1990

The Federal Sentencing Guidelines: Miracle Cure for Sentencing Disparity

Kathryn A. Walton
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Criminal Procedure Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol79/iss2/8

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
The Federal Sentencing Guidelines: Miracle Cure for Sentencing Disparity (Caution: Apply Only as Directed)

I. INTRODUCTION

[Judges vary widely in their explicit views and "principles" affecting sentencing; they vary, too, in the accidents of birth and biography generating the guilts, the fears, and the rages that affect almost all of us at times and in ways we often cannot know. It is unnecessary, though not irrelevant, to frighten ourselves with the statistical probability and direct personal knowledge that some percentage of judges may be psychotic. It is disturbing enough that a charged encounter like the sentencing proceeding, should turn so arbitrarily upon the variegated passions and prejudices of individual judges.]

In an effort to remedy the previously non-directed criminal sentencing process, the Comprehensive Crime Control Act of 1984 empowered the United States Sentencing Commission to create the Federal Sentencing Guidelines, which became effective November 1, 1987. The Act called for guidelines that would fairly and effectively advance the basic purposes of criminal punishment: deterring

---

1 Frankel, Lawlessness in Sentencing, 41 U. CIN. L. Rev. 1, 8 (1972) (discussing the lack of guidance regarding the weight given factors in sentencing decisions).
2 See generally id.
4 Congress created the United States Sentencing Commission and instructed the members to write the Sentencing Guidelines by April, 1987. The guidelines were to take effect six months later unless Congress passed a contrary law. 28 U.S.C. §§ 991-998 (1990). The president appoints the Commission’s seven voting members with the advice and consent of the Senate. At least three of the Commission’s voting members must be judges appointed under article III of the United States Constitution. The two non-voting, ex officio members are the Attorney General (or his authorized representative) and the chairperson of the United States Parole Commission. 28 U.S.C. § 991(a) (1990).
crime, incapacitating offenders, providing just punishment, and rehabilitating offenders.\(^6\)

The United States Sentencing Commission, composed of seven voting and two nonvoting, \textit{ex officio} members,\(^7\) took on the task of developing Sentencing Guidelines aimed at setting out appropriate sentences for offenders convicted of federal crimes.\(^8\)

The completion and implementation of the Sentencing Guidelines undoubtedly is commendable, however, it appears that the Commission is just beginning its trek toward the construction of a fair, effective and workable sentencing system.\(^9\) The implementation and revision of the Sentencing Guidelines will not be a smooth and easy ride; rather, the unfavorable conditions that are an inherent facet of \textit{terra incognito} inevitably will arise.\(^10\)

The Supreme Court, recognizing the confusion that the guidelines sparked among the federal district courts, granted certiorari before judgment by the Eighth Circuit in \textit{United States v. Mistretta}.\(^11\) The Court disposed of two attacks on the constitutionality of the guidelines. First, the Court found no excessive delegation of legislative power under the "intelligible principle" test\(^12\) because the "delegation of authority to the Sentencing Commission [is] sufficiently specific and detailed to meet constitutional require-

---


\(^7\) See supra note 4 and accompanying text.


\(^9\) The guidelines are effective, and their constitutionality was upheld in \textit{United States v. Mistretta}, U.S., 109 S. Ct. 647, 675 (1989). However, some case law suggests that the guidelines may present a new issue for convicted offenders on appeal. See, e.g., \textit{United States v. DeLuna-Trujillo}, 866 F.2d 122 (5th Cir. 1989); \textit{United States v. Spraggins}, 868 F.2d 1541 (11th Cir. 1989). For a discussion of the application of the guidelines and the possibility of appeal, see \textit{infra} notes 60-110 and accompanying text.

\(^10\) The Commission emphasizes that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines by submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts throughout the nation.


\(^11\) \textit{Mistretta}, U.S., 109 S. Ct. at 647 (delegation of powers to the Sentencing Commission was not a violation of constitutionally mandated separation of powers).

\(^12\) J. W Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (The intelligible principle test is stated as follows: "If Congress shall lay down by legislative act an intelligible principle to which the person or body is directed to conform, such legislative action is not a forbidden delegation of legislative power.").
ments.”

Second, the Court decided that no violation of separation of powers existed because the Constitution does not prohibit Congress from procuring the wisdom and experience of the judiciary in an effort to create policy that is uniquely within the ambit of the Judicial Branch. After Mistretta, several federal district courts nevertheless have held the Sentencing Guidelines unconstitutional. In United States v. Martinez-Ortega, the district court held the Sentencing Guidelines unconstitutional, stating that the guidelines deny due process by preventing offenders from receiving individualized sentences. This and similar cases illustrate that the Mistretta decision answered only part of the question concerning the constitutionality of the guidelines.

Post-Mistretta attacks on the guidelines have been aimed largely at their application in a particular case or the reasonableness of

---

14 Id. at 675.
17 Mistretta did not address a due process argument, hence the district courts’ findings that the guidelines are unconstitutional as violating due process do not conflict with Mistretta’s rationale.
19 See, e.g., United States v. Bermingham, 855 F.2d 925 (2d Cir. 1988) (defendant, convicted for entering the United States after a previous deportation, argued for a favorable resolution of which sentencing guidelines range applied to the offense); United States v. Betancourt, 868 F.2d ’1410 (5th Cir. 1989) (defendant, convicted of conspiring to transport stolen vehicles in interstate commerce, was not a minor or minimal participant for purposes of Federal Sentencing Guidelines); United States v. Franco-Torres, 869 F.2d 797 (5th Cir. 1989) (defendants appealed finding that throwing away gun constituted obstruction of justice for purposes of increasing offense level under Sentencing Guidelines). See FED. R. CRIM. P. 35:

(a) Correction of Sentence on Remand. The court shall correct a sentence that is determined on appeal under 18 U.S.C. § 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court—

(1) for imposition of a sentence in accord with the findings of the court of appeals; or

(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

The standard of review for incorrect application requires that the sentence was clearly
the sentence. Although the guidelines provide basic application instructions, incorrect application is possible. Federal Rule of Criminal Procedure 35(a) provides for resentencing upon "incorrect application" of the Guidelines or "unreasonable" departure from the Guidelines. Ideally, the Sentencing Guideline Manual represents a "recipe" for concocting the sentence an offender will serve. However, the new sentencing law allows for some judicial discretion; therefore, the sentence an offender receives may not be the same among jurisdictions.

This Note focuses on the application of the guidelines and provides specific examples for illustrative purposes. The sections of the guidelines that are considered in all cases regardless of the offense, such as substantial assistance, acceptance of responsibility, criminal history, and general departure provisions, are emphasized in an effort to reveal the magnitude of "leftovers" from the old sentencing system. These "leftovers" provide dangerous weaponry with which one may attack and possibly defeat the basic congressional objectives of the Sentencing Guidelines.

Problems with the old, unstructured sentencing system revolved mainly around two concepts: disparity in sentencing and dishonesty in sentencing. Under the prior system, similar offenders could receive grossly disparate sentences for similar conduct. For example, "punishments for identical cases could range from three years to twenty years imprisonment." Congress sought uniformity of sentencing in developing the guidelines. Congress also planned to alleviate some of the uncertainty in sentencing by calling for honesty in sentencing. Under the old system, the possibility of parole acted as a "wild card" in determining the actual time an offender would serve because early release by the parole commission was erroneous; however, the standard for review of a departure asks only whether the departure was reasonable. 18 U.S.C. § 3742(d)(3).

"likely but not inevitable." Under the new guidelines, uncertainty no longer exists because the possibility of parole is eliminated; each offender serves his entire sentence.

Following the introduction, part two of this Note discusses the foundation for the guidelines, including the basic goals Congress sought to achieve upon enacting the new sentencing law. Part three provides an explanation of how the guidelines work in application, walking the reader through the application instructions. Part four critically examines the current case law, focusing on departures based on the criminal history category and the substantial assistance to authorities category. Part five analyzes the overwhelming possibilities the guidelines present for manipulation, as well as the implications thereof. Finally, this Note concludes that the Guidelines are far from polished, but with careful application and a conscious regard of congressional objectives by the sentencing courts, the guidelines are the beginning of a fair and efficient federal sentencing system.

II. BASIC FOUNDATION FOR FORMULATING THE NEW SENTENCING SYSTEM

A. Congressional Objectives in Enacting the New Sentencing Law

Most agree that the old federal sentencing process lacked structure and form. Many believed, however, that a structured sentencing system would cause conflicts as well. In analyzing the old sentencing system, Congress used three main areas as focal points for creating the new sentencing law Congress focused on honesty in sentencing, uniformity in sentencing, and proportionality in sentencing to achieve the goal of increasing the criminal justice

30 Breyer, supra note 28, at 4.
31 See infra notes 37-59 and accompanying text.
32 See infra notes 60-110 and accompanying text.
35 See infra notes 171-216 and accompanying text.
36 See infra notes 217-24 and accompanying text.
system's ability to reduce crime through fair and effective means.38
Congress sought to alleviate much of the uncertainty of sentencing under the old law by focusing on "honesty." 39

Congress meant to end the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him after four. Since release by the Parole Commission was likely but not inevitable, this system sometimes fooled the judges, sometimes disappointed the offender, and often misled the public. Congress responded by abolishing parole.40

The abolition of parole provided the sentencing system with "honesty" because all sentences under the new law are determinate—offenders serve the sentence handed down by the court.42

The second objective Congress sought is uniformity.43 Uniformity is a critical factor in fair sentencing because it provides consistency,44 predictability,45 and public respect.46 Uniformity narrows the gap in sentences imposed by different judges for similar criminal conduct by similar offenders.47

Proportionality in sentencing, i.e., different sentences for criminal conduct of different severity, is Congress's third objective.48

40 Breyer, supra note 28, at 4.
41 Under the old law, sentencing was indeterminate, and an offender could never be sure how much time he would spend incarcerated. E.g., United States v. Addonizio, 442 U.S. 178, 188-90 (1979) (judge cannot predict when offender will be released, Parole Commission is in the best position to determine release date); see also note 32 and accompanying text.
42 See 18 U.S.C. § 3624(b) (1990). The offender serves the entire sentence he receives with the exception of the possibility of 54 days of "good time" per year after the first year. Id.
(a) Factors to be considered in imposing a sentence
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. See also Frankel, supra note 1, 15-17 (efforts toward reform have been directed at improving judicial competence in sentencing).
44 The old law caused wide disparity among different judges in treating similar cases. Breyer, supra note 28, at 5 n.26. "The region in which the defendant is convicted is likely to change the length of time served from approximately six months more if one is sentenced in the South to twelve months less if one is sentenced in Central California." Id.
45 Robinson, supra note 37, at 8 and n.34 (stating that sentences must be predictable to enhance deterrence).
46 Id. at 8-10.
47 See supra notes 28-29.
At first glance, uniformity and proportionality appear to be logically interwoven. In reality, however, tension exists between the two objectives making it difficult simultaneously to achieve both goals. In order to perfect uniformity, the criminal justice system would have to be based on broad offense categories. For example, robbery might be a category and all offenders would serve five years. On the other hand, to perfect proportionality, categories would be eliminated, and each offender's sentence would be tailor-made. In attempting to achieve uniformity and proportionality, the Commission compromised, resulting in integration of both goals but perfection of neither goal.

In the end, there is no completely satisfying solution to this practical stalemate. The Commission has had to simply balance the comparative virtues and vices of broad, simple, categorization [uniformity] and detailed, complex subcategorization [proportionality], and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any ultimate system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

B. Real Offense v Charge Offense System

The first step for the Commission was to decide whether to base the guidelines on "real offense" sentencing or "charge offense" sentencing. "Real offense" sentencing determines the sentence by the conduct of the defendant, "regardless of the charges for which he was indicted or convicted." All identifiable conduct is considered with real offense sentencing; the conduct does not have to satisfy the statutory elements of a crime. In contrast, "charge offense" sentencing examines "the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted." Charge offense sentencing overlooks conduct that is not a statutory element of the offenses for which the defendant was convicted.

---

49 Robinson, supra note 37, at 9 ("The corollary to treating meaningfully different cases differently is treating similar cases similarly. This corollary is not only logical but also is a goal founded in the purposes of sentencing."). But see 18 U.S.C.A. app. 4 (West Supp. 1990).


51 Id. A pure real offense system sentences on the basis of the identifiable conduct. A pure charge offense system overlooks some conduct that does not constitute a statutory element of the offenses for which the defendant was convicted.

52 Id.
offense. At the outset, the Commission sought to develop a real offense system. Practical considerations forced the Commission to abandon the effort to create a pure real offense system. A pure real offense system would have "required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements." Based on these concerns, the Commission decided that a fair and efficient pure or modified real offense system could not be devised, and turned to a "charge offense" system.

Although the Commission turned away from a real offense system, the charge offense system is not pure. It includes some non-statutory, "real" elements, such as the defendant's role in the offense and some victim-related adjustments. The Commission commented that, in the federal criminal system, the difference between a real and a charge offense system is not critically significant because "the conduct that an indictment charges approximates the real and relevant conduct in which the offender actually engaged."

The ultimate approach necessarily intermingles elements of a charge offense system and a real offense system. The Commission noted that there would be few instances that compel a court to examine "particular real facts that will make a difference to the sentence." The Commission further commented that "a sentencing court may control any inappropriate manipulation of the indictment through use of its power to depart from the specific guideline sentence."

---

53 Id., see Robinson, supra note 37, at 11, where the author states the following: [A] comprehensive sentencing system may reduce the number of guilty pleas if it is a "real offense" sentencing system. Unless it provides some explicit benefit for a guilty plea, a real offense system may reduce the incentive to plead guilty. Even a slight reduction in the percentage of pleas would cause a significant increase in the percentage of trials.


55 Id. First, the Commission wrote guidelines that are "descriptive of generic conduct" rather than limited strictly to statutory language. Second, through "specific offense characteristics and adjustments," the guidelines necessarily recognize some real offense elements, such as role in the offense, the presence of a gun, or the amount of money actually taken.

56 Id. But see Schulhofer, Due Process of Sentencing, 128 U. Pa. L. Rev 733, 757 (commenting that "real offense" sentencing would serve as a control on prosecutorial sentencing power).


58 Id.

59 Id. If a court departs, it follows that "particular real facts" must be considered.
III. APPLICATION OF THE SENTENCING GUIDELINES

A. General Application Instructions

The Sentencing Guidelines Manual includes "Application Instructions" that provide step-by-step directions to assist the Court in reaching an appropriate sentence. It may appear that determining a guideline range would be a simple mechanical act; however, Judge Carl Rubin commented that the new sentencing law offers "guidelines, not a computer exercise," implying that the sentencing process is tedious and continues to require discretion.

The application instructions are set out in the guidelines following the introduction. Although the instructions are somewhat mundane, their importance is substantial as they prevent backsliding into the old system, which was riddled with sentencing disparity. Specifically, the Commission's three goals of honesty, uniformity, and proportionality could be sacrificed inadvertently by judges who choose to deviate from the guidelines, despite the instructions. For example, Judge J Owen Forrester, speaking about the effect of the guidelines on judicial discretion, opined

I am persuaded there is no way to limit discretion and accommodate all of the interests our society wants. You can't

Apparently, the Commission did not perceive vast use of the departure power; however, case law suggests otherwise. See infra notes 118-70 and accompanying text.


62 Chapter Two of the Act includes the guideline section. The guideline section in Chapter Two is determined by reference to § 1B1.2, Applicable Guidelines, which sets out the method to apply the guidelines to all offenses. The base offense level, given under the appropriate statute of conviction, is adjusted by any applicable specific offense characteristics. Adjustments from Chapter Three are then applied. For example, an adjustment relating to the victim's role may be made: If there are multiple counts, the above steps are repeated for each count. Chapter Three aids in grouping the counts and adjusting the offense level. The defendant may or may not get an Acceptance of Responsibility adjustment. The result, at this point, is the total offense level. Next, Chapter Four specifies categories and adjustments for criminal history. The total offense level and the criminal history category provide the guideline range through the Sentencing Table in Chapter Five. Sentencing requirements and options, such as probation, are listed in Chapter Five to determine the particular guideline range. Finally, Chapter Five lists Specific Offender Characteristics, Departures, and policy statements that might help in imposing sentence.
stay within the guidelines and manipulate them that much. But you can, I think, in the average case probably double or triple the sentence if you choose to.63

Sentencing Commission member Paul Robinson, in contrast, alluded to the use of a computer to aid in the technical procedural requirements of sentencing: “Indeed a sentencing system may avoid most complexity in application by utilizing a microcomputer software program that asks a series of questions, performs the necessary calculations, and prints a report that displays the resulting sentence options and how they were determined.”64

The illusion of a simple formula to determine a particular offender’s sentence is quickly dispelled by the technical procedural requirements; the basic offense level, set out by the statute under which a defendant is convicted, is the only step that possibly could be viewed as simplistic and analogous to a computer exercise.65

B. Procedural Analysis of the Application Instructions

Examples of the guidelines’ application provide a basic understanding of how the guidelines work.66 Each offense determines a base offense level, which is then adjusted according to the specific offense characteristics set out in the offense guideline.67 For example, the offense of “robbery”68 has a designated base offense level of 20.69 Thereafter, if the dollar amount of the loss exceeds $10,000, the level is increased from one to seven points depending

63 Fulton County Daily Report, Nov. 18, 1988, at 1, 10-14, col. 1 (emphasis added).
64 Robinson, supra note 37, at 11. Robinson concedes that use of a computer necessarily would be limited to avoid “dehumanization” of the process.
As a general rule, the court is to apply the guideline covering the offense conduct most applicable to the offense of conviction. However, there is a limited exception to this general rule. Where a stipulation as part of a plea of guilty or nolo contendere specifically establishes facts that prove a more serious offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established.
66 It would be an exercise in futility to talk abstractly of guideline application. Therefore, examples of application to specific offenses are necessary. Even the examples set forth are in no way certain due to specific factors perhaps present in one case but absent in another. Factors relevant to particular cases as well as differences among cases as a result of different courts applying the guidelines are discussed infra notes 112-216 and accompanying text.
68 See id. at § 2B3.1.
69 Id. at § 2B3.1(a).
on the amount of the loss. The next step under specific offense characteristics of robbery requires the court to determine whether (1) the property involved was that of a financial institution or a post office, (2) a firearm was involved, (3) the victim sustained bodily injury, (4) a person was either abducted or restrained to facilitate commission of the offense or to facilitate escape, and (5) the object of the conduct was to obtain a firearm, destructive device, or controlled substance. Any or all of these considerations could substantially increase the base offense level.

Next, in all offenses, the court must look to Chapter Three, Part A—Victim Related Adjustments, Part B—Role in the Offense, and Part C—Obstruction of Proceedings. For example, in the robbery illustration, if the defendant knew or should have known of the victim’s vulnerability “due to age, physical or mental condition,” then a two-level increase occurs under victim-related adjustments.

The court next examines the defendant’s role in the offense. This part provides for adjustment based on the “size of a criminal organization” and the defendant’s degree of responsibility in committing the offense. Additionally, this section provides a downward adjustment for a “defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.” A defendant “recruited as a courier for a single smuggling transaction involving a small amount of drugs” is intended to receive a downward adjustment of two to four levels, reflecting conduct of lesser culpability. Alternatively, if a defendant is determined to be a “leader” of a criminal activity, his offense level is increased by four levels.

The commentary indicates when a downward adjustment is intended. It is not clear whether the court must give an appro-

---

70 Id. at § 2B3.1(b)(6).
71 Id. at § 2B3.1(b)(2)-(5).
73 Id. at §§ 3B1.1-3B1.4.
74 Id. at § 3C1.1.
75 See id. at § 3A1.1 and commentary (A two-level increase for victim vulnerability would occur “in a robbery where the defendant selected a handicapped victim.”).
77 Id. at § 3B1.2 (emphasis added).
78 Id. at § 3B1.1(a) and commentary (distinguishing leadership from mere management).
79 Id.
80 Id. at § 3B1.2 and comment 2.
81 Id.
priate offender a downward adjustment when the circumstances necessary for the reduction are present. The court should automatically give the reduction to offenders who satisfy section 3B1.2, Mitigating Role; this section is not intended to be discretionary. The comments to this section note that this reduction will be used "infrequently," because it is unlikely that many offenders will satisfy the section, but not because judges can choose when to grant the reduction.

Finally, Part C, Obstruction of Proceedings, provides for sentence enhancement if the defendant "willfully interfere[s]" with criminal proceedings. The comments note conduct that may warrant an increase for obstruction, such as destroying material evidence and lying on the stand. The Commission further directs that in applying this section "suspect testimony and statements should be evaluated in a light most favorable to the defendant."

The next procedure in the application instructions requires the court to repeat steps A through C if there are multiple counts of conviction. This means the court will determine the correct guideline section, base offense level, and adjustments. Part D of Chapter Three explains how multiple counts are grouped and how to adjust the offense level accordingly. The Introductory Commentary of Part D—Multiple Counts supplies an explanation of the Commission's intentions regarding multiple counts:

This part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted.

The rules in this part seek to provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine how much to increase the offense level. The amount of the additional punishment declines as the number of additional of-

---

Id.
Id. at comment 1(a).
Id. at comment 1(c).
Id. at comment 2.
See supra notes 66-87 and accompanying text.
See id., Introductory Commentary.
fenses increases.

Some offenses that may be charged in multiple-count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range.\textsuperscript{92}

Section 3D1.1 lists the following as the procedure for determining an offender's offense level on multiple counts:

(a) Group the counts resulting in convictions into distinct Groups of Closely-Related Counts ("Groups") by applying the rules specified in § 3D1.2; (b) determine the offense level applicable to each group by applying the rules specified in 3D1.3; and (c) determine the combined offense level applicable to all Groups taken together by applying the rules specified in § 3D1.4.\textsuperscript{93}

The Commission intended that "[a]ll counts involving substantially the same harm"\textsuperscript{94} be grouped together in accordance with section 3D1.2. This section sets out when counts involve substantially the same harm. Counts should be grouped together, for example, "when counts involve the same victim and the same act or transaction"\textsuperscript{95} and "when counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. . ."\textsuperscript{96}

Illustrative is a conviction for one count of assault with intent to commit murder\textsuperscript{97} and one count of assault with a dangerous weapon\textsuperscript{98} for attacking one victim on a single occasion. Section 3D1.2 provides that these counts must be grouped together because they involve the same victim and the same act or transaction.\textsuperscript{99} Counts may involve the same victim but not be part of the same act or transaction and, therefore, they are not grouped together under section 3D1.2(a). Suppose a defendant is convicted of two counts of postal burglary for burglarizing the same post office on two different occasions; since the defendant committed the offense

\textsuperscript{93} Id. at § 3D1.1.
\textsuperscript{94} Id. at § 3D1.2.
\textsuperscript{95} Id. at § 3D1.2(a).
\textsuperscript{96} Id. at § 3D1.2(b).
\textsuperscript{98} Id. at § 113(c).
on two different occasions, the offenses are not grouped together.

After the court determines whether counts are grouped together pursuant to section 3D1.2, the court then determines the offense level applicable to each group of Closely-Related Counts and finally determines the combined offense level. The resulting combined offense level is the level that the court utilizes in determining the appropriate punishment. The combined offense level, however, is not the ultimate basis for punishment: "[t]he combined offense level is subject to adjustments from Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, Part B (Career Offenders and Criminal Livelihood)."

At this point, the court is in the final stages of imposing a sentence. After the court determines whether the final adjustments apply, it may consider policy statements or commentary in the guidelines that warrant further manipulation of the sentence. At this stage, the offender may receive a reduction in sentence, an increase in sentence, or both, depending on the relevant facts of a particular case.

---

100 Id. at § 3D1.3.
101 Id. at § 3D1.3.
102 Id. at § 3D1.5.
103 Id. and Commentary.
104 18 U.S.C.A. app. 4, § 3E1.1 (West Supp. 1990). The application of Chapter Three is discussed more thoroughly infra notes 177-95, and Chapter Four, Part B is discussed infra notes 127-51.
105 18 U.S.C.A. app. 4, §§ 5H1.1-5H1.10 (West Supp. 1990) (consideration of certain specific offender characteristics, if relevant to "the nature, extent, place of service or other incidents of an appropriate sentence"); see also 28 U.S.C. § 994(d); 18 U.S.C.A. app. 4, §§ 5K1.1, 5K1.2, 5K2.0-5K2.15 (West Supp. 1990). Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guideline. The court must articulate the reasons for a departure, and there must be an "aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b)-(c).
107 A defendant's sentence may be reduced under 18 U.S.C.A. app. 4, § 5K1.1, Substantial Assistance to Authorities, discussed infra notes 152-70 and accompanying text.
108 A defendant's sentence may be increased substantially as a result of his criminal history. 18 U.S.C.A. app. 4, § 4Al.1 (West Supp. 1990). Furthermore, if the defendant is determined to be a "career offender," his increase is 12 or more points which greatly impacts his sentence. Id. at § 4B1.1; see also Id. at § 5, Sentencing Table.
109 Adjustments upward or downward from the total sentence level are independent of each other. See supra notes 107 and 108.
110 The final stage of determining an appropriate sentence considers particular facts of an offender's conduct. Congress directed the Commission to consider relevant factors in determining a sentence. Additionally, § 5K2.0 allows departure when the Commission has
The last phase of the sentencing procedure is the most amorphous. For this reason, it is no longer helpful to look at the application instructions and bare guideline sections. Current case-law dealing with the last phase is discussed and analyzed in the following section.

IV CURRENT CASELAW: RESULTS UNDER THE NEW SENTENCING LAW

A. Does the New Sentencing Law Meet Congressional Goals?

One federal judge commented that he thought the guidelines were unnecessary, but stated "they are here now, so prosecutors, defense attorneys and judges should work together to make them somewhat predictable, but anything humans do is not going to be totally equal." "Predictability" may be one of the largest problems within the guidelines; it may also be a problem that is often ignored. The potential lack of predictability undermines uniformity, one of the Commission's most desired objectives.

Before the new sentencing law, an offender's sentence could vary based on an intangible factor such as geographical location.
"Intangibles" that affected sentencing before the guidelines were enacted still haunt the sentencing process under the new sentencing law. The Commission instructed sentencing courts "to treat each guideline as carving out a 'heartland', a set of typical cases embodying the conduct that each guideline describes." By allowing the sentencing courts to carve the "heartland," the Commission gave the courts discretion without guidance—resulting in continual uncertainty and non-uniformity in sentencing.

B. Departures from the Sentencing Guidelines

This section focuses on departures from the Sentencing Guidelines, with special emphasis on departures based on Chapter Four, Criminal History, and on Chapter Five, Substantial Assistance to Authorities. The Policy Statement of Guideline section 5K2.0 states that "the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that there exists an aggravating or mitigating circumstance not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.'" The language of this section is vague causing a range of interpretations among sentencing courts, which results in a lack of uniformity.

In United States v. Bethancurt, the court noted that "since the Commission has already considered all but the most esoteric..." instead of leaving sentencing courts to "carving out a heartland," the Commission, through the guidelines, should have designated the "heartland" as well as the boundaries. Chief Judge Rubin noted this problem in commenting on the lack of "guidance," and further noted that all Mistretta means is "it's [the guidelines are] legal." See Rubin, supra note 61.

---

116 See United States v. Diaz, 874 F.2d 43, 52 (1st Cir. 1989) ("There appears to be some inherent tension in the guidelines themselves as to the extent to which departure is permissible."); see also 18 U.S.C. § 3553(b) (1990) (permitting the court to depart from a guideline—Specified Sentence); Sentencing Guidelines, Chapter 1, Part A - Introduction, 6 ("[I]n principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the court's departure powers.").

117 Instead of leaving sentencing courts to "carving out a heartland," the Commission, through the guidelines, should have designated the "heartland" as well as the boundaries. Chief Judge Rubin noted this problem in commenting on the lack of "guidance," and further noted that all Mistretta means is "it's [the guidelines are] legal." See Rubin, supra note 61.


119 Id. at § 5K1.1.

120 18 U.S.C. § 3553(b). Some defense attorneys view the language of 18 U.S.C. § 3553(b) as a two-prong test where the conduct must satisfy (1) of a kind, and (2) to a degree not adequately taken into consideration by the Sentencing Commission. Seminar, The Lawyers Guide to the New Federal Sentencing Guidelines They're Here to Stay, Cincinnati and Federal Bar Associations (July, 1989). The language of § 3553(b), on its face, states "of a kind, or to a degree " directly contradicting the two-prong test above. 18 U.S.C. § 3553(b) (emphasis added).

121 See infra notes 122-70 and accompanying text.

factors, valid departures are likely to be few in number."\textsuperscript{123} The statutory standard for appellate review is whether the sentencing court stated reasons for the departure and whether under the facts of the case the departure is reasonable.\textsuperscript{124} Since this statutory standard is very deferential to the sentencing court,\textsuperscript{125} most departures have been upheld despite the Commission’s standards as set out in the policy statement.\textsuperscript{126} Although the Commission did not specifically limit the court’s departure power, it is limited inherently if the court is procedurally correct in its guideline application; departure is warranted only if the aggravating or mitigating circumstance has not been considered adequately by the Commission.

### 1. The Criminal History Category

It appears that a vast number of departures are based on the "inadequacy" of the Criminal History category.\textsuperscript{127} In United States v DeLuna-Trujillo,\textsuperscript{128} the sentencing court departed upward based on the inadequacy of the offender's criminal history placement.\textsuperscript{129} DeLuna-Trujillo pled guilty to conspiring to possess 200 pounds of marijuana. The court determined his offense level to be 22\textsuperscript{130} and his criminal history category to be II\textsuperscript{131} "because he has been


\textsuperscript{124} Fed. R. Crim. P. 35(a) ("The court shall correct a sentence that is determined on appeal under 18 U.S.C. § 3742 to be unreasonable.").

\textsuperscript{125} See generally United States v. Missick, 875 F.2d 1294, 1301 (7th Cir. 1989);
Diaz, 874 F.2d at 49-50; United States v. Juarez-Ortega, 866 F.2d 747, 748 (5th Cir. 1989).

\textsuperscript{126} See Missick, 875 F.2d at 1294 (while not upholding the sentencing court’s departure, the Seventh Circuit recognized that great deference should be given to the sentencing court);
Diaz, 874 F.2d at 43 (deferring to the lower court’s holding that defendant’s status as an important narcotics supplier, pendency of eight trafficking charges against defendant, defendant’s use of adolescent or preadolescent children to deliver narcotics, and defendant’s involvement in drug ventures that reaped $10,000 to $15,000 daily justified departure from the guidelines);
Juarez, 866 F.2d at 747 (deferring to the lower court’s holding that possession of a firearm during a drug transaction justified departure from the guidelines). In determining whether the departure is reasonable, appellate courts assert that sentencing courts have a "superior feel" for the facts and appellate courts "will not lightly disturb a decision to depart." Diaz, 874 F.2d at 50.


\textsuperscript{128} 868 F.2d at 122.

\textsuperscript{129} See supra note 108 and accompanying text.

\textsuperscript{130} 18 U.S.C.A. app. 4, § 2D1.1(c) (West Supp. 1990) (listing the Drug Quantity Table which increases offender's offense level based on the amount of drugs possessed).

\textsuperscript{131} Id. at § 4A1.1 (sentencing table adjusting the offense level based on criminal history).
convicted and sentenced to three years imprisonment for intending to distribute 1,653 pounds of marijuana." The correlation of the offense level and the criminal history category resulted in a punishment range of 46-57 months. The district court sentenced DeLuna to 72 months imprisonment, stating that "the criminal history category did not adequately reflect the amount of drugs involved in each offense and did not consider that the prior conviction was for the same type of offense." DeLuna-Trujillo appealed the departure and the appellate court upheld the sentencing court's decision based on "the seriousness of the past offense and the increased likelihood of future criminal acts." The court found a likelihood of future criminal acts because of prior convictions for the same type of offense.

It is true that the Commission recognized that the criminal history category would be inadequate in some cases. Guideline section 4A1.3 states that "if reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range." The Commission's sanctioning of departure based on criminal history, at first glance, evidences an intent to place broad discretion with the sentencing court. However, the Commission qualifies its authorization by listing information that the sentencing court may use (but is not limited to) in determining whether to depart based on criminal history.

It is critical to the success of the guidelines that the sentencing court afford absolute attention to the limiting language that the

132 Deluna, 868 F.2d at 123.
133 Id.
134 Id.
135 Id. at 125.
136 Id.
138 Id.
139 Id.
140 Id.

(a) prior sentence(s) not used in computing the criminal history category,
(b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;
(c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;
(d) whether the defendant was pending trial, sentencing, or appeal on another charge at the time of the instant offense;
(e) prior similar adult criminal conduct not resulting in a criminal conviction.
Commission places on otherwise permissible departures. Although the Commission does not purport to list every reason that courts may consider when departing based on criminal history, it is logical to conclude that the Commission did not intend courts to manipulate or disregard the listed reasons.

The *DeLuna* court deliberately misconstrued the stated reasons of this section.\(^\text{141}\) Section 4A1.3(a) permits a court to consider “prior sentence[s] *not* used in computing the criminal history category”\(^\text{142}\) Subsection (c) permits a court to consider “prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.”\(^\text{143}\) Additionally, subsection (e) permits a court to consider “prior similar adult criminal conduct not resulting in a criminal conviction.”\(^\text{144}\) DeLuna-Trujillo’s prior conviction was used to compute his criminal history category,\(^\text{145}\) therefore under section 4A1.3(a) the sentencing court could not depart based on the prior conviction.\(^\text{146}\) DeLuna-Trujillo’s prior similar misconduct, distribution of marijuana, was not established by a “civil adjudication or by failure to comply with an administrative order,” thus the sentencing court was barred from departing based on prior similar misconduct under section 4A1.3(c).\(^\text{147}\) If the Commission intended for courts to consider any prior similar misconduct then it would not have included the limiting language. Finally, DeLuna-Trujillo’s prior similar adult criminal conduct did result in criminal conviction, thus preventing the court from departing based on section 4A1.3(e),\(^\text{148}\) which allows consideration only of criminal conduct not resulting in a conviction.

The *DeLuna* court stated as its reason for departure under section 4A1.3, that “the prior conviction was not taken

---

\(^{141}\) *DeLuna*, 868 F.2d at 124-25.


\(^{143}\) Id.

\(^{144}\) Id.

\(^{145}\) *DeLuna*, 868 F.2d at 123 (“The court found DeLuna’s criminal history category to be II because he had been convicted and sentenced to three years imprisonment in 1975 for intending to distribute 1,653 pounds of marijuana.”).

\(^{146}\) 18 U.S.C.A. app. 4, § 4A1.3(a) (West Supp. 1990) (specifically states that the court can use only prior sentences *not* used in calculating the criminal history category).

\(^{147}\) Id. at § 4A1.3(c). The Commission qualifies prior similar misconduct by requiring that it be “established by a civil adjudication or failure to comply with an administrative order.”

\(^{148}\) Id. at § 4A1.3(e). If the Commission planned on courts considering *any* prior similar criminal conduct then the limiting words, “not resulting in a criminal conviction” would be absent.
into consideration in the criminal history category. The *DeLuna* court is incorrect; the prior conviction was not only considered in the criminal history category, but also was the basis for computing the criminal history level. Even if the sentencing judge meant to say that the criminal history category did not "adequately" consider the prior conviction, the court is still barred from departure because the prior sentence was used in computing the criminal history level in section 4A1.3(a). Ultimately, the criminal history category was adequate in *DeLuna-Trujillo*’s case. Unfortunately, neither the sentencing court nor the appellate court recognized the adequate consideration of *DeLuna-Trujillo*’s criminal history.

Although departure based on criminal history is only one of the bases for departure, the above analysis illustrates several points: (1) a sentencing court can manipulate the departure provisions to reach a desired result, (2) "invalid" departures may nevertheless be affirmed on appeal by the "reasonableness" review, and (3) sentencing courts and appellate courts alike must apply the departure provisions through meticulous recognition of the Commission’s intentions, revealed in the policy statements and commentary, in order to allow the Federal Sentencing Law to function in a uniform fashion.

Up to this point, this section has focused on upward departures from the guidelines. The guidelines also permit downward departures under 18 U.S.C. § 3553(b) if a mitigating circumstance exists "of a kind, or to a degree, not adequately taken into consideration.

2. *Substantial Assistance to Authorities*

The following section examines section 5K1.1, Substantial Assistance to Authorities, in order to determine the level of "assistance" necessary to warrant a downward departure. If a defendant makes a good faith effort to provide "substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

---

149 *DeLuna*, 868 F.2d at 124.
150 *DeLuna*, 868 F.2d at 125 (the court considered DeLuna’s sentence inadequate because of the excessive amount of marijuana possessed by the defendant and his prior similar adult criminal conduct).
153 *Id.* at § 5K1.1.
section allows the court to depart from the applicable guideline range "[upon motion of the government]." In *United States v Donatiu* the defendant appealed based on no reduction in his sentence for substantial assistance under section 5K1.1.

The Drug Enforcement Agency (DEA) Task Force stopped and questioned Donatiu in an airport during a routine airport courier stop. Donatiu consented to a search of his carry-on luggage and to the opening of a package found inside. The package contained cocaine and the defendant admitted knowledge of the cocaine. He immediately agreed to cooperate with the DEA agents. Donatiu’s cooperation with the government consisted of (1) revealing the name of his source and his instructions, (2) making a telephone call to his source in order to complete the delivery as scheduled, and (3) attempting to find out who he was to meet and the location of the meeting. Word of Donatiu’s arrest reached Donatiu’s conspirators, which kept the government from making the controlled delivery of the cocaine. The court noted that the failure of the plan was not Donatiu’s fault. Although it appears that Donatiu “substantially assisted” authorities, the government did not make a motion for a downward departure based on his assistance.

On appeal, Donatiu asserted that (1) "§ 5K1.1 violates due process [if it requires] a government motion before a court may depart", or (2) "§ 5K1.1 does not require a government motion before a court may consider a departure."

The appellate court recognized that section 5K1.1 is a policy statement and noted that "policy statements under the guidelines generally are not binding on courts." The court further stated,

> [I]n the context of departures under the guidelines which are governed by § 3553(b), the Court must follow § 5K1.1 even though it is described by the Commission as a "policy statement" [S]ection 3553(b) directs courts that they may only consider the guidelines, the policy statements, and official commentary in determining whether the Sentencing Commission adequately considered a circumstance for departure. If the Com-

---

154 *Id.*

155 *Id.* at 619.


157 *Id.* at 621.

158 *Id.*


160 *Donatiu*, 720 F Supp. at 624.
mission did consider the circumstance in a policy statement, as it clearly did with a defendant’s “substantial assistance” in § 5K1.1, the court must follow § 5K1.1 in order to depart.161

Based on the court’s determination that it must strictly follow section 5K1.1, it affirmed the sentencing court, holding that departure is not warranted unless the government makes a motion.162 The court held that section 5K1.1 must be followed “to the letter” in keeping with congressional intent163 and that departures under the guidelines are the rare exception rather than the rule.164 The court that decided the Donatiu case previously had held the guidelines unconstitutional prior to the Mistretta decision by the Supreme Court. Subsequently, in the Donatiu opinion, the court stated that “[t]he best way to draw attention to faulty legislation is to enforce it to the letter. Though many individuals, our federal system of criminal justice and the taxpayers will suffer, this regretful suffering should cause a reconsideration.”165 It is unfortunate that DeLuna-Trujillo did not reap the benefits of the “enforce it to the letter” mentality of the Donatiu court, as it would have worked to his advantage.166

The DeLuna167 and Donatiu168 cases are only isolated examples of departure application.169 The case illustrations are beneficial in that they reveal how vast the differences may be in departure provision interpretation, thus resulting in harmful disparity among federal courts. The cases further uncover the haunting discretion that remains in the federal criminal sentencing process.170

---

161 Id., see United States v. Justice, 877 F.2d 664, 666 (8th Cir. 1989) (holding that any departure from the guidelines must be made pursuant to section 5K1.1).
162 Donatiu, 720 F Supp. at 624.
163 See 18 U.S.C. § 3553(b); see also notes 39-54 and accompanying text.
164 Donatiu, 720 F Supp. at 624.
165 Id. at 624 n.2.
166 See supra notes 152-65 and accompanying text. If the DeLuna court had followed the Guidelines strictly as did the Donatiu court then DeLuna-Trujillo’s sentence would not have been erroneously increased due to an unreasonable departure.
167 868 F.2d 122.
169 See, e.g., Sturgis, 869 F.2d 54 (proper for the court to increase defendant’s criminal history level based on two pending felony convictions and three misdemeanor arrests within two months of the offense of conviction); United States v. Campbell, 704 F Supp. 661 (E.D. Va. 1989) (a government motion to the court based on the defendant’s substantial assistance was made since the defendant provided information to support a search warrant and provided a full debriefing in anticipation of trial).
170 The sentencing court maintains broad discretion due to manipulations in guideline interpretation utilized to reach the desired outcome. See notes 133-35 and accompanying text.
V Prognosis of "Discretionary" Sections of the Guidelines

The prior section discussed the adequacy of the criminal history and substantial assistance categories in relation to specific case law. This section analyzes adjustments such as acceptance of responsibility, use of certain information, as well as the general departure provisions by interpreting the language of particular guideline sections and their accompanying policy statements. This part serves as a prognosis, exposing interpretation difficulties in the form of ambiguities that may defeat congressional objectives sought in enacting the Sentencing Guidelines. This section attempts to illustrate the probable continuing disparity in federal sentences because court discretion has not been actually reduced; rather, it has been merely camouflaged by the new sentencing law.

A. Acceptance of Responsibility

A defendant may procure a two-level decrease in his sentence if he "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." A defendant may receive this decrease "without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury." The Acceptance of Responsibility guideline, section 3E1.1, states further that a guilty plea does not ensure the reduction "as a matter of right." The Commission intended this section to apply to defendants who demonstrate "sincere remorse." Determining when circumstances exist that amount to "sincere remorse" is a problem. The commentary following section 3E1.1 lists examples of appropriate

171 See supra notes 118-70.
173 Id. at § 1B1.8.
174 Id. at §§ 5K2.0-5K2.15.
175 See supra notes 37-50 and accompanying text.
176 See infra notes 177-216 and accompanying text.
178 Id. at § 3E1.1(b).
179 Id. at §§ 3E1.1(c), 3E1.1(c) comment 3 (noting that a guilty plea "may show some evidence of acceptance of responsibility.")
180 Id. (commentary background).
considerations for use in judging remorse. The last consideration listed, but the most crucial, is "the timeliness of the defendant's conduct in manifesting the acceptance of responsibility".

Timeliness is critical because (1) if the defendant does not demonstrate remorse "on time" he will be denied the two-level reduction, and (2) if the defendant does offer valuable information in an effort to accept responsibility but it is not "on time", thus disallowing the two-level decrease, the given information may be used against him. The guidelines are silent as to the meaning of timeliness in section 3E1.1. Language in other sections implies that the giving of information is timely if it is unknown to the government, or if it would be helpful to the investigation when the defendant comes forth with the information.

For purposes of discussion this Note assumes that the Commission intended timeliness to be measured by what the government already knows or by the helpfulness to the investigation. For example, if a defendant in an effort to accept responsibility assists authorities in the recovery of the "fruits and instrumentalities of the offense," the defendant could earn a two-level reduction by way of section 3E1.1. The government also could reject his efforts as untimely and apply this information to increase his offense level under specific offense characteristics. Assume the offender's criminal conduct is tax evasion. Under specific offense characteristics, in section 2T1.1, a two-level increase is possible. Section 2T1.1(b)(2) calls for a two-level increase if "sophisticated means were used to impede discovery of the nature or extent of the offense." The commentary states that the enhancement under section 2T1.1(b)(2) "would be applied for example, where the defendant used offshore bank accounts, or transactions through

---

181 Id. at comments 1(a)-(g) (for example, voluntary withdrawal from criminal conduct, or voluntary and truthful admission of involvement in the offense).

182 Id. at comment 1(g).

183 See infra notes 196-206 and accompanying text.


185 Id. at § 1B1.8(b) (entitled "Use of Certain Information" and stating that information known to the government before the offender provides it will be used in computing the guideline range).

186 Id. at comment 1.

187 Id. at § 3E1.1, comment 1(e).

188 Id. at § 3E1.1(a).

189 See 18 U.S.C.A. app. 4, Chapter 2 (pertaining to offense conduct in which most offenses provide adjustments for specific offense characteristics).


191 Id. at § 2T1.1(b)(2).
corporate shells." If the defendant produced this information seeking a reduction for acceptance of responsibility, the government could reject the offender's information as untimely. The offender's information still would result in a two-level increase under section 2T1.1(b)(2)'s specific offense characteristics. If this information could be used against the defendant to increase his level, then the cautious defendant will forfeit the possibility of a two-level decrease knowing the information's range of uses against him.

B. Use of Certain Information

Section 1B1.8, Use of Certain Information, raises the same concerns as the acceptance of responsibility provision. This section provides,

[w]here a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and the government agrees that self-incriminating information so provided will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

This section does not restrict the use of information known to the government prior to the agreement.

Unlike section 3E1.1, Acceptance of Responsibility, this section purports to gather information concerning the unlawful activity of others. The defendant may wish to assist the government to receive a reduction under section 5K1.1, Substantial Assistance to Author-
The timeliness of assistance is important under section 3E1.1 and section 5K1.1.

An offender may enter into an agreement with the government whereby he agrees to cooperate concerning the unlawful activities of others, and the government agrees not to use some self-incriminating information against the offender. Subsection (b)(3) of section 1B1.8 provides that restriction of use shall not be applicable if "there is a breach of the cooperation agreement." It follows that if the defendant breaches the cooperation agreement, the information may be used in determining an applicable guideline range.

Defense attorneys should determine and alert their clients as to what constitutes a "breach of the cooperation agreement." Suppose a defendant enters into a cooperation agreement under section 1B1.8 and then refuses to further assist authorities. Does the refusal to further assist constitute a breach of the cooperation agreement? Section 5K1.2 states that "a defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating factor" to depart upward. Despite section 1B1.8, once the defendant has executed the agreement to cooperate, it can be argued that the obtained information may be used to incriminate the defendant and thus increase his offense level if he fails to cooperate. If this argument is valid, then the rationale of sections 1B1.8 and 5K1.2 is circumvented: the government can use incriminating information against the defendant, and the use of this information necessarily subjects him to an increased sentence. This effect will cause defendants to be reluctant about entering cooperation agreements with the government, thus undermining the intent of section 1B1.8 to encourage offender cooperation.

---

200 The guidelines do not cross reference these sections.
202 Id. Use of information will not be restricted when the government is aware of the information prior to the agreement, there is a prosecution for perjury, or there is a breach of the cooperation agreement. Id. at § 1B1.8(b).
203 The defendant may, for instance, refuse to further assist due to imminent danger to himself or others.
205 Id. at § 1B1.8.
206 See id. at § 5K1.2. See also id. at comment 1, 3.
C. Grounds for Departure

The final focus of ambiguities in guideline language falls on section 5K2.0, Grounds for Departure. Pursuant to 18 U.S.C. section 3553(b) "the sentencing court may impose a sentence outside the range established by the applicable guideline." The policy statement directs that "[w]here the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction." The Commission noted, "[t]he controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing.

Section 5K2.0 may be the "Pandora's box" of the Sentencing Guidelines. If a sentencing court need only determine that a factor exists "substantially in excess" of the norm, the old sentencing law's much criticized discretionary aspects are present. For example if a defendant engages in gambling the base offense level is 6. The Specific Offense Characteristic provision directs an increase by six levels "if the offense is committed as part of, or to facilitate, a commercial gambling operation." The defendant's possible offense level rises to 12. According to section 5K2.0, if the court can identity a factor that is substantially in excess of an ordinary conviction in this type of gambling, then the court may depart from the applicable guideline range. If the court determines that a six-point increase under Specific Offense Characteristics does

---

207 Id. at §§ 5K2.0-5K2.15.
208 Id. at § 5K2.0.
209 Id.
210 Id.
211 See supra notes 28-30 and accompanying text. The Supreme Court will review this problem in the near future. In United States v. Burns, 893 F.2d 1343 (1990), cert. granted, U.S., 110 S. Ct. 3270 (1990), the court sentenced the defendant to 60 months imprisonment although the U.S. attorney and the probation officer recommended a sentence of 30-37 months, consistent with the guidelines. The Supreme Court has the opportunity to preserve the congressional objectives and prevent unreasonable departures by compelling sentencing courts to adhere strictly to the departure standards.
212 18 U.S.C.A. app. 4, §§ 2E3.1-2E3.3 (1990) (§ 2E3.1 refers to the crime of engaging in a gambling business and has a base offense level of 12; § 2E3.2 refers to the crime of transmission of wagering information and has a base level of 6; § 2E3.3 refers to all other gambling offenses and has a base level of 6).
213 Id. at§ 2E3.3.
214 Id. at § 2E3.3(b).
not reflect the seriousness of the offense, then arguably it could depart upward based on its perception that the Commission failed to adequately consider this circumstance in formulating the guideline. If this is true, then widespread disparity among sentences will undoubtedly continue.

The examples contained in this Note offer only a brief glance at the guidelines and their possible operational flaws. With critical analysis by sentencing courts and future modifications of the guidelines, some of the more extreme possibilities stated may never become a reality. Certain safeguards are present to prevent such extreme results. Future analysis and current safeguards may limit discretion adequately. If discretion is not limited, however, the desired uniformity will be lost.

CONCLUSION

The Commission undertook a seemingly insurmountable task in creating the Federal Sentencing Guidelines. But the venture is far from complete as the Commission concedes in its introductory commentary. The guidelines are still an amorphous set of ideas that have not yet come to full fruition. Although there are "land mines" dispersed throughout, the guidelines are a start in the direction of attaining the congressional objectives of honesty, uniformity, and proportionality.

Congress achieved the first goal of honesty because all sentences under the new law are determinate. Indefinite sentences are no longer a problem under the guidelines because each offender and the sentencing judge know how long the offender will be imprisoned. The success of the next two goals, uniformity and propor-

---

215 Id. at § 5K2.0. For example, a defendant could be involved in what the court perceives to be an inordinate commercial gambling scheme. The guidelines do not suggest methods by which a court could fairly and efficiently determine when a factor exists "substantially in excess" of the norm. See 18 U.S.C.A. app. 4, § 5K2.0. "[T]he court may depart from the guidelines, even though the reason for departure is listed elsewhere (e.g., as an adjustment or specific offense characteristic)." Id.


218 See Robinson, supra note 37, at 12 (commenting that "[w]e may need to devise a transitional system that gradually increases the degree of binding effect as confidence grows in the propriety of the system's results.").

219 See supra notes 37-50 and accompanying text.

220 See supra notes 39-42 and accompanying text.
tionality, may be determined by looking at them contemporaneously. Uniformity and proportionality are intertwined so that both cannot be unequivocally attained; the two concepts are inherent antagonists.\textsuperscript{211}

Congress compromised both concepts in an effort to incorporate them into the guidelines. A certain amount of uniformity exists since similar criminal conduct by similar offenders results in consistent and predictable sentences. On the other hand, proportionality exists in the new sentencing law to allow different sentences for criminal conduct of different severity.

Although the guidelines technically attained the congressional goals of honesty, uniformity, and proportionality, the victory is somewhat hollow. Since the Commission graciously gave the courts unbridled departure power,\textsuperscript{222} the guideline objectives have been somewhat sacrificed. Honesty in sentencing will be diluted because offenders will not be able to predict their sentence length based on a strict reading of the guidelines. Uniformity will be forfeited since each court may deviate based on the individual peculiarities before the bench. Proportionality will also vanish because, although different conduct will receive different sentences, if each court departs based on unguided discretion it will not be logically consistent.

The Commission recognized that some would criticize the guidelines as "overly cautious, [and] as representing too little a departure from existing practice."\textsuperscript{223} The Commission is a permanent body and can amend the guidelines annually. The Commission should drastically amend the departure provisions in order to limit them, and to prevent resurfacing of the ghost of discretion.

The departure provisions\textsuperscript{224} present a great opportunity to manipulate the sentencing process even though most other sections are restrictive. Judges may find that their thirst to deviate from the given guideline ranges may be quenched through abuse of the departure provisions. The guidelines are an enormous set of rules and policy statements; in order to apply the guidelines correctly and receive their potentially invaluable benefits, greater balance must be achieved between the guidelines' sections. Each section should act as a check and balance on the other sections to promote congressional objectives and prevent unjust sentences. The aboli-

\textsuperscript{211} See supra notes 43-50 and accompanying text.
tion of parole reinforces the offender’s need to depend on consistency in the Federal Sentencing System. The Sentencing Guidelines are only a miracle cure if applied as directed with a narrowed view of court discretion. If courts persist in exerting too much discretion, the Commission should amend the Sentencing Guidelines. It is only through continued analyses of the results under the new guidelines, with the congressional objectives in mind, that the sentencing system can be cured.

*Kathryn A. Walton*

* Kathryn Walton is serving a one year appointment as judicial clerk to Chief Justice Robert F Stephens of the Kentucky Supreme Court. She received her J.D. in 1990 and B.A. in 1987 from the University of Kentucky. The author would like to express her appreciation for the suggestions and support of Sarah N. Welling, Professor of Law at the University of Kentucky.