral sciences, was selected for service in the probation system after demonstrating skills in working for the "welfare of others," most commonly, offenders. The probation officer came to employment with a variety of skills, not the least of which were assessing factors contributing to behavior maladjustment, investigating, writing, and counseling. The officer's required knowledge base was primarily concerned with social/human behavior; however, knowledge of statutes and Federal rules associated with sentencing and sentencing alternatives was also critical.

Denzlinger & Miller, *supra* note 165, at 49.

¹⁶⁸ Rule 32(c)(2) states:

Report: The report of the presentence investigation shall contain—

(A) Information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) The classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to § 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued

Probation officers are no longer asked to assess the defendant's character and the possibility of rehabilitation outside of prison; they instead are asked to chart the defendant's position on a sentencing matrix. Gone from Rule 32 itself is language commanding that the PSI provide information that may be helpful "in granting probation." In its place is language commanding the presentence writer to report all damage done to the victim by the offender and to stay abreast of all Commission directives. In their new Guidelines roles, probation officers feel attacked not only by defense counsel, but by federal prosecutors as well, to whom probation officers must address unwelcome inquiries about the facts of the case. Since objections can be made to the findings in the presentence report by both prosecution and defense, the PSI writer can often feel defensive and isolated. Thus the sentencing court may receive three divergent sentencing recommendations from the prosecutor, defense counsel and the probation officer.

With the statutorily imposed emphasis upon describing in great detail the offense characteristics rather than the offender and the goal of achieving standardized sentencing, the Guidelines structure gives little incentive to the probation officer to gather extensive information on the personal history of the defendant other than researching his or her prior criminal missteps. The PSI writer could readily conclude that information about the offender's character, accomplishments and life history before commission of the offense are irrelevant for sentencing purposes. The best use to which background data such as stable family life, drug free life style, long employment

by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances;

(C) Any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(2);

(D) Verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) Unless the court orders otherwise, information concerning the nature and extent of non-prison programs and resources available for the defendant; and

(F) Such other information as may be required by the court.

history and extensive voluntary community service record can be put is to help place a defendant at the lower end of the Guidelines sentence range. Background information may also help fashion conditions of probation for those few who are lucky enough to qualify for this sentencing option. The PSI personal history information will also assist other probation officers during the supervised release period following the offender's completion of any custody sentence. This personal history information, however, has limited impact upon selection of "appropriate" offense punishment level assigned to the offender's crime by the *Guidelines Manual*. In short, the law-abiding, even virtuous, life one led before the commission of a federal crime counts for very little within the Guidelines structure.¹⁶⁹

Not surprisingly, the presentence investigation process generated by the Guidelines approach has drawn criticism. Senior Judge Jack B. Weinstein of the Eastern District of New York has remarked:

Under the Guidelines, probation reports are no longer designed to uncover good as well as bad facts about defendants. They mechanically describe what the Guidelines consider relevant, so that the judge often will not be aware that there is a basis for departure Defense counsel, unfortunately, are often merely passive when it comes to gathering evidence for sentencing.¹⁷⁰

Despite frustration expressed by some members of the judiciary about the "uninspired" investigative work produced by those probation officers who adhere strictly to the offense focus of the Guidelines, federal judges generally commend probation officers for the excellent job done within the Guidelines regime. Professors Nagel and Schulhofer note that: "[P]robation officers articulate frustration with judges, viewing them as being unfamiliar with the guidelines, manipulating the guidelines, or unjustifiably siding with the government on disputed facts. In contrast, judges report confidence in and admiration for the excellent job done by the probation officers."¹⁷¹ Indeed the probation officer often facilitates better Guidelines treatment

¹⁶⁹ FED. R. CRIM. P. 32(c)(2)(D).

¹⁷⁰ Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 364 (1992).

¹⁷¹ See Nagel & Schulhofer, *supra* note 51, at 545.

for an offender than do defense counsel who remain "Guidelines shy." That defense counsel have fallen behind in becoming conversant with Guidelines opportunities for their clients has been acknowledged in various quarters.¹⁷² The danger in the low level of Guidelines competency displayed by many defense attorneys is that their clients are left at the mercy of the offense bias of the Guidelines' evaluation structure. Therefore, the Guidelines calculations prepared by the PSI writer will be determinative of the sentencing outcome by default because a defendant's counsel is unprepared to do battle over Guidelines nuances that might be favorable to the offender. Passionate, but uninformed, arguments for leniency by unprepared defense counsel will be of no avail unless a path through the Guidelines jungle can be mapped out for the judge; apparently the only person who has a compass is the probation PSI writer.

Having recognized the importance of the probation officer's preliminary fact-finding role in a defendant's sentencing outcome, this Article now examines whether defendants will likely receive the benefits of *Johnson's* holding. Does the *Johnson* case give sufficient guidance to the PSI writer to allow identification of the appropriate "offender characteristics" which the

¹⁷² Chief Judge Gerald Bard Tjoflat of the Eleventh Circuit noted:

After 3 years of considering appeals from sentences imposed under the guidelines, I have become convinced that attorneys have yet to take full advantage of the mechanisms for judicial discretion built into the guidelines. The continued failure of counsel competently to participate in the adversarial process of guideline sentencing has resulted in a number of unfortunate consequences. A judge who receives no assistance from an incompetent defense attorney unfamiliar with the proper arguments in favor of a downward departure may impose an excessively harsh sentence.

Tjoflat, *supra* note 41, at 4.

Professors Ilene H. Nagel and Stephen J. Schulhofer in their survey of three cities also observed:

There is little doubt that probation officers are the most conversant with the guidelines and knowledgeable about their application . . . Most federal defenders, particularly Chief Federal Defenders, are very conversant with the Guidelines. The federal defenders are excellent advocates, for their positions, appreciate the nuances of the guidelines and are effective in gaining benefits for their clients Even though we interviewed only private defense attorneys who were putatively experienced with the Guidelines, this group's mastery of the Guidelines was consistently unimpressive.

Nagel & Schulhofer, *supra* note 51, at 546.

Second Circuit favorably considers in granting downward departures? Such a discussion leads to the unavoidable question raised by the Guidelines' absence of emphasis on finding unguided downward departures: are defendant's "extraordinary" family ties and responsibilities, which might warrant a downward departure, normally highlighted as such to the sentencing court? A related and perhaps equally crucial question is whether anyone within the sentencing system is actively searching for the factors that make a defendant's family circumstances qualify as "extraordinary" under the Guidelines rubric. Case law and the Sentencing Commission Annual Reports can provide only limited clues to the questions posed. In an effort to obtain some empirical information regarding the attitudes and experiences of actual federal probation officers, the author prepared a survey ("Survey") and distributed it to all the probation districts within the Second Circuit.¹⁷³

A. *Content of Presentence Investigation Report*

The product that the PSI writer creates for sentencing purposes has a standardized format. Aided by the Guidelines Sentencing Worksheets and the *United States Probation Office Presentence Investigative Report Manual*,¹⁷⁴ PSI writers conduct an investigation that will allow them to inform the sentencing judge about the criminal history of the offender, the offense for which the offender is convicted and the characteris-

¹⁷³ Surveys were sent to the following U.S. Probation Officers within Second Circuit: Southern District of New York, Eastern District of New York, Northern District of New York, Western District of New York, Districts of Connecticut and Vermont. All PSI writers and supervisors were invited to respond.

The surveys consisted of 44 guidelines related questions and 19 personal data questions. The surveys were distributed in May 1993 and received by June 30, 1993 (all surveys on file with author). Respondents were advised that confidentiality would be maintained. Accordingly, this Article will refer to individual Survey respondents by a coded number only.

Although the number of Survey responses were too few to be statistically valid, the Survey respondents constituted a focus group who revealed the varied attitudes of the PSI writers toward their investigative tasks. Moreover, the informal anecdotal responses to the Survey raise issues that have arisen in the context of probation officers trying to reconcile the sentencing directives generated by the Commission and the departure case law developed by the federal judiciary.

¹⁷⁴ The *Presentence Investigative Report*, Publication 107, was designed by the Probation Office; most participants in the Survey responded that they no longer use the Guidelines worksheets.

tics of the offense conduct that really depict the dangerousness of the crime and the degree of serious injury caused. The latter might include use of weapon, drug purity or quantity or amount of dollar loss or psychological injury inflicted on the victim. This information is of great significance in cases where a defendant has pled guilty instead of electing a trial because the judge hears only the limited facts elicited from a defendant to satisfy the factual basis requirement of the Rule 11 guilty plea.¹⁷⁵

Using the *Guidelines Statutory Index*, the probation officer initially must assess the "base level" of a given offense in order to select a baseline sentencing range. That base offense-level will also reflect the defendant's prior convictions, placing the defendant in one of six criminal history categories. This information translates to a box on the sentencing range and, in turn, reveals the offender's potential eligibility for a non-custody sentence.¹⁷⁶ The probation officer also must provide information regarding additional adjustments to the offense level

¹⁷⁵ Rule 11(f) of the Federal Rules of Criminal Procedure requires the federal judge to obtain a factual basis for guilt relating to the crime to which the defendant pleads. If a defendant has entered a plea of guilty to one of multiple counts charged by the government pursuant to a plea agreement, the judge will require only the minimal recitation of facts sufficient to accept the guilty plea. Yet under the Guidelines structure, the bigger factual picture is also relevant for sentencing purposes and will be described in some detail in the PSI. Defense counsel might question the relative merit of pleading guilty to one count only to defer debate about the "real facts" of the crime to the sentencing phase. Often defense counsel is frustrated when the PSI writer seemingly adopts wholesale the prosecution's view of the strength of all the charges against the defendant. Defense counsel often yearns to go to trial just to prove the prosecution's lack of evidence regarding other counts to which the defendant did not plead guilty. Thus, the recurring complaint that PSI writers, not being lawyers, cannot appreciate the weakness in the proof of the counts charged in the indictment leads some defense attorneys to an acrimonious, combative relationship with the probation officer. One district within the Second Circuit has a Probation Office where all presentence writers are lawyers. Telephone interview with James Dean, Chief Deputy Probation Officer, Vermont (July 1, 1993).

For a thoughtful discussion of the due process disadvantages present in the Guidelines structure, see Professor Susan N. Herman's article, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992).

¹⁷⁶ The Guidelines Sentencing Table permits eligibility for a probation sentence for a first time offender whose crimes fall within the first 10 levels (6-12 months maximum). A "split sentence"—part custody and part probation—is only available if a first-time offender's base offense-level falls within level 12 or below (10-16 months maximum). See U.S.S.G. §§ 5B1.1(a)(1)-(2), 5C1.1(c)(3), .1(d)(2).

such as a defendant's role in the offense and whether or not she obstructed justice. If a defendant "accepts responsibility" for the offense, a downward adjustment of two levels is generally awarded.¹⁷⁷ The act of pleading guilty, however, does not necessarily ensure acceptance of responsibility credit as the probation officer may conclude that a particular defendant does not personally admit to the magnitude of the wrongdoing involved in the offense charged or the alleged "relevant conduct related to it."¹⁷⁸ The PSI writer will also solicit the defense's version of the facts.¹⁷⁹ The probation office will routinely include some personal history information about the defendant in the PSI, including employment history, family members and the defendant's accomplishments. Such information is somewhat gratuitous for Guidelines sentencing purposes other than as argument for a lenient lower-end sentence within the designated Guidelines range. It is critical, however, for purposes of a section 5H1.6 downward departure.¹⁸⁰

¹⁷⁷ *Id.* § 5K2.16.

¹⁷⁸ Relevant conduct includes the events surrounding the charged crime and other uncharged criminal activity allegedly attributable to the defendant. The Guidelines, effective as amended November 1992, restrict relevant conduct to reasonably foreseeable acts done by criminal associates in joint activities. Relevant conduct assessments can loom quite large in determining the appropriate sentencing range and can negate any benefits of pleading guilty to only certain charges of the indictment. *See id.* § 1B1.3(a).

¹⁷⁹ As a general practice, in the Guidelines era defense counsel attends the presentence interview with the probation officer. In the pre-Guidelines era, defense counsel's only worry was that clients might not express sufficient remorse for their crimes and thereby receive a poor sentencing evaluation from the probation officers. Now, however, defense counsel is very cautious about allowing a defendant to speak with the probation officer, because too often a defendant may unwittingly finalize information that has dire consequences under the Guidelines. The "gagging" of the defendant often imposed by defense counsel's presence adds to the tension between the probation officer and the defense counsel.

¹⁸⁰ A comparison of pre-Guidelines and post-Guidelines PSI reflects the difference in sentencing approaches. The pre-Guidelines PSI contained extensive information on the life history of the defendant, including employment history, educational background and general accomplishments. Guidelines PSIs generally contain less background information. A most telling difference in the two styles of PSI is the presence of a mathematical calculation that runs throughout the Guidelines report. A tally of criminal offense "points" is made, subtraction or addition is performed upon the "base level" calculation and, ultimately, some offense level and criminal history category is reached. At the end of this mathematical reckoning, the defendant receives a number and collects his "price" at the sentencing hearing. The theme of converting human events to mathematical numbers in order to evaluate the defendant's crime and appropriate punishment can lead probation profes-

In addition to the descriptive and mathematical components, the PSI includes a recommendation section. The Guidelines, however, greatly restrict the sentencing options that can be recommended by the PSI writer. Sentencing options other than prison are impossible even for a nonviolent, first-time offender if the offense committed is assigned a base level above the levels where probation or home detention are available as punishment options.¹⁸¹ This restriction on sentencing alternatives hampers the probation officer's ability to recommend sentencing solutions that might be most responsive to the particular defendant's situation.

Survey participants expressed some frustration that the Guidelines structure had too few sentencing options available for the nonviolent, first offender. Specifically, monitored home detention was seen as a preferred viable alternative sentence for certain first or even second time nonviolent offenders.¹⁸² It was also suggested by respondents that since the prison population has greatly increased, the Guidelines should be changed to allow for alternatives to incarceration for first time nonviolent offenders.¹⁸³ A good illustration of the way the

sionals to feel like tax assessors levying sentencing penalties. This dehumanizing effect is seen in the Guidelines' format.

¹⁸¹ See, e.g., *supra* note 176 and accompanying text.

¹⁸² After attending the June 1993 United States Sentencing Commission Drugs & Violence in America Symposium, both Maria McBride, Chief U.S. Probation Officer, Connecticut, and James Dean, Chief U.S. Probation Officer, Vermont, independently spoke of their perception that there is a change in attitudes toward sentencing. The focus in sentencing seems to be shifting from incarceration to rehabilitation and the possibility of alternative sentencing. Although it is unlikely that the mandatory minimums will be repealed outright in the near future, there was a consensus at the Symposium that the minimums are not producing the desired results and in fact are unjust in application.

¹⁸³ Respondents answered the questions:

17) To what degree are the Federal Sentencing Guidelines flexible enough to allow a defendant to qualify for appropriate alternative types of sentencing (e.g., home detention).

- a) moderately flexible
- b) sufficiently flexible
- c) very flexible
- d) insufficiently flexible

18) In what specific circumstances or situations, not covered by the Federal Sentencing Guidelines, should a defendant be eligible to qualify for home detention?

Anonymous Survey Question Nos. 17, 18.

Generally the responses were in the "sufficiently flexible to moderately flexi-

Guidelines' calculation structure restricts consideration of sentencing options even for a first-time offender is the crime of embezzlement. Guidelines section 2B1.1 states that a crime of embezzlement earns a base level of "4" (zero to six months).¹⁸⁴ If the loss is more than \$100, the base level increases in designated increments.¹⁸⁵ If a defendant were to embezzle \$70,000, such an amount would warrant a 7-level increase above the base level to level 11 (eight to fourteen months). Moreover, if this embezzlement required more than "minimal planning," such as one committed over a period of time, an additional increase of 2 levels is permitted.¹⁸⁶ If sentenced at level 13 (twelve to eighteen months),¹⁸⁷ the defendant would be ineligible for probation even as a nonviolent first offender. The Guidelines' treatment of embezzlement is of particular note for the female offender. Of the 31 categories of offense outcomes annually tallied in the 1990-1992 United States Sentencing Commission Annual Reports, embezzlement is the only federal crime in which females constitute the most likely offenders. In 1992, female offenders constituted 58.6% of all reported federal embezzlement convictions.¹⁸⁸

It is significant that in 1990, female offenders constituted 54.5% of the embezzlement convictions nationwide. In 1990, federal judges also reported that the primary reason they had granted downward departures in embezzlement cases was because of "family responsibilities."¹⁸⁹ The combination of

ble" range.

Some respondents did offer the suggestion that nonviolent first offenders with health concerns or significant family responsibilities should be eligible for alternative sentencing options such as home detention.

¹⁸⁴ U.S.S.G. § 2B1.1.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ 1992 ANNUAL REPORT, *supra* note 3, at 48 (Table 13) (*Gender of Defendant by Primary Offense Category*) (covering October 1-September 30, 1992). Of the 1186 embezzlement offenses, 491 (41.4%) were committed by males and 695 (58.6%) were committed by females. *Id.*

Of the 1134 embezzlement offenses, 60.9% were committed by females while 39.2% were committed by males. 1991 ANNUAL REPORT, *supra* note 49, at 55 (Table 17) (October 1990 - September 30, 1991).

¹⁸⁹ According to the 1990 *Annual Report*, of the 6144 total embezzlement offenses, 521 (45.5%) were committed by males and 623 (54.5%) were committed by females. 1990 ANNUAL REPORT, *supra* note 49, at 45 (Table G) (*Embezzlement*) (covering Oct. 1, 1989-Sept. 30, 1990). Of the reasons most frequently given for

these two statistics strongly suggests that in the crime category where federal judges are most likely to encounter female offenders, judges needed to resort to a downward departure below the applicable Guidelines range in order to arrive at a sentence that seemed appropriate to the defendant's situation.¹⁹⁰ The restrictive Guidelines approach to probation eligibility is significant because of the parsimony rule found in 18 U.S.C. section 3553(a) that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with purposes set forth" in that subsection.¹⁹¹ If the probation officers and the federal judiciary have both concluded that probation is preferable for these nonviolent offenders, then the Guidelines should be modified to reflect this empirical data.¹⁹²

Far and away the greatest impediment to the presentation of appropriate sentencing options according to Survey respondents is the mandatory minimum sentencing scheme. Survey respondents emphasized that mandatory minimum statutory requirements negatively impacted their ability to propose viable sentencing options and resulted in sentencing disparity.¹⁹³

departures when the crime implicated the primary offense categories, family ties and responsibilities constituted 28.6%; substantial assistance constituted 21.4% of the total number of departures. *See id.* at 75 (Table T).

In the other categories of federal offenses that year, substantial assistance was the most frequent reason given for a downward departure.

¹⁹⁰ This sentencing pattern is entirely consistent with the Survey respondent's observation that the Guidelines' mathematical formula may be unrealistic in its results and, thereby, does not allow judges sufficient latitude to craft appropriate sentences for the typical first-time, nonviolent offender.

¹⁹¹ 18 U.S.C. § 3553(a) (1992).

¹⁹² Although theoretically the Guidelines allow for use of "downward departures" where appropriate in order to adjust the punishment to the offender, this approach requires the probation officer and, in turn, the judge to couch the departure in terms of "extraordinary" circumstances where in fact the opposite may be true—the offender is typical of the offenders who commit this crime because the "typical" offender has family responsibilities and has been law-abiding throughout her life. The real problem may be the unrealistic punishment scheme devised by the mathematical approach of the Guidelines themselves. As Dale G. Parent observed:

The primary reason for departures is to achieve more proportional punishments for the small number of exceptional cases that do not fit into the general norms embodied in the guidelines and therefore require sentences outside the usual range. Departures were never intended to be a mechanism for fundamentally revising sentencing guidelines.

What Did the United States Sentencing Commission Miss?, 101 YALE L.J. 172 (1992).

¹⁹³ Mandatory minimum sentences are drug-offense statutes, which require that

Furthermore, some respondents were particularly troubled by the capricious, heartbreaking effect of mandatory minimum statutes in drug conspiracies where low level conspirators receive the mandatory minimum while higher-ranking and more culpable co-conspirators serve less time because they have provided information of value to the government.¹⁹⁴ As the probation officers who prepare PSIs, Survey respondents expressed a feeling of futility in situations where the mandatory minimum statutory provision controls the sentence outcome so that virtually no information about a worthy offender or her marginal role in the case has any bearing on the sentence that must be imposed by law.¹⁹⁵

The PSI, however, does differentiate between the probation officer's sentence recommendation and the officer's identification of possible grounds for departure. A separate section in

a prescribed minimum sentence be imposed unless the government makes a motion to sentence below the statutory minimum. The Survey respondents mentioned mandatory-minimum sentences and § 5K1. substantial assistance motions in response to the question regarding whether disparity under the Federal Sentencing Guidelines persists. *See, e.g.*, Anonymous Survey No. 44.

¹⁹⁴ Professors Nagel and Schulhofer noted the sentencing disparity created by mandatory minimum sentences in the Guidelines scheme:

So long as mandatory minimum sentences, and guidelines anchored by mandatory minimums, are tied to the charges for which the defendant is convicted and prosecutors exercise unfettered discretion in charging decisions, the goals of certainty, uniformity, and the reduction of unwarranted disparity are at risk. At a time when the federal caseload is increasingly dominated by drug cases, the problem cannot be ignored. The problem can be managed and circumscribed through a guideline system; it appears insoluble in a system governed by mandatory minimums tied to the charges for which defendants are convicted.

Nagel & Schulhofer, *supra* note 51, at 561.

¹⁹⁵ One survey respondent commented:

However, it must be pointed out that there are certain disparities that cannot be remedied by the guidelines. I refer specifically to the case of mandatory statutory minimums. I was personally involved in a case where a young woman who was barely involved in a drug transaction by virtue of having accompanied her boyfriend to a drop off, received the same mandatory minimum of 10 years as he did. On the other hand, the confidential informant, a big, notorious drug dealer, received no sentence at all.

Anonymous Survey No. 79.

Maria McBride, Chief Probation Officer, Connecticut, shares this distaste for the mandatory minimums, particularly their effect on multiple defendant conspiracy cases. "The *big fish*, who can give substantial assistance because of his or her greater culpability often receives a lesser sentence than a less culpable defendant." Interview with Maria McBride, Chief Probation Officer, Connecticut (July 6, 1993).

the standard PSI is set aside for such factors, accompanied by the caveat that information contained in that section does not necessarily constitute the probation officer's actual recommendation for a departure. This PSI section thereby serves notice on the court and all counsel that the PSI writer is at least aware of the existence of these factors, whether or not they are reflected in the ultimate sentence recommendation. This, in turn, allows the court and advocates to argue for or against the departures based upon these factors. Defense counsel is encouraged to communicate any mitigating factors to the PSI writers for inclusion in the report,¹⁹⁶ but this decision is a strategic one. Although inclusion of these mitigating factors in the PSI report could result in persuading the Probation Office to support a downward departure, inclusion could also detract from the possible sympathetic impact upon the judge if the Probation Office and the prosecutor have ample time to defeat the departure theory. Of course, the PSI writer may simply be neutral regarding the wisdom of the departure theory and remove himself or herself from the debate. The PSI is submitted to the court at least ten days before the sentencing date with copies disclosed to the prosecution and defense. Both advocates can file any objections to the PSI with the Probation Office and the court. The PSI writer considers these objections and then formally responds by rejecting the contentions or modifying the PSI calculations in a supplemental report.

Thus, through the PSI Guidelines assessment and the responses to that assessment filed by the advocates, the sentencing court will be alerted to any possible contested sentencing issues at the sentencing hearing. Since the PSI involves interpretations of Guidelines policies and commentary, the PSI writer plays a critical role in shaping how the court initially views the facts for sentencing purposes.

B. *Attitudes Regarding Downward Departures*

Although Survey respondents were somewhat frustrated that they could not always offer sentencing options that fit the offenders' needs, the overwhelming majority of respondents viewed the PSI as very important in determining the ultimate

¹⁹⁶ See Garoppolo, *supra* note 166, at 302.

sentence imposed; only one respondent viewed it as not important in the sentencing outcome. Respondents also acknowledged that the PSI had a significant effect on a defendant's life after incarceration.

While the amount of initial training time required to learn record-gathering and interviewing skills varied, Survey respondents described the degree of initial training in the area of identification of downward departures as only "moderate" or "somewhat" adequate. Only two respondents felt "thoroughly" prepared through initial training to identify bases of downward departures.¹⁹⁷ Given the focus of *Johnson* upon the "extraordinary" family ties and circumstances that would warrant a court to depart downward, the Survey addressed the respondent's familiarity with offender characteristics which might constitute departure factors. Survey respondents provided noteworthy anecdotal experiences in this downward departure area. Most respondents learned of possible downward departures factors from defense counsel either "often" or "sometimes," whereas not surprisingly they rarely learned of downward departure bases from the government. Sometimes prosecutors did communicate a basis for a downward departure, but those occasions usually related to a defendant's coop-

¹⁹⁷ Respondents also remarked:

"Departures, particularly searching for creative departures was not part of training." Anonymous Survey No. 123. Respondents noted as well that time on the job and additional training has resulted in improved identification skills: "As the PSI writer continues to write PSI's after training, he/she learns through exposure the identification of applicable downward departures." Anonymous Survey No. 35. "Improved in the sense that as more grounds are recognized by the courts, the more options for departures we can suggest." Anonymous Survey No. 78.

Interestingly, when asked to describe the degree to which the Guidelines scheme achieves the stated goal of eliminating unwarranted disparity, few respondents judged the Guidelines more than "moderately successful." The Survey respondents remarked that "guidelines are excellent, the use of § 5K departures create the disparity," another respondent observed: "the judges continue to downwardly depart." One respondent shared the following anecdote: "On a visit to the Sentencing Commission, I asked the same question and their response after five years of Guidelines sentencing was 'We don't know yet.'" The respondent expressed disbelief at this Commission position.

Survey respondents were also asked: "To what degree do you feel plea bargaining practices (e.g., charging decisions, substantial assistance motions by government) in your district create unwarranted sentencing disparity?" Approximately two-thirds of the respondents described the degree as "somewhat to moderately." Approximately one third chose "not at all."

eration.¹⁹⁸ Respondents were asked to give examples from their own experiences for the possible departure categories of "aberrant behavior" and "extraordinary family circumstances." Generally their answers reflected interest in the presence of major health problems in a defendant's family and debilitating events such as "a parent becomes extremely ill and therefore the adult child who has no prior criminal history embarks on a crime spree in order to pay for the parent's medical expenses."¹⁹⁹ Sudden loss of long-term employment coupled with family health crisis was also cited by respondents as a circumstance that might warrant sentencing leniency.²⁰⁰

A defendant's child-rearing responsibilities where no other family member could care for infirm, young or elderly family members was the predominant example of "extraordinary family circumstances."²⁰¹ Some respondents, however, had reservations about applying the "extraordinary family responsibili-

¹⁹⁸ Significantly, a minority of respondents stated that they rarely or never learn of a basis for downward departure from defense counsel; almost half the respondents stated that they had never learned of a downward departure from a case agent.

¹⁹⁹ Respondents stated that they would also consider the impact of incarceration on people close to the defendant. They considered whether the defendant had even been in trouble before. Specific anecdotal cases presented included a "[l]ongtime bank employee with good work record blatantly took cash and drove around the country for about two weeks after her husband left her. She surrendered voluntarily." Anonymous Survey No. 107. Another anecdote described a law-abiding bank teller in her late thirties who became involved with a check-kiting scheme because the family fell behind in its bills due to the erratic manner in which her husband was paid in his business. Anonymous Survey No. 79.

²⁰⁰ "Sudden loss of job" was usually considered important if the offender previously had been "law-abiding." This sudden change in financial security was seen as a credible "trigger" for aberrant behavior among offenders who commit nonviolent property crimes.

²⁰¹ Anecdotal Survey responses included:

1) "The defendant was the sole source of support for a 9-year old nephew . . . [whose] mother died of cancer, his father was uninterested, and his grandparents (The defendant's parents) committed suicide." Anonymous Survey No. 37.

2) "Child with life threatening illness (father not responsible). Defendant uniquely capable (among co-defendants) of making restitution." Anonymous Survey No. 108.

3) "Sudden loss or incapacitation of a family member due to illness, accident, or violence; e.g., a mother of two lost her husband to a sudden illness and was also laid off from her employment. Her mortgage was foreclosed. She was offered the opportunity to smuggle on one occasion." Anonymous Survey No. 107.

4) "Obedient wife (Latin custom outside U.S.) does what her husband demands." Anonymous Survey No. 39.

ties" departure theory. They reported that they would examine the situation very carefully to determine whether there was an "able guardian" available to care for very young or aging dependents. One respondent commented, "Personally, I may bring this fact to the court's attention, however, I feel that the defendants did not consider these factors when committing the crime; should we place more weight on them?"²⁰² Another respondent remarked, "Some consideration is given, however, even in pre-[G]uidelines practice, dependents were not viewed as a reason to 'excuse' the defendant from the personal consequences of his behavior. Appropriate agencies are normally notified by the United States Probation Officer"²⁰³ Similarly, another respondent echoed the belief that social agencies will assist with defendant's very young or elderly dependents:

[I]f the child is very young or if there are elderly parents in our city should not matter. There are numerous social service agencies which can and will provide for the family while the defendant is incarcerated. It is just a matter of how hard the probation officer can/wants to work in order to ascertain the needed information for Federal agencies.²⁰⁴

When asked to what degree being a single parent with minor children would be significant in evaluating a defendant's family responsibilities where the other parent is unwilling or unable to care for the children, the majority of respondents stated that such a fact would be "highly" or "moderately" significant.²⁰⁵ Respondents also expressed the following opinions: "I would consider the welfare of the dependant/minor child, however, there are other means/agencies which deal with this issue. Personally, depending on the individual case, the minor children may be in better hands in such an agency."²⁰⁶

²⁰² Anonymous Survey No. 126.

²⁰³ Anonymous Survey No. 107.

²⁰⁴ Some respondents expressed the belief that the presence of very young or elderly dependents in the defendant's home "was a hardship, but not an extraordinary hardship." Other respondents noted the Guidelines' position: "While under the Guidelines, family responsibility is not *ordinarily* relevant, the key word here is ordinary. There may be extraordinary circumstances which constitute significant factors." Anonymous Survey No. 79.

²⁰⁵ Eight respondents indicated "highly" or "moderately." Seven respondents chose "somewhat significant" as an answer. Three respondents indicated "not at all significant" and two respondents chose "other/explain."

²⁰⁶ Anonymous Survey No. 126.

Another respondent observed, "Naturally, you don't want to send a recovering (abstinent) drug abuser away to prison if she is a single mother of a young 3-11 year old child; if the addict is using drugs, then it may be in the best interest of both parties."²⁰⁷

When asked if it would make a difference if the single parent is a mother or a father, the overwhelming majority of respondents said that it would not make a difference.²⁰⁸ For the majority of the respondents, this was a hypothetical question because they had rarely, if ever, dealt with a single father with dependent children. One respondent, however, had encountered a male grandparent in a kinship foster-care situation. The respondents also reported that it would not make a difference in their evaluation whether both parents were present in the home and the defendant-mother faced incarceration.²⁰⁹ The majority of respondents also stated that they made home visits in connection with their investigation of the defendant's personal history.²¹⁰

When respondents were also asked if there were any aspects of a defendant's personal history that should be considered in the Guidelines scheme, most answered in the negative with the following exceptions: "Most personal history is irrelevant to [G]uidelines computations, however, adequate departures already exist to address serious personal history problems."²¹¹ Those respondents who did believe that some, as yet unused, aspects of personal history should be considered, of-

²⁰⁷ Three respondents indicated that the single parent status was "not at all significant" in their evaluation. Anonymous Surveys Nos. 102, 104 & 134. Another respondent stated that the significance of this factor would "depend[] on how big a departure" was needed. Anonymous Survey No. 125. When asked how interested the average district court judge was in the consequences of parental removal from the home if the defendant parent is incarcerated, most respondents stated "somewhat" concerned or "very dependent" on the particular judge. Only one respondent indicated this fact was "not a consideration" for the average judge. Anonymous Survey No. 104.

²⁰⁸ Respondents remarked, "[t]he impact upon the child is the same, regardless of the sex of the parent," Anonymous Survey No. 39, and "[t]he remaining parent is a 'focus' of the dependent regardless of gender, except in the case of very young ('pre-school') age children," Anonymous Survey No. 107.

²⁰⁹ Sixteen respondents indicated "no difference," while five indicated "some difference."

²¹⁰ Respondents also reported contacting siblings, parents and children of the defendants.

²¹¹ Anonymous Survey No. 35.

ferred "family background/history, education, work/employment history" as examples.²¹² Other respondents addressed the problem with section 5H1 policy statements: "More emphasis and direction should be given regarding extraordinary personal circumstances particularly relating to the person's background or upbringing."²¹³ One respondent challenged the limitation found in section 5H1: "U.S.S.G. [Section] 5H1.12-factors in the upbringing should be considered for offenders in the 18-25 age bracket formerly covered by FCYA."²¹⁴ "Many of the departures listed by the Sentencing Commission as 'not ordinarily relevant' ought to be relevant: [sections] 5H1.3, 5H1.4, 5H1.6, 5H1.11, and successful rehabilitation after the time of the offense which has been upheld is now taking a beating in some districts."²¹⁵ Another respondent observed:

Actually the judges can depart almost any time they wish because the Guidelines give them the authority when circumstances exist of a kind not adequately taken into consideration by the U.S.S.G. Well—that's awfully broad. In reality, the judges don't feel comfortable departing. If the U.S.S.G. wanted the judges to have this broad discretion, then why have such structured guidelines?²¹⁶

Respondents were asked if they had encountered any examples of significant mental or physical disabilities that would warrant a downward departure. Although several respondents remarked that they had never encountered such disabilities, the majority of responses focused on AIDS or HIV-positive situations.²¹⁷ Other comments indicated that cancer, serious cardiac conditions, juvenile (insulin-dependent) diabetes and mental illness²¹⁸ could be, or have been, bases for downward

²¹² Anonymous Survey No. 128.

²¹³ Anonymous Survey No. 37.

²¹⁴ Anonymous Survey No. 107.

²¹⁵ Anonymous Survey No. 97.

²¹⁶ Anonymous Survey No. 120.

²¹⁷ The Survey responses included the following:

- "severe mental deviant behavior which requires hospitalization . . . full blown AIDS—death imminent" (Anonymous Survey No. 39);

- "defendant was HIV positive and extended incarceration would negatively impact upon his health" (Anonymous Survey No. 54);

- "defendant suffering from a terminal illness" (Anonymous Survey No. 108).

²¹⁸ Respondents offered the following examples:

- "[t]he defendant had a history of mental illness. When he took this medication, he was fine. But when he stopped taking his medication, he began committing ridiculous crimes" (Anonymous Survey No. 37);

departures.

The range of Survey responses regarding which offender characteristics and personal circumstances warrant consideration as bases for downward departures highlights the problem inherent in the Guidelines structure. Presentence investigators are themselves unclear as to which factors should be treated as a basis for the downward departure. At the heart of the problem is the difficulty of defining what exactly is "ordinary." The respondents who were able to offer examples of "aberrant" criminal behavior seemed implicitly to presume that these defendants were "acting out" criminally because of the extreme pressure put on them arising out of "extraordinary" misfortune, whether economic, psychological or health-related. Thus, it would appear from the responses that while "ordinary" should encompass the ordinary vicissitudes of life, overwhelming obstacles dramatically change that equation. If some as yet unspecified amount of misfortune is visited upon an "ordinary" individual, and she succumbs to criminality as a response, then it appears that some judicial lenity may be appropriate. A Job-like response is not expected by at least some probation officers as the ordinary reaction to such extraordinary stress. The Guidelines, however, do not address why individuals choose criminality; the Guidelines focus primarily on what form of criminality they choose and on how to ensure that all similarly situated offenders receive like punishment. Such an approach, however, begs the question the sentencing court must address: is the punishment actually the same if the impact of the punishment upon the offender has very different consequences?

Having taken no position in the Guidelines on the purposes of sentencing in general, the Commission leaves to courts and probation officers the task of identifying "atypical" offender situations. The question that remains unanswered by this approach is whether the reason an offender resorts to crime in some way lessens or enhances *culpability* which, after all, is

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- "defendant alcoholic/professional gambler/psychiatrically impaired/long time participant in psychotherapy/incorrect understanding of the law (lesser harms) intent of U.S.S.G" (Anonymous Survey No. 108);
 - "Post-traumatic stress syndrome" (Anonymous Survey No. 107);
 - "[i]ndividuals with extensive psychiatric history and several cases with Vietnam veterans who suffer post-war effects" (Anonymous Survey No. 78).

the trait the Guidelines seek to measure. The Survey respondents' anecdotal examples seem consistent with the premise that culpability is somehow aggravated or mitigated. The sentencing goal of deterrence is arguably affected by the offender's motivation in resorting to crime. For the offender who resorts to crime due to aberrant circumstances, crime is "out of character," and, as a result, there is less probability of deterring such an individual. The offender's criminal act is an outgrowth of unusual pressure or stress, not greed or ennui; the crime appears to be a response to an unusual situation, not a character flaw. The Survey respondents suggest that while the probation investigators expect that "ordinary" mature people will withstand "ordinary" misfortune, they recognize the fragility of the human spirit when it is overwhelmed.

It is significant that a common example from the Survey responses of the "out-of-the-ordinary" pressure imposed by modern living upon ordinary individuals is the current health care crisis. Survey respondents mirrored the greater society's recognition of the crippling social, financial and emotional burden that the American health care situation creates. The Survey responses suggest that an offender's decision to commit nonviolent crimes in such a situation may be understandable, although not excusable, and therefore may be worthy of downward departure consideration. The probation officers who responded revealed a sensitivity to the broad range of factors in modern living that temporarily could alter a law-abiding person's judgment, causing such a person to commit crimes. With the widespread occurrence of AIDS, it came as little surprise to see Survey respondents from at least two districts question the wisdom of incarcerating someone whose fate is sealed by a source other than the sentencing judge. Some other health considerations taken into account by respondents concern mental or emotional health problems that are both significant and recognizable: "post-traumatic stress syndrome," often suffered by Vietnam veterans; "extensive psychiatric history;" and addictions to drugs, alcohol or gambling that rise to the level of extenuating circumstances that sentencing court should consider in arriving at a sentence.

The responses also make clear that identification of downward departures is a value-laden experience. Presentence investigators' perceptions about what is ordinary, what is toler-

able misfortune for a mature adult to handle and what is "extraordinary" will control the way facts are presented to a sentencing court. Disapproval of, or empathy for, the offenders' predicament will enter the assessment process. Moreover, there is no agreement other than at the extreme end of the spectrum as to what constitutes "extraordinary" circumstances. Case law concluding that a defendant's situation was extraordinary can assist the evaluative process, but only if a sufficient description is given. A case in point is *United States v. Johnson*.²¹⁹ While many respondents were aware that extraordinary child-care responsibilities could constitute grounds for a downward departure, there was some resistance to this basis for departure, and arguably a presentence investigator holding such a point of view would set an exceptionally high standard for the type of circumstances that should be viewed as extraordinary. Cultural and gender factors may also interfere with the downward departure evaluative process. A male defendant may not emphasize or even mention the degree to which he functions as the "care-giver" in the family unit. Instead, he may describe himself in the more traditional role of "breadwinner," which is less compelling rhetorically. While the defendants in *Johnson*²²⁰ and *United States v. Alba*²²¹ were working parents or "breadwinners," they were described in their extensive care-giving roles as well. The district courts, presented with these facts, found each defendant was the linchpin of the family unit. If a defendant provides economic support to the family, such a circumstance, standing alone, would not appear to be compelling enough for a departure. It remains to be seen as well whether a defendant who does not live with his or her children but provides regular emotional support or guidance could even qualify for a section 5H1.6 downward departure. For now, though, it appears that the only acceptable family model is the parent-child, close-knit living arrangement.²²² Yet if the PSI writer does not perceive a family situ-

²¹⁹ 964 F.2d 124 (2d Cir. 1992).

²²⁰ *Id.*

²²¹ 933 F.2d 1117 (2d Cir. 1991).

²²² *United States v. Scamo*, 997 F.2d 970 (1st Cir. 1993), suggests that the emphasis may very well be shifting from the stricter parent-child model to the "extended care-giver" or emotional linchpin model. Defendant Scamo was living with his girlfriend and her two children. Although Scamo was neither the natural

ation as one in which the defendant is a readily identifiable care-giver, and the defendant does not report himself to be one, the PSI writer may well overlook eligibility of the defendant—especially the male defendant—for a downward departure under section 5H1.6. Thus, even in the Second Circuit there is no safeguard to ensure that all potentially eligible defendants will be scrutinized by the same standard to qualify for the “family responsibility” downward departure.²²³

CONCLUSION

In *United States v. Johnson*, the Second Circuit reached a predictable result in view of that court's approach to the Guidelines. Its holding nonetheless reinforces an important point in the evolving Second Circuit downward-departure jurisprudence. District courts have received a clear signal that the

father, nor the legal stepfather to the children, he developed a “special and crucially important relationship with the twelve year old son, James.” *Id.* at 72. James had emotional and psychological problems sufficiently severe to warrant extensive psychological counseling. Two letters from the boy's psychologist documented the improvement in the boy and attributed some of this improvement to Sclamo in his voluntary role as stepfather. The psychologist also warned that Sclamo's “removal from the family could rob all [family] members of a critical source of affection and positive care and clinically could trigger a major regression in James' stability and emotional development.” *Id.*

The Court found it significant that the psychologist's reports were “based on a long history of personal observation, interaction, and treatment not only of James but of the defendant as well . . .” which long predated the defendant's present circumstances. *Sclamo*, 997 F.2d at 974. The First Circuit agreed with the “district court's conclusion that the psychological treatment and observation of James were not contrived or fabricated to assist Sclamo.” *Id.* Relying on *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993), *United States v. Peña*, 930 F.2d 1486, 1495 (10th Cir. 1991) and *United States v. Johnson*, 964 F.2d 124, 129 (2d Cir. 1992), the court saw a number of special factors that “transform[ed] Sclamo's situation into an extraordinary one meriting the downward departure.” *Sclamo*, 997 F.2d at 974. Thus, *Sclamo*, along with *Johnson*, *Peña* and *Rivera*, strongly suggest that while “breadwinning” does not necessarily merit a downward departure, care-giving might.

²²³ Some supervising probation officers make a special point of affirmatively asking if a basis for a downward departure is present. Maria McBride, Chief Deputy Probation Officer Connecticut in a June 1993 phone interview, stated that in Connecticut “[w]e insist officers find a basis for departures. If there are no possible reasons for a departure on the PSI, I ask, ‘why not?’” Telephone Interview with Maria McBride, Chief Deputy Probation Officer in Connecticut (June 1993). Ms. McBride views part of the probation officers' job as providing “reasons for judges.” Defendants are on more equal footing if the probation officers take it upon themselves to investigate affirmatively a basis for downward departures.

"coast is clear" in the Second Circuit for the use of certain "extraordinary" offender characteristics as bases of downward departures, even when the "extraordinary" nature of the offender's circumstances is seen primarily in the eyes of the district court. The Second Circuit made it clear that it would not thwart a district court's efforts to perform a task that it is much better suited than the Commission to perform—that is, select the appropriate sentence for the particular offender standing before it. Therefore, the Second Circuit chose to second-guess the Commission's Guidelines rather than the district court's perceptions of the extraordinary nature of an offender's circumstances.

Although the Commission ostensibly welcomes the empirical data generated by judicial downward departure patterns, few circuit courts until *Johnson* had allowed district courts to deviate from the Guidelines as readily as the Second Circuit has. While nominally adhering to the Guidelines' sentencing mechanism, the Second Circuit has been quick to conclude that the Commission had not adequately considered a particular offender characteristic and, therefore, that the district court should not feel constrained by the Guidelines when factoring in that circumstance for sentencing purposes. With unwavering confidence, the Second Circuit has established an outpost on the Guidelines downward-departure frontier and has broadcast its messages back to the Commission as requested. It appears, however, that the messages have been garbled in transmission because the Commission viewed *Johnson* as a case of "atypical circumstances involving offender characteristics." Yet if *Johnson* is treated as an "atypical" case, then its message concerning the importance of treating the nonviolent offender's family responsibilities with compassion will not impact the Commission's data collection and evaluation as it should.

The precedent established in the 1992 *Johnson* case has caused some apparent rethinking of § 5H1.6 policy statement in other circuits. Both the Third Circuit in *United States v. Gaskill*²²⁴ and the First Circuit in *United States v. Rivera*²²⁵

²²⁴ 991 F.2d 82 (3d Cir. 1993).

²²⁵ Both *Rivera* and *Selamo* owe a debt to *Johnson*'s ground-breaking effort to broaden the court's perspective in considering those, other than just the defendant, who will be irrevocably affected by the sentence.

have retreated from their previous disapproving interpretation of § 5H1.6 downward departures based upon family responsibilities and instead have adopted a philosophical approach in greater alignment with the Second Circuit's position in *Johnson*.²²⁶ The First Circuit reflected this philosophical change in *United States v. Rivera* when it observed:

It may not be unusual, for example, to find that a convicted drug offender is a single mother with family responsibilities, but at some point, the nature and magnitude of family responsibilities (many children? with handicaps? no money? no place for children to go?) may transform the "ordinary" case of such circumstances into a case that is not at all ordinary.²²⁷

While expansion of the possible factors that may constitute "not ordinary" family responsibilities is encouraging, the federal judiciary must continue to find principled ways to assess "extraordinary" circumstances. Factual detail supporting the downward departure conclusion reached by a court should be clear in the record so that future PSI writers, defense counsel and judges will be able to identify "extraordinary" personal history factors that should bear upon the sentencing outcome. Circuit courts should be deferential to a district court's downward departure findings and remand for additional findings but should not reverse hastily if the record does not contain sufficient information to explain the sentencing court's § 5H1.6 downward departure decision. The message sent by the Second Circuit in *Johnson* will continue to reverberate throughout the neighboring circuits and will make attainment of the "extraordinary" family responsibilities downward departure easier for the deserving nonviolent offender in the Second Circuit.

²²⁶ 964 F.2d at 124.

²²⁷ 994 F.2d 942, 948 (1st Cir. 1993). One month following *Rivera* the first Circuit, in *United States v. Sclamo*, 997 F.2d 970 (1st Cir. 1993), found emotional and psychological care-giving by a non-biological parent to be an acceptable basis for a downward departure. The court considered the potential destruction, both emotionally and psychologically, of a twelve-year-old boy if the defendant were to be removed from the home for an extended period of time.