WHEN ARE DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES WARRANTED?

INTRODUCTION

The Federal Sentencing Guidelines ("Guidelines") were enacted by the Federal Sentencing Commission ("Sentencing Commission") pursuant to the Sentencing Reform Act of 1984.1 A major objective of sentencing reform was to temper judicial discretion so that similarly situated offenders convicted of like offenses would receive the same treatment in the sentencing process.2 However, Congress did not intend to so mechanize sentencing that no consideration would be

   (b) The purposes of the United States Sentencing Commission are to-
   (1) establish sentencing policies and practices for the Federal criminal justice system that-
      (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
      (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
      (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.
   Id.

2. 18 U.S.C. § 3553(a)(6) (1988). This section provides:
   (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-
   (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
   (2) the need for the sentence imposed-
      (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
      (B) to afford adequate deterrence to criminal conduct;
      (C) to protect the public from further crimes of the defendant; and
      (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
   (3) the kinds of sentences available;
   (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;
   (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;
given to the individual factors of a case. With the Guidelines, Congress sought to achieve a balance of judicial discretion so as to avoid disparate treatment, but still provide individualized sentences.

Although the objective of Congress in enacting the Guidelines appears sound in theory, this objective is not so easily realized in application. A problem inherent in application of the Guidelines is determining when the need for individualized treatment outweighs the need for equal treatment so as to justify a departure from the Guidelines.

This Comment will provide a general overview explaining when departures from the Guidelines are warranted. This Comment will then specifically discuss the discretion of district judges to impose a sentence below the authorized guideline range, that is, to depart downward from the Guidelines, based upon certain offender characteristics. The offender characteristics discussed include family responsibilities, community ties, employment record, race, and socioeconomic status of the offender.

This Comment concludes that although district court judges have discretion to depart from the Guidelines based upon family responsibilities, community ties, and past employment record, departures should only be made when such circumstances are truly extraordinary. This Comment also concludes that district judges should not base departures on an offender's race or socioeconomic status because Congress and the Sentencing Commission have clearly indicated that these factors are irrelevant in departure considerations.

BACKGROUND

The Sentencing Reform Act of 1984 provides for the establishment of guidelines to further the purposes of criminal punishment.

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

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

Id.


4. Id.

5. See infra notes 17-23 and accompanying text.

6. See infra notes 117-26 and accompanying text.

7. See infra notes 24-68 and accompanying text.

8. See infra notes 63-74 and accompanying text.

9. See infra notes 63-74 and accompanying text.

10. See infra notes 200-06 and accompanying text.

11. See infra notes 200-03 and accompanying text.

The Act delegates authority to the Federal Sentencing Commission ("Sentencing Commission") to oversee the federal sentencing process. The primary purpose of the Sentencing Commission is to formulate federal sentencing practices and policies that promote justice by establishing detailed sentencing guideline ranges for federal criminal offenders.

A court may depart from a sentence specified in the Federal Sentencing Guidelines ("Guidelines") only when "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The Guidelines provide that when a court determines what circumstances have been considered, it may look only to the sentencing guidelines, the official commentary, and the policy statements of the Federal Sentencing Commission ("Sentencing Commission").

A court must make several determinations before departure from the Guidelines is warranted. A court must first decide that an aggravating or mitigating factor is present in the case and then determine whether the Guidelines already account for that factor. If the Guidelines account for the factor adequately, the court may not depart from the Guidelines. If the Guidelines either do not account for the factor or do not do so adequately, the court must then determine if the existence of the factor suggests a sentence outside the

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14. Id.
15. 18 U.S.C. § 3553(b) (1988). This section provides:
   (b) Application of guidelines in imposing a sentence. The court shall impose a sentence of the kind, and within the range, referred to subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

Id.
16. Id.
18. Id.
19. Id.
recommended guideline range.\textsuperscript{20} Upon determining that the factor requires a sentence different from the guideline sentence, the court may depart from the Guidelines.\textsuperscript{21}

A difficulty arises in a situation in which the Sentencing Commission has not stated whether a given factor should be considered.\textsuperscript{22} The absence of a certain factor from the Guidelines could result from the Commission deciding that the factor was irrelevant or from failure by the Commission to consider a factor.\textsuperscript{23}

Departures from the Guidelines are generally made based upon either the unusual circumstances of an offense as discussed in Part K of the Guidelines, or the specific characteristics of the offender as discussed in Part H of the Guidelines.\textsuperscript{24} Other grounds for departure may be found in the sections of the Guidelines discussing substantive offenses or in the general application principles of the Guidelines.\textsuperscript{25}

**GROUNDS FOR DEPARTURE OTHER THAN PART K OR PART H**

Provisions for permissible departures from the Guidelines are dispersed throughout the sections discussing substantive offenses.\textsuperscript{26} For example, in the section fixing the sentencing for drug-related offenses, the Guidelines state that an upward departure, that is, a sentence above the applicable guideline range, may be warranted if a defendant was trafficking in unusually pure controlled substances, mixtures, or compounds.\textsuperscript{27} Such an upward departure would be based upon the assumption that the defendant must have played a key role in the drug enterprise in order to be in possession of such high purity narcotics.\textsuperscript{28}

The general application principles of the Guidelines may also provide a basis for departure.\textsuperscript{29} In the section detailing which information can be used in imposing a sentence, the Guidelines provide

\textsuperscript{20} Id. at 386-87.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 359 (Supp. 1991).
\textsuperscript{23} Id.
\textsuperscript{24} See U.S.S.G., supra note 12, Part H, K (Specific offender characteristics and Departures).
\textsuperscript{25} See U.S.S.G., supra note 12, §§ 1B1.4, 2D1.1 comment n.9. See infra notes 27-28, 30 and accompanying text.
\textsuperscript{26} See U.S.S.G., supra note 12, § 2D1.1 comment n.9. See, e.g., §§ 2A1.1 comment n.1, 2A6.1 comment n.1, 2B1.3 comment n.4 (allowing downward departure when a defendant unintentionally caused the death) (providing that factors not incorporated into the sentencing range for threatened communications may be grounds for departure) (allowing an upward departure when monetary value of damaged property does not reflect extent of harm).
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} See id. § 1B1.4.
that in determining whether a departure is warranted, the court may consider any information on a defendant's background, character, or conduct unless prohibited by law.30

PART K: DEPARTURES BASED UPON CIRCUMSTANCES OF AN OFFENSE

1) Substantial Assistance to Authorities

The only departure under Part K that was specifically dictated by Congress is a departure based on a defendant's substantial assistance to the authorities.31 The Guidelines provide that upon a government motion stating that the defendant has provided significant assistance in the prosecution or investigation of criminal activities of another person, the court may depart below the Guidelines.32 However, a court is not required to reward defendants for their cooperation if such defendants have already received the benefits of their assistance through a plea agreement.33 The Sentencing Commission further specified that a defendant's refusal to assist the authorities is not an aggravating sentencing factor.34

2) Other Grounds for Departure in Part K

As to other grounds for departure under Part K, Congress has said only that departures from the Guidelines are warranted when circumstances exist that were not adequately considered by the Sentencing Commission in drafting the Guidelines.35 Congress intended to ensure that the sentencing statute provided enough flexibility to allow adequate consideration of circumstances that may call for a sentence outside the guideline range.36 Although the Sentencing Commission has helped to define circumstances that may warrant departure, the Commission recognized that, as atypical circumstances

30. Id.
31. See 18 U.S.C. § 3553(e) (1988). This section provides:
   (e) Limited authority to impose a sentence below a statutory minimum. Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

Id.
33. See United States v. Sutherland, 890 F.2d 1042, 1043 (8th Cir. 1989) (stating that a court need not depart from the Guidelines when the defendant had already benefitted from his assistance through a favorable plea agreement); United States v. Justice, 877 F.2d 664, 669 (8th Cir. 1989) (finding that defendant had already benefitted from his cooperation in the charging phase of the case).
34. U.S.S.G., supra note 12, § 5K1.2.
cannot be comprehensively listed, courts must make the final decision as to whether a departure is warranted.\textsuperscript{37}

The Sentencing Commission stated that even when a factor had already been considered in setting the guideline range, the court may still depart from the Guidelines on the basis of that factor if the court finds that, due to unusual circumstances, the guideline range is inadequate.\textsuperscript{38} In making such a determination, departure is allowed only if the factor of the case on which departure is to be made is substantially in excess of the factors that would normally be involved in the offense.\textsuperscript{39}

The Sentencing Commission sought to assist the courts in determining whether there exists a basis for departure by identifying numerous circumstances that the Commission had been unable to take fully into account in formulating the Guidelines.\textsuperscript{40} The Commission listed some of these situations, which may warrant a departure from the Guidelines.\textsuperscript{41}

\textit{A) Aggravating Sentencing Factors}

The Sentencing Commission stated that the death, physical injury, or extreme psychological injury of a victim because of the defendant's offense, may call for a sentence above the guideline range.\textsuperscript{42} However, psychological injury will usually only be severe enough to be an aggravating sentencing factor if such injury results in severe impairment of the psychological, emotional, behavioral, or intellectual functioning of the victim.\textsuperscript{43}

In addition, the Sentencing Commission stated that the unlawful restraint or abduction of a person during the commission of an offense, or the use or possession of a weapon in the commission of an offense, may warrant an upward departure from the authorized guideline range.\textsuperscript{44} Property damage or loss not already taken into account by the Guidelines may also call for an increased sentence.\textsuperscript{45} Furthermore, conduct of a defendant that either seriously disrupts a governmental function or endangers national security or public

\textsuperscript{37} U.S.S.G., \textit{supra} note 12, § 5K2.0.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} See \textit{infra} notes 42-53 and accompanying text.
\textsuperscript{42} U.S.S.G., \textit{supra} note 12, §§ 5K2.1-2.3.
\textsuperscript{43} Id. \textit{But see} United States v. Perkins, 929 F.2d 436, 439 (8th Cir. 1991) (Heaney, J., concurring) (approving a departure partially based upon psychological injury to the victim despite no evidence of severe impairment to the victim's psychological, emotional, behavioral, or intellectual functioning).
\textsuperscript{44} U.S.S.G., \textit{supra} note 12, §§ 5K2.4, 5K2.6.
\textsuperscript{45} Id. § 5K2.5.
health, may also justify upward departure from the Guidelines.\(^4\)

Unusually cruel, brutal, degrading, or heinous conduct by a defendant may also constitute an aggravating sentencing factor.\(^4\) This policy statement calls for a rather subjective determination as to whether to depart because the Sentencing Commission does not define what constitutes unusually cruel, brutal, degrading, or heinous conduct.\(^4\) Finally, a court may also increase a sentence above the specified guideline range when a defendant has committed an offense for the purpose of concealing another offense.\(^4\)

B) Mitigating Sentencing Factors

The Sentencing Commission has also stated some occasions in which, due to atypical circumstances of the offense, the defendant may deserve a reduction in sentence below the applicable guideline range.\(^5\) When a defendant acts because of provocation by the victim or because of serious duress or coercion, a reduced sentence may be in order.\(^5\) In addition, when the interest of society in deterring or punishing a defendant's conduct is significantly reduced because a defendant committed an offense to avoid a perceived greater harm, a sentence reduction may be appropriate.\(^5\) The Sentencing Commission further stated that a reduced sentence may be justified when the conduct of a defendant does not threaten the harm that the law seeks to prevent or when a defendant suffered from a severe diminished mental capacity during the commission of a non-violent offense.\(^5\)

PART H: DEPARTURES BASED UPON OFFENDER CHARACTERISTICS

Offender characteristics comprise the other category upon which departures from the Guidelines have been based.\(^5\) Congress provided the Sentencing Commission with more information on the fac-

\(^{46}\) Id. §§ 5K2.7, 5K2.14.

\(^{47}\) Id. § 5K2.8.

\(^{48}\) See id. § 5K2.8. The Commission does state that torture and prolonging of pain are examples of such extreme conduct. Id. See Perkins, 929 F.2d at 438 (holding continuous use of the same victim's identity in commission of numerous fraudulent acts and crimes was unusually cruel and degrading conduct).

\(^{49}\) U.S.S.G., supra note 12, § 5K2.9.

\(^{50}\) See infra notes 51-53 and accompanying text.

\(^{51}\) U.S.S.G., supra note 12, §§ 5K2.10, 5K2.12. However, the Commission specifically excluded economic hardship and personal financial difficulties as grounds for departure. Id. § 5K2.12.

\(^{52}\) Id. § 5K2.11. A mercy killing is cited as a situation where such a reduced sentence may be called for. Id.

\(^{53}\) Id. For example, although a veteran's possession of a machine gun as a trophy is illegal, such a possession probably does not threaten the harm sought to be prevented by the law. Id. §§ 5K2.11, 5K2.13. However, a departure is unwarranted if the diminished capacity was due to the defendant's voluntary use of intoxicants or drugs, or when the defendant is a threat to public safety. Id.

\(^{54}\) See infra notes 59-63, 67-68 and accompanying text.
tors the Commission should consider in formulating policy statements in Part H than in Part K, where there was little direction from Congress.\(^5\) Congress specifically ordered the Sentencing Commission to consider certain things in formulating categories of defendants to which the guidelines and policy statements would apply.\(^6\) Such considerations included certain offender characteristics for the Sentencing Commission to take into account, to the extent of their relevancy, in setting appropriate sentencing ranges.\(^7\) The offender characteristics specified included family ties and responsibilities, education, community ties, age, previous employment record, physical condition, mental and emotional condition, and vocational skills.\(^8\)

In response, the Sentencing Commission stated that the age and physical condition of the defendant are not ordinarily relevant when determining whether a departure from the Guidelines is warranted.\(^9\) Age may be a mitigating sentencing factor when the defendant is elderly and infirm if a form of punishment other than incarceration

\(^{55}\) Compare 28 U.S.C. § 994 (1988) (citing numerous offender characteristics the Sentencing Commission was to take into account in determining departures) with 18 U.S.C. § 3553 (1988) (stating only one factor, substantial assistance to the authorities, as a basis for departure).

\(^{56}\) 28 U.S.C. § 994(d) (1988). This section provides:

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;
(2) education;
(3) vocational skills;
(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
(5) physical condition, including drug dependence;
(6) previous employment record;
(7) family ties and responsibilities;
(8) community ties;
(9) role in the offense;
(10) criminal history; and
(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

\(^{57}\) Id. (footnote omitted).

\(^{58}\) Id.

\(^{59}\) U.S.S.G., supra note 12, §§ 5H1.1, 5H1.4.
would work equally well. As to the physical condition of the defendant, drug or alcohol abuse is not a mitigating sentencing factor. In addition, the education and vocational skills of the offender are not ordinarily relevant when considering a downward departure from the Guidelines.

The Sentencing Commission also issued policy statements providing that family ties and responsibilities, community ties, employment record, and emotional and mental conditions are “not ordinarily relevant in determining whether a sentence should be outside the guidelines.” Such a statement necessarily implies that these factors may occasionally be relevant. The policy statement is of little help to courts because the statement does not indicate what the Commission considers extraordinary circumstances. As might be expected, many disputes over the Guidelines center on when circumstances are sufficiently extraordinary to make these factors relevant.

Congress also instructed the Sentencing Commission to ensure that the guidelines and policy statements promulgated would be completely neutral in regard to the race, national origin, creed, sex, and socioeconomic status of the offenders. In response, the Commission issued a policy stating that these factors are not relevant when determining a sentence.

Aside from the policy statement, the Sentencing Commission

60. Id. § 5H1.1.
61. Id. § 5H1.4.
62. Id. § 5H1.2.
63. Id. §§ 5H1.3, 5H1.5, 5H1.6. Section 5H1.5 provides:
   Employment record is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. Employment record may be relevant in determining the type of sentence to be imposed when the guidelines provide for sentencing options. If, independent of the consideration of employment record, a defendant is sentenced to probation or supervised release, considerations of employment record may be relevant in the determination of the length and conditions of supervision.

64. T. Hutchison & D. Yellen, supra note 17, at 369.
65. Id. at 370.
66. See infra notes 85-123 and accompanying text.
68. U.S.S.G., supra note 12, § 5H1.10. This section provides: “Race, Sex, National
provided little assistance as to when other offender characteristics justify departure from the Guidelines. Therefore, an examination of case law becomes necessary to determine when courts have found such offender characteristics extraordinary enough to justify departure from the Guidelines.

The area of the Guidelines that has provided many interpretative difficulties is the statement by the Sentencing Commission that an offender's family responsibilities, community ties, and employment record are not ordinarily relevant in determining when to depart from the Guidelines. The logical implication of this lack of specificity by the Commission is that the Commission intended to grant great discretion to the courts in determining what constitutes extraordinary circumstances. Determinations by the court as to the relevancy of these enumerated offender characteristics give substance to the policy statements of the Sentencing Commission. In addition, although the Sentencing Commission unequivocally stated that the national origin, race, and socioeconomic status of defendants are irrelevant in determining departures from the Guidelines, some courts have still found it necessary to interpret the statement.

In United States v. Big Crow, the defendant returned to his home on the Pine Ridge Indian Reservation after a night of heavy drinking. Although testimony differed as to the events occurring at Big Crow's home after his return, Big Crow was convicted of assault resulting in serious bodily injury and assault with a dangerous weapon. The applicable sentencing range for Big Crow was found to be thirty-seven to forty-six months, yet the United States District Court for the District of South Dakota departed downward from this range and sentenced Big Crow to a twenty-four month prison term.

The district court based its departure on Big Crow's inebriation at the time he committed the offense, his outstanding employment history, his lack of a previous criminal record, and his continuous efforts to overcome the poor living conditions of the Pine Ridge Indian

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Origin, Creed, Religion, and Socio-Economic Status (Policy Statement) These factors are not relevant in the determination of a sentence. See T. Hutchison & D. Yellen, supra note 17, at 370.

69. See infra notes 75-123 and accompanying text.

70. See infra notes 75-123 and accompanying text.

71. See T. Hutchison & D. Yellen, supra note 17, at 370.

72. See U.S.S.G., supra note 12, § 5K2.0.

73. See id. § 5H1.10. See supra note 68 and accompanying text. See infra notes 75-88, 105-16 and accompanying text.

74. See id. at 1326. See infra 898 F.2d 1326 (8th Cir. 1990).

75. See id. at 1327.

76. See id. at 1327-28.

77. See id. at 1329.
The district court also considered the strong community support for Big Crow. The United States Court of Appeals for the Eighth Circuit found that the district court did not abuse its discretion in basing a sentence reduction upon Big Crow's remarkable employment history, his strong community ties, and his consistent efforts to pursue a respectable life in the difficult environment of an Indian reservation. The Court considered the environment of the Pine Ridge Indian Reservation and noted that, while the unemployment rate on the reservation was seventy-two percent, Big Crow had worked steadily for six years and had provided adequately for his family. The court also considered letters from the community that were written on Big Crow's behalf and Big Crow's favorable relationship with his employer. The court held that Big Crow's case presented unusual enough circumstances to justify a downward departure from the Guidelines.

The court of appeals acknowledged that previous employment record, family responsibilities, and community ties of a defendant usually are not relevant in determining whether to depart from the Guidelines, but that in Big Crow's case these were mitigating sentencing factors. The court found that Big Crow's circumstances were of such magnitude that the Sentencing Commission could not have adequately taken such circumstances into consideration in formulating the Guidelines.

The majority also noted that, although the Guidelines declare that socioeconomic status is irrelevant in determining a sentence, commentators say this may be too broad of a statement. According to the court, commentators have noted that deeming these factors irrelevant may be too sweeping because a report of the Senate Judiciary Committee stated that "the requirement of neutrality . . . is not a requirement of blindness."

Judge Wollman disagreed with the court's allowance of a departure.
ture based upon Big Crow's national origin and socioeconomic status. Judge Wollman found that the report of the Senate Judiciary Committee was irrelevant in applying the Guidelines because 18 U.S.C. § 3553(b) limits courts to considering only the guidelines, official commentary, and policy statements in deciding whether a circumstance was taken into consideration by the Sentencing Commission. Judge Wollman further stated that not only is legislative history specifically excluded from a sentencing court's consideration, it is also unnecessary here as the Sentencing Commission had already unequivocally evidenced its consideration of national origin and socioeconomic status in a policy statement.

The Eighth Circuit, in United States v. Prestemon, followed Judge Wollman's approach and held that the intent of Congress to exclude such factors as race and socioeconomic status from consideration when a court is sentencing a defendant was clearly stated in the Guidelines. In Prestemon, the defendant was convicted of armed bank robbery, but the district court sentenced the defendant below the applicable guideline range because of his race and family situation. Prestemon was a twenty-one-year-old bi-racial adoptee who had been a high school honor student and who had completed a year of vocational training. The court of appeals remanded for resentencing and held that the appellee's status as a bi-racial adoptee was not a basis for departure as the Guidelines specifically state that race is irrelevant in departure considerations.

The court of appeals further noted that most courts, in interpreting the Guidelines, have refused departure on the grounds of family circumstances unless such circumstances are highly unusual. The court found that even cross-racial adoption was not an unusual family circumstance and adoptive status was therefore assumed to have been taken into consideration by the Sentencing Commission in formulating the Guidelines. Thus, the court reasoned that because adoptive status had already been accounted for in the Guidelines,
such status does not constitute a mitigating sentencing factor. The court stated that a downward departure was unwarranted in the case before it. However, the court stated that on remand, the district court should consider the defendant’s status as a bi-racial adoptee and the defendant’s outstanding academic record in determining the appropriate sentence within the applicable guideline range.

Judge Heaney, in a dissenting opinion in Prestemon, disagreed with the majority’s claim that cross-racial adoptions are not unusual. Judge Heaney stated that in Minnesota, less than one percent of all children are cross-racial adoptees. Judge Heaney further stated that nothing in the Guidelines indicates that adoptive status had already been taken into consideration by the Sentencing Commission and he therefore agreed with the district court’s departure from the Guidelines.

In United States v. Handy, the United States District Court for the Eastern District of New York found that, under certain circumstances, family relationships and employment history of the defendant may be sufficiently extraordinary to justify a downward departure from the applicable guideline range. In Handy, the defendant was convicted for conspiring with her former boyfriend to distribute cocaine.

The court considered the defendant’s lifestyle and found that she had been employed for over thirteen years in what the court found to be a perilous urban environment. The court also gave weight to the fact that Ms. Handy had single-handedly and successfully raised and supported her three children without public assistance. The court also found that the exceptionally promising futures of the two older children would be endangered if their mother were to be incarcerated for a prolonged period. The defendant’s nineteen-year-old son could potentially receive a college basketball scholarship and the defendant’s sixteen-year-old daughter was eligible for an annual $1,000 college scholarship.
The *Handy* court considered letters that were written on behalf of the defendant by her fellow workers and by members of the community. The court found that the defendant's family ties and employment record, under these circumstances, were sufficiently extraordinary to justify their relevancy as mitigating sentencing factors.

Although the court in *Handy* discussed the socioeconomic status of the defendant, the court explicitly stated that socioeconomic status of the defendant was not considered a mitigating sentencing factor in its decision. Thus, the court specifically tied its departure from the Guidelines to family ties and employment record, which are ordinarily not relevant for determining departures, but which the court found to be sufficiently extraordinary in the present case. The district court in *Handy* qualified its decision at the end of its opinion by stating that its departure was highly fact-specific and that it was not providing authority for departing downward in every case of a gainfully-employed single parent.

In *United States v. Neil*, the defendant was convicted of possession of cocaine with intent to distribute. The district court found that the defendant's stable home life and his work with young people justified a departure because to stay within the Guidelines in this situation would be eminently unfair. However, the Eighth Circuit found that the defendant's stable family life and his assistance to the youth of the community were not grounds for departure and remanded for resentencing. The court of appeals stated that departures from the Guidelines were intended to be rare and are warranted only when an atypical case is presented.

The court of appeals in *Neil* held that the defendant's family and community ties were not distinguishable from those of other defendants and, as such, the circumstances of the defendant had already been taken into consideration by the Sentencing Commission. The court of appeals did state, as did the court in *Prestemon*, that although the defendant's family and community ties did not justify a

112. *Id.* at 562. See *Big Crow*, 898 F.2d at 1332. See *supra* note 83 and accompanying text.
113. *Handy*, 752 F. Supp. at 564.
114. *Id.*
115. See *id.* See also U.S.S.G., *supra* note 12, § 5H1.6. See *supra* note 63 and accompanying text.
117. 903 F.2d 564 (8th Cir. 1990).
118. *Id.* at 565.
119. *Id.*
120. *Id.* at 565-66.
121. *Id.* at 565.
122. *Id.* at 566.
downward departure from the Guidelines, these factors may be considered by the district court when setting the defendant’s sentence within the applicable guideline range.\(^\text{123}\)

**ANALYSIS**

It is understandable that courts have struggled when determining whether departures from the Guidelines are warranted based upon family and community ties, and employment records.\(^\text{124}\) The language of the Sentencing Commission that these factors are “not ordinarily relevant” has been subject to many different interpretations and applications.\(^\text{125}\) However, courts must bear in mind that by stating that these factors are not ordinarily relevant, the Sentencing Commission had to be recommending that the courts ordinarily not consider these factors.\(^\text{126}\)

It is not so easy to understand why courts have struggled in determining whether a departure is warranted based upon a defendant’s race or socioeconomic status.\(^\text{127}\) The language of the Sentencing Commission unambiguously states that these factors are irrelevant in determining whether departures from the Guidelines are warranted.\(^\text{128}\)

Despite a congressional directive to consider many offender characteristics, only with respect to age and physical condition did the Federal Sentencing Commission (“Sentencing Commission”) provide any specific assistance to the courts in determining whether these characteristics are bases for departure from the Federal Sentencing Guidelines (“Guidelines”).\(^\text{129}\) As to the remaining factors that Congress required the Sentencing Commission to consider, the Sentenc-

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123. *Id.* See *Prestemon*, 929 F.2d at 1278.
124. Compare United States v. Big Crow, 898 F.2d 1326, 1332 (8th Cir. 1990) (upholding departure partially based upon solid employment history and community ties) with United States v. Neil, 903 F.2d 564, 566 (8th Cir. 1990) (holding that strong family and community ties not unusual enough to warrant departure).
127. See generally *Big Crow*, 898 F.2d at 1332 (stating that defendant’s efforts to lead a respectable life in a difficult environment was unusual enough to constitute grounds for departure); United States v. Handy, 752 F. Supp. 561, 562 (E.D.N.Y. 1990) (discussing defendant’s poor socioeconomic background at length).
128. *U.S.S.G.* supra note 125, § 5H1.10. See supra note 68 and accompanying text.
129. 28 U.S.C. § 994(d) (1988). *See supra* note 56 and accompanying text. *See U.S.S.G., supra* note 125, §§ 5H1.1, 5H1.4 (providing that age may justify a departure when the defendant is elderly and infirm and punishment other than incarceration will be effective) (stating that drug or alcohol abuse are not mitigating sentencing factors).
ing Commission simply issued policy statements declaring that such factors are "not ordinarily relevant in determining whether a sentence should be outside the Guidelines."\(^{130}\)

Congress also directed the Sentencing Commission to ensure that any guidelines or policy statements promulgated be entirely neutral with respect to the race, religion, creed, sex, national origin, or socioeconomic status of the offenders.\(^ {131}\) The Commission did comply with this directive.\(^ {132}\) The Sentencing Commission stated that it had considered such factors as sex, race, national origin, religion, creed, and socioeconomic status, and had determined that these factors are irrelevant in determining a sentence.\(^ {133}\) Such a strong policy statement necessarily implies that a court is not to consider these factors.\(^ {134}\) However, in *United States v. Big Crow*,\(^ {135}\) the United States Court of Appeals for the Eighth Circuit affirmed the district court's downward departure from the Guidelines even though such departure seems to have been based upon national origin and socioeconomic factors.\(^ {136}\)

In *Big Crow*, the defendant was convicted of assault with a dangerous weapon and assault resulting in serious bodily injury.\(^ {137}\) The district court departed substantially from the Guidelines partially on the basis of Big Crow's employment history and his poor living conditions on the Pine Ridge Indian Reservation.\(^ {138}\) The Eighth Circuit affirmed the district court's sentence specifically upon Big Crow's outstanding employment record, his strong community ties, and his steady efforts to overcome the difficult lifestyle of the Indian reservation.\(^ {139}\)

The court of appeals seemed to find that Big Crow's working for the past six years and providing for his family constituted extraordinary circumstances to which the Sentencing Commission had not given adequate consideration.\(^ {140}\) Although the court considered Big Crow's employment record in light of the hard life of an Indian res-
ervation, the fact that Big Crow lived on a destitute Indian reservation should not have been considered by the court as a basis for departure because the Guidelines specifically state that socio-economic status is irrelevant in determining whether to depart from the Guidelines.141

While Big Crow's plight may evoke sympathy, a court should not depart from the Guidelines when it has been specifically instructed not to do so.142 As the dissent in Big Crow stated,

"Congress made a policy decision . . . when it created the Sentencing Commission and adopted as one of the goals of guidelines sentencing the elimination of what it perceived to be unwarranted disparity in sentencing. We should not approve departures that, however, appealing they may be in their result, subvert both the goal and the spirit of the Guidelines."143

When examining Big Crow, one may conclude that the court of appeals approved the district court's departure on the mere fact that Big Crow worked for six years to support his family.144 Alternatively, one might conclude that the court of appeals disregarded the strong language of the Sentencing Commission's policy statement and did in fact approve the district court's departure based upon Big Crow's socioeconomic status.145 Neither conclusion is appealing. It seems preposterous to conclude that holding a job is such an extraordinary feat that the Sentencing Commission could not have considered it.146 It is equally unappealing to conclude that the court of appeals closed its eyes to unambiguous statutory language.147

Surprisingly, in a case similar to Big Crow, United States v. Handy,148 a New York district court also appeared to find that hold-

141. Compare id. at 1331-32 with U.S.S.G., supra note 125, § 5H1.10. See supra note 68 and accompanying text.

142. Compare T. Hutchison & D. Yellen, supra note 126, at 369 (providing that a policy statement directing that a factor is irrelevant necessarily means that the court not consider that factor) with Big Crow, 898 F.2d at 1332 (affirming a departure partially based on socioeconomic status).

143. Big Crow, 898 F.2d at 1333 (Wollman, J., dissenting).

144. See Big Crow, 898 F.2d at 1331-32.

145. Id.

146. See 18 U.S.C. § 3553(b) (1988) (stating that courts are only to consider departure in the presence of aggravating or mitigating circumstances). See supra note 15 and accompanying text.

147. See U.S.S.G., supra note 125, § 5H1.10. See supra note 68 and accompanying text. This may be a separation of powers violation as courts should defer to the legislative power of Congress. Where Congress has spoken in an area of legitimate legislative concern, like the promulgation of statutes setting the punishment for crimes, the Judiciary is not free to ignore congressional directives. See U.S. Const. art. I, § 1; J. No- wak & R. Rotunda, Constitutional Law § 3.5 at 126 (4th ed. 1991).

ing a job in a difficult environment is a sufficiently extraordinary occurrence so as to justify departure from the Guidelines.\textsuperscript{149} In \textit{Handy}, the United States District Court for the Eastern District of New York only briefly discussed the facts pertaining to the indictment of Ms. Handy for conspiring to possess and distribute cocaine, but then proceeded to provide a detailed account of Ms. Handy's life.\textsuperscript{150}

The court found that Ms. Handy had been employed for over thirteen years and had single-handedly raised and supported her three children without public assistance.\textsuperscript{151} The court found this continuous employment of a single parent raising three children to be extraordinary.\textsuperscript{152}

The district court painted a picture of Ms. Handy as a young woman raised in a poverty-stricken environment who overcame her poor socioeconomic background to raise her three children without relying on welfare.\textsuperscript{153} The district court also noted that letters from Ms. Handy's employer and community members attested to her good character.\textsuperscript{154}

In \textit{Handy}, the court discussed at length the poor socioeconomic environment of the offender.\textsuperscript{155} However, the district court dutifully recognized, at least in print if not in application, that the Sentencing Commission specifically found, as required by Congress, that socioeconomic status is irrelevant in determining whether a departure from the Guidelines is warranted.\textsuperscript{156} In \textit{Handy}, the court was careful to state that its downward departure was based on the defendant's employment record and family responsibilities, despite the court's lengthy discussion of the defendant's socioeconomic status.\textsuperscript{157} The court made this statement because, while the employment record and family responsibilities of a defendant are "not ordinarily relevant" in sentencing, a defendant's socioeconomic status is clearly irrelevant.\textsuperscript{158}

The court in \textit{Handy} also stated that its decision was highly fact-specific and was not intended to provide authority for a downward departure in every case of a gainfully-employed single parent.\textsuperscript{159}

\textsuperscript{149} See \textit{id.} at 562 (discussing defendant's poor socioeconomic background at length despite purporting to depart on other bases).

\textsuperscript{150} See \textit{id.} at 561-62.

\textsuperscript{151} \textit{Id.} at 562.

\textsuperscript{152} \textit{Id.} at 564.

\textsuperscript{153} \textit{Id.} at 562.

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id.} See \textit{Big Crow}, 898 F.2d at 1331-32. See \textit{supra} notes 81-82 and accompanying text.

\textsuperscript{156} \textit{Handy}, 752 F. Supp. at 564.

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.}
However, absent consideration of Ms. Handy's socioeconomic status, it is difficult to observe any reason for the district court's downward departure other than the fact that Ms. Handy was a gainfully-employed single parent.\textsuperscript{160}

The district courts in \textit{Big Crow} and \textit{Handy} may argue that because Congress did not require the Sentencing Commission to specifically state all atypical situations that constitute grounds for departure, Congress intended to give great deference to the courts in determining these atypical situations.\textsuperscript{161} This may very well be the case for Part K and Part H departures, provided Congress has not spoken.\textsuperscript{162}

In the circumstance-based departures of Part K, Congress gave the Sentencing Commission very little direction as to the circumstances the Sentencing Commission should consider in formulating the Guidelines.\textsuperscript{163} Specifically, Congress only required the Commission to provide a downward departure for substantial assistance to the authorities.\textsuperscript{164} The Sentencing Commission did proceed to assist the courts by listing some circumstances that may be aggravating or mitigating sentencing factors, but this list was not mandated by Congress.\textsuperscript{165} Therefore, it is logical to conclude that Congress did intend to give the courts wide discretion in determining whether to depart based on the circumstances of the offense.

As to Part H, departures based on offender characteristics, Congress has spoken more extensively.\textsuperscript{166} Specifically, Congress instructed the Sentencing Commission to take employment record, family responsibilities, and community ties into account only if they were relevant.\textsuperscript{167} The Sentencing Commission stated that these factors are "not ordinarily relevant."\textsuperscript{168}

Congress also instructed the Commission to ensure that the Guidelines were "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."\textsuperscript{169} The Sentencing Commission stated that these factors are irrelevant in sentencing.\textsuperscript{170}

\textsuperscript{160.} See id. at 562-63 (failing to offer any other factors for downward departure).
\textsuperscript{161.} See U.S.S.G., \textit{supra} note 125, \$ 5K2.0; T. HUTCHISON & D. YELLEN, \textit{supra} note 126, at 370.
\textsuperscript{162.} See \textit{supra} notes 31-40, 56-65, 67-68 and accompanying text.
\textsuperscript{163.} See \textit{supra} notes 31-32 and accompanying text.
\textsuperscript{165.} See U.S.S.G., \textit{supra} note 125, \$ 5K2. See \textit{supra} notes 42-53 and accompanying text.
\textsuperscript{166.} See 28 U.S.C. \$ 994(d) (1988). See \textit{supra} note 56 and accompanying text.
\textsuperscript{168.} U.S.S.G., \textit{supra} note 125, \$ 5H1.5, 5H1.6. See\textit{supra} note 63 and accompanying text.
\textsuperscript{169.} 28 U.S.C. \$ 994(d) (1988). See \textit{supra} note 56 and accompanying text.
\textsuperscript{170.} U.S.S.G., \textit{supra} note 125, \$ 5H1.10. See \textit{supra} note 68 and accompanying text.
Congress has more extensively voiced its objectives pertaining to Part H departures.\textsuperscript{171} Therefore, the discretion of the court is much more far-reaching in Part K departures, where Congress is basically silent, than in Part H departures, where Congress has clearly evidenced its intent.\textsuperscript{172} Thus, courts should be far more careful when considering departures based upon offender characteristics.\textsuperscript{173} It is questionable whether the courts in \textit{Big Crow} and \textit{Handy} adhered to this logical conclusion.\textsuperscript{174}

Although courts have a much more limited discretion to depart from the Guidelines under Part H as compared to Part K, this fact does not affect a sentencing court's ability to take offender characteristics into account when setting a sentence within the applicable guideline range.\textsuperscript{175} Furthermore, this exercise of judicial discretion within the guideline range is much less objectionable when the offender characteristics are not truly extraordinary.\textsuperscript{176} The cases of \textit{United States v. Prestemon}\textsuperscript{177} and \textit{United States v. Neil}\textsuperscript{178} are representative of this approach.\textsuperscript{179}

Contrary to \textit{Handy} and \textit{Big Crow}, the Eighth Circuit in \textit{Neil} found that the stable family life and community work of the defendant did not constitute such extraordinary circumstances as to be relevant in considering a sentence reduction.\textsuperscript{180} In \textit{Neil}, like \textit{Handy}, the defendant was convicted of conspiring to distribute cocaine and of possessing cocaine with the intent to distribute.\textsuperscript{181} The court of appeals found that Neil's supportive family relationships and his coaching of young athletes in his neighborhood were not so extraordinary as to have escaped consideration by the Sentencing Commission.\textsuperscript{182} Thus, the court of appeals stated that these factors had already been considered in setting the applicable guideline range and that there was no basis for a downward departure.\textsuperscript{183}

The court of appeals then stated that, although the defendant's

\begin{itemize}
  \item \textsuperscript{171} See 28 U.S.C. § 994(d) (1988) (listing numerous offender characteristics to consider when sentencing). \textit{See supra} note 56 and accompanying text.
  \item \textsuperscript{172} \textit{See supra} notes 31, 56-57, 67 and accompanying text.
  \item \textsuperscript{173} \textit{See supra} notes 56-57, 67 and accompanying text.
  \item \textsuperscript{174} \textit{See supra} notes 142-50 and accompanying text.
  \item \textsuperscript{175} \textit{See supra} notes 101, 123 and accompanying text.
  \item \textsuperscript{176} \textit{See supra} notes 97-101, 122-23 and accompanying text.
  \item \textsuperscript{177} 929 F.2d 1275 (8th Cir. 1991).
  \item \textsuperscript{178} 903 F.2d 564 (8th Cir. 1990).
  \item \textsuperscript{179} \textit{Prestemon}, 929 F.2d at 1278; \textit{Neil}, 903 F.2d at 566.
  \item \textsuperscript{180} \textit{Neil}, 903 F.2d at 565-66. \textit{See} \textit{Big Crow}, 898 F.2d at 1331-32; \textit{Handy}, 752 F. Supp. at 562. \textit{See supra} notes 139-40, 149-51 and accompanying text.
  \item \textsuperscript{181} \textit{Neil}, 903 F.2d at 565; \textit{Handy}, 752 F. Supp. at 561. \textit{See supra} note 150 and accompanying text.
  \item \textsuperscript{182} \textit{Neil}, 903 F.2d at 566.
  \item \textsuperscript{183} \textit{Id.}
\end{itemize}
family and community ties did not warrant a downward departure from the Guidelines, it would be appropriate to consider these factors in imposing the defendant's sentence within the relevant guideline range.\textsuperscript{184} Thus, assuming in \textit{Big Crow} and \textit{Handy} that, absent consideration of the defendant’s socioeconomic situation, a departure would have been unwarranted, these courts still would have had discretion to consider the individual characteristics of the defendants in setting a sentence within the applicable guideline range.\textsuperscript{185} The Eighth Circuit followed this approach in \textit{Prestemon}.\textsuperscript{186}

In \textit{Prestemon}, the court of appeals affirmed the defendant’s conviction for armed bank robbery but held that the defendant’s status as a bi-racial adoptee was not a mitigating sentencing factor and remanded for resentencing within the appropriate guideline range.\textsuperscript{187} Prestemon was a twenty-one-year-old bi-racial adoptee who had been an honor student.\textsuperscript{188}

The court of appeals first stated that, as Congress clearly had directed the Sentencing Commission to ensure that the Guidelines were entirely neutral as to race, the defendant’s racial background could not be grounds for departure.\textsuperscript{189} The court of appeals next considered whether the defendant’s adoptive status constituted a mitigating sentencing factor.\textsuperscript{180} The court of appeals stated that, when applying the guideline language that family ties are usually not relevant in determining departure from the Guidelines, most courts have refused departure based upon family situation on the strength of this guideline statement.\textsuperscript{191} Based upon this precedent and the court’s conclusion that even cross-racial adoption is not unusual, the court found that the defendant’s adoptive status was not so atypical as to have escaped consideration by the Sentencing Commission in formulating the Guidelines.\textsuperscript{192} The court of appeals made it clear that departures from the Guidelines are intended to be rare.\textsuperscript{193} However, the court of appeals did state that while a downward departure was unwarranted in the present case, on remand the district court was to consider the defendant’s bi-racial adoptee status and the defendant’s outstanding academic record in determining the appropriate sentence within the applicable

\begin{footnotes}
\item[184] Id.
\item[185] See id. at 566. See supra notes 135-43, 148-60 and accompanying text.
\item[186] See \textit{Prestemon}, 929 F.2d at 1278.
\item[187] Id. at 1276-78.
\item[188] Id. at 1276.
\item[189] Id. at 1277.
\item[189] Id.
\item[191] Id.
\item[192] Id. at 1277-78.
\item[193] Id. at 1276.
\end{footnotes}
guideline range. Thus, as in Neil, the Prestemon court stated that while departures from the guideline range should be rare, discretion still exists in imposing sentences within this guideline range.

Both Big Crow and Handy cite numerous facts evidencing the difficult environments of the defendants, which serve to evoke compassion for these offenders. However, the difficult socioeconomic environments of defendants should not be a mitigating sentencing factor as the Sentencing Commission explicitly and without qualification stated that socioeconomic factors are irrelevant in determining whether a sentence below the Guidelines is justified. Stripped of the elaborate details of the defendants' socioeconomic plight, both Big Crow and Handy boil down to two defendants who worked to support their families. It is difficult to envision that this is such an extraordinary occurrence that the Sentencing Commission did not take it into consideration in setting the guideline ranges.

The better approach, as exemplified in Prestemon and Neil, is to recognize that race and socioeconomic status are irrelevant in departure considerations, and employment record, family responsibilities, and community ties are only relevant when, absent any socioeconomic considerations, the circumstances truly are extraordinary. If a court finds that these factors are not extraordinary, as will most likely be the case, a court can still exercise its discretion and consider these factors when setting a sentence within the appropriate guideline range.

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194. *Id.* at 1278.
196. *See Big Crow,* 898 F.2d at 1331-32 (discussing difficult environment of Indian reservation where defendant lived); *Handy,* 752 F. Supp. at 562 (discussing defendant's life in a treacherous urban environment).
198. *See Big Crow,* 898 F.2d at 1331-32; *Handy,* 752 F. Supp. at 562.
199. *See Big Crow,* 898 F.2d at 1333 (Wollman, J., dissenting) (questioning what about defendant's steady employment, and family and community ties distinguished him from other defendants who could make the same showing); *Neil,* 903 F.2d at 566 (stating that defendant's strong family and community ties were not unusual and did not distinguish the defendant from other defendants).
200. *See,* e.g., Prestemon, 929 F.2d at 1277 (holding that defendant's racial background could not be a basis for departure and that adoption is not an atypical family circumstance and thus, did not warrant departure); Neil, 903 F.2d at 555-56 (stating that departures from the Guidelines are rare and that defendant's family and community ties were typical and thus, did not warrant departure).
201. *See Prestemon,* 929 F.2d at 1278 (stating that even though race and family situation of offender did not warrant a departure, the district court should consider offender's family situation in imposing a sentence within the guideline range); Neil, 903 F.2d at 566 (providing that although offender's family and community ties do not warrant a downward departure, these factors may be considered in setting a sentence within the guideline range).
CONCLUSION

In enacting the Federal Sentencing Guidelines ("Guidelines"), Congress attempted the formidable task of balancing judicial discretion so as to avoid disparate treatment, yet still provide for individualized sentences.\textsuperscript{202} Ultimately, Congress has stated that although district judges have limited discretion to depart from the Guidelines based upon an offender's employment record, and family and community ties, courts should never depart on the basis of an offender’s race or socioeconomic status.\textsuperscript{203}

Also, in determining whether to depart based upon employment record, or family or community ties, district courts must bear in mind that the Federal Sentencing Commission ("Sentencing Commission") has stated that these factors are not ordinarily relevant.\textsuperscript{204} Ordinary situations do not warrant a downward departure from the Guidelines.\textsuperscript{205} Therefore, a situation must be sufficiently atypical to justify basing a departure on these factors.\textsuperscript{206} Congress and the Sentencing Commission have set these standards for sentencing, and it is the duty of the courts to adhere to these standards.

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\textsuperscript{206} Id.