INTRODUCING THE "HEARTLAND DEPARTURE"

ADAM LAMPARELLO*

* Associate, Greenbaum, Rowe, Smith, Ravin, Davis & Himmel. B.A., *magna cum laude*, University of Southern California; J.D., *with honors*, Ohio State University College of Law; L.L.M. Candidate, New York University. The author would like to thank Professor Douglas Berman for his helpful insights with respect to earlier drafts of this Article.

Under the Federal Sentencing Guidelines (the "Guidelines"), sentencing decisions have often been comprised of "more complication of detail than richness of concept."[1] This Article proposes one means—the "heartland departure"—by which federal sentencing procedure may be able to gain the conceptual depth and purpose it currently lacks.

Prior to the advent of the Guidelines, sentencing decisions were primarily the product of unfettered judicial discretion; no rules, principles, precedent, or purposes guided or controlled district court judges in their determination of particular sentences to impose. The exercise of this discretion resulted in unjustifiable disparities in sentencing among similarly-situated defendants. As such, pre-Guidelines jurisprudence could be characterized as "lawless" in that sentences were primarily the product of individual judges' subjective predilections. Furthermore, in the absence of meaningful appellate review of such sentencing determinations, district court judges rarely, if ever, wrote reasoned sentencing decisions justifying the imposition of a given sentence in light of the purposes of criminal punishment. As such, the system was also purposeless, lacking the essential

1. Robert Weisberg, *Guideline Sentencing, Traditional Defenses, and the Evolution of Substantive Criminal Law Doctrine*, 7 FED. SENTENCING REP. 168, 168 (1994); *see also* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 284 (1993) ("Federal sentencing jurisprudence [is] almost entirely about tangential issues . . . rather than about fundamental questions relating to the trade-offs among sentencing purposes or alternatives to traditional imprisonment.")

foundations for a doctrinally-rich common law of sentencing.

While the Guidelines were designed to remedy these problems by reducing judicial discretion and creating a detailed grid of sentencing norms, their method of adoption ensured that federal sentencing practice would remain purposeless. In short, the Sentencing Commission created a grid of possible sentencing ranges and specified the conditions under which a defendant could fall within each category, based on offense and offender characteristics deemed apposite to pre-Guidelines sentencing determinations. The grid, comprised of nothing more than the mathematical average of sentences imposed by judges for particular offenses in pre-Guidelines jurisprudence, formed a "heartland" to govern all *typical* cases (i.e., cases that presented sentencing factors already considered by the Commission when adopting a given sentencing range). The "heartland" was *not* the product of substantive discussions in which the principles, purposes, and justifications of criminal punishment formed the basis for adoption of a particular sentencing norm for a particular offense. Nor was there any explication by the Commission as to the specific purposes being furthered by adoption of a particular sentencing norm, or, for that matter, *how any* of the delineated purposes of criminal punishment were finding expression through adoption of a particular sentencing norm for an individual criminal offense. The heartland exists merely as a codification of inconsistent pre-Guidelines sentencing decisions.

The Sentencing Commission also limited judicial discretion by permitting departures from the Guidelines only in rare, atypical cases. Constrained by its inability to exercise even de minimis discretion, the judiciary resorted, with disastrous results, to circumventing the Guidelines in a significant percentage of cases. As a result, the Guidelines have resulted in the same incoherence, inconsistency, and lack of principle they were designed to correct.

This Article proposes a remedy: the "heartland departure" paradigm, in which the purposes of criminal punishment are interlocked with the adoption of a particular sentence. To do so, this Article challenges three critical assumptions upon which the Guidelines ultimately rest. First, the Commission's assumption that drastically restricting judicial discretion would necessarily result in greater uniformity in sentencing failed to recognize that such measures encourage circumvention of the Guidelines. Second, the Commission's belief that the exercise of judicial discretion should be

limited to the most atypical cases deprives the judiciary of the opportunity to participate in a substantive discourse about the purposes, principles, and doctrines that undergird sentencing policy. Finally, the Commission should have rejected its impulse to freeze sentencing norms at the time it issued the Guidelines and instead encouraged an evolutionary process of development in which the judiciary could collaborate with the Commission to create a principled, doctrinally-based sentencing model.

The "heartland departure," therefore, reverses these critical assumptions upon which the Guidelines stand. It will permit district court judges to depart in both typical and atypical cases, as long as its departure decision is detailed in a written sentencing opinion explaining the specific purposes of criminal punishment that are being served by the alternative sentence and *why* the chosen sentence better furthers those objectives than the existing heartland sentence under the Guidelines. These opinions will provide both appellate courts and the Sentencing Commission with the substantive foundation to develop a common law of sentencing.

Since uniformity in sentencing is an important objective in any sentencing model, judges will be severely restricted in the extent to which they may depart from the applicable heartland range. In this way, the Guidelines can enable courts to incorporate principle while maintaining substantially uniform treatment of similarly-situated offenders. The limits of judicial discretion are not therefore eliminated, but repositioned to permit an open, robust debate among the courts and Commission regarding sentencing policy. In essence, the "heartland departure" frees courts to surface the "hidden departures" that have been driven underground by the restrictive departure paradigm as part of a comprehensive discourse on sentencing or district court lawmaking.

In addition, the Circuit Court of Appeals will similarly assume a "lawmaking function" through a two-tiered, de novo/abuse of discretion standard of review. Specifically, when a district court departs from the heartland in a *typical* case, the Circuit Courts of Appeal will hold de novo review over the district court's departure, enabling appellate courts to issue independent, principled, and purpose-driven sentencing opinions that assay the district court's opinions with reference to the purposes of criminal sentencing policy. Rather than acting merely as enforcers of the Guidelines' strictures, appellate courts will be called upon to exercise a "lawmaking

function" aimed at deciding *what* purposes of criminal punishment are being served by a particular sentence, *how* those purpose are being furthered by a particular heartland departure, and *whether* the alternative sentence better expresses a principled basis for a particular offense than the existing heartland range. This process can be labeled "appellate lawmaking."

Finally, armed with policy-driven sentencing opinions from the courts, the Commission will be better equipped to assess the legitimacy of the courts' heartland departures. The Commission could then revise or reformulate a particular heartland should it observe a substantive contribution to positive sentencing law from the judiciary. This will ultimately build a stronger, more-principled heartland than that created by mere mathematical averaging.

The institutional partnership envisioned by this Article assumes that federal sentencing should be an evolutionary process, and one in which the judiciary exercises a critical role. Through the development of a common law of sentencing, this evolutionary heartland will emerge. In this way, guided discretion will ultimately be the vehicle by which meaningful uniformity can be realized.

Part I details the policies and practices characteristic of pre-Guidelines jurisprudence and the resulting inequities. Part II examines the creation of the Federal Sentencing Guidelines, and Part III details the pernicious effects that have worked to undermine federal sentencing today and that prohibit a robust debate with respect to sentencing policy. Part IV introduces the "heartland departure," and proposes it as a mechanism to achieve, for the first time, a sentencing paradigm that rests upon a principled, purposeful foundation while simultaneously promoting fairness and uniformity in the treatment of criminal offenders.

I. FEDERAL SENTENCING PRIOR TO THE FEDERAL SENTENCING GUIDELINES

Prior to the implementation of the Guidelines, federal criminal sentencing could best be characterized as lawless and purposeless.[2] It was largely governed by the subjective predilections of district court judges with "nearly unfettered authority" to impose upon a criminal offender any sentence from within a broad range provided by a given

2. *See* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 4-6 (1972).

Congressional statute.[3] In fact, judges enjoyed such broad discretion that they could impose *any* sentence provided that it did not exceed the statutory maximum applicable to the relevant offense.[4]

In addition, "the judge was given wide latitude in determining which factors to take into account at the sentencing phase and how long the offender should be incarcerated, given parole, or both."[5] In fact, no limits existed on the type of information that the judge could consider when sentencing a defendant. Neither were there rules of evidence to constrain the judge's consideration of such factors.[6] In vesting judges with this broad grant of discretionary authority, "the system assumed that judges expert in the law and social sciences, and seasoned by the experience of sentencing many offenders, would choose penalties that maximized the rehabilitative chances of offenders."[7]

To put it bluntly, federal sentencing in the pre-Guidelines era can be appropriately characterized as "lawless" because the judiciary was not required to enunciate *any* principles or objective factors by which lower courts in subsequent cases could channel and apply their discretionary authority.[8] In fact, "sentencing decision-makers

3. Douglas A. Berman, *A Common Law For This Age of Federal Sentencing: The Opportunity and Need For Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 94 (1999); *see also* Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1473 (2002) ("Judges had broad discretion in sentencing and could impose any sentence below the statutory maximum applicable to the particular offense.")

4. *See* Deborah E. Dezelan, *Departures From the Federal Sentencing Guidelines After* Koon v. United States: *More Discretion, Less Discretion*, 72 NOTRE DAME L. REV. 1679, 1683 (1997); *see also* Dorszynski v. United States, 418 U.S. 424, 441 (1974).

5. Dezelan, *supra* note 4, at 1683 ("Prior to the enactment of the Federal Sentencing Guidelines, district court judges enjoyed wide latitude in sentencing determinations."); *see also* Mistretta v. United States, 488 U.S. 361, 363 (1989).

6. *See* Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly A Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1053 (2001).

> There was no limit on the type or quality of information a judge could consider at sentencing. A judge could properly receive and consider evidence about virtually any factor the judge felt to be important—the defendant's troubled childhood, emotional instability, arrest record, acquitted charges, uncharged conduct, rumored conduct, education, family responsibilities, substance abuse problems, civic activism, and so forth ad infinitum.

Id.

7. *Id.* at 1054; *see also* PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE 1 (1991) (stating that the rehabilitative ideal was premised upon the presupposition that "case-by-case decision-making should be encouraged; that future behavior could be predicted; that criminal-justice practitioners possessed the expertise required to make individualized sentencing decisions").

8. *See* Frankel, *supra* note 2, at 9-11; *see also* Berman, *supra* note 3, at 94; S. REP. NO. 98-225, at 41 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3224 (explaining that there existed a dearth of comprehensive "federal sentencing law" to inform judges regarding the

operated within a system that not only allowed but implicitly encouraged rendering decisions without explicit 'explanation or purported justification.'"[9] Trial judges were not required to "explain the reasons for their sentencing decisions on the record."[10] Moreover, since appellate review of the propriety of such sentences was, save for constitutional issues, precluded, no substantive sentencing law existed.[11] In this way, the discretionary sentencing regime vested "in judges and parole and probation agencies the greatest degree of *uncontrolled power* over the liberty of human beings that one can find in the legal system."[12]

Additionally, criminal sentences in the pre-Guidelines era were *indeterminate* in the sense that judges would sentence defendants "to either a specified term or a range of years (e.g., 5-20), but the number of years the defendant actually serves is then entirely in the hands of an administrative body, such as a parole board."[13] In fact, under the pre-Guidelines sentencing regime, "parole officials had authority to release prisoners *anytime* after they had served one-third of their

---

purposes of punishment). *See generally* Frank O. Bowman III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 682 (noting that pre-Guidelines judicial sentencing was "virtually unlimited").

9. Berman, *supra* note 3, at 95 (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 42-43 (1973)); *see also* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1445-46 (1997).

> Another disablement of appellate review was the widespread rule that trial courts were not obliged to explain the reasons for their sentencing decisions on the record. . . . [A]s one distinguished judge acknowledged, the trial judge was well aware that only an explained decision was at risk of reversal. Prudent trial judges had incentive to keep the reasons for their sentences to themselves.

Id.

10. Reitz, *supra* note 9, at 1445.

11. *Id.*

> [J]udges were instructed to consult any and all factors having to do with the crime itself or the offender—including the offender's whole life, character, and background. With such a free-form thought process in gear, there were effectively no legal principles against which a sentence could be tested on review.

Id. See also Bowman & Heise, *supra* note 6, at 1053 ("None of this information [sentencing factors] was subject to filtering by the rules of evidence, and the judge was required to make no findings of fact."); Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of* Koon v. United States, 58 OHIO ST. L.J. 1697, 1699 (1998).

12. Frankel, *supra* note 2, at 45; *see also* FRANKEL, *supra* note 9, at 49.

13. Bowman & Heise, *supra* note 6, at 1051-52 (explaining that for "most of the twentieth century prior to the SRA [Sentencing Reform Act], federal sentencing was indeterminate in this sense").

nominal sentence."[14] After the trial court imposed a particular sentence, "the United States Parole Commission, an executive branch agency, not only created its own guidelines for determining release dates but retained the discretionary power to set individual release dates anywhere within the broad parameters dictated by those guidelines."[15]

Unfortunately, although not surprisingly, the discretionary sentencing practices that characterized pre-Guidelines jurisprudence resulted in unwarranted, inequitable, and sometimes alarming disparities in the sentencing of similarly-situated criminal defendants.[16] Indeed, "[e]mpirical and anecdotal evidence indicated that trial judges' exercise of broad and essentially unreviewable sentencing discretion consistently resulted in substantial [and undue] differences in the lengths and types of sentences meted out to similar defendants."[17] Even worse, a number of studies found that "purportedly irrelevant personal factors, such as an offender's race, gender, and socioeconomic status, impacted sentencing outcomes and accounted for certain disparities."[18] Most importantly, there appeared

---

14. Berman, *supra* note 3, at 94 (emphasis added); *see also* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN FEDERAL COURTS 19-22 (1998).

15. Bowman & Heise, *supra* note 6, at 1052; see also 18 U.S.C. § 4206(a) (1976) (repealed in 1984 after passage of the Sentencing Reform Act), which illustrates the wide ranging discretion vested in parole officials:

> If an eligible prisoner has substantially observed the rule of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristic of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare; subject to the provisions of subsection (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

Id.

16. *See* Peter B. Hoffman & Barbara Stone-Meierhoefer, *Application of Guidelines to Sentencing*, 3 LAW & PSYCHOL. REV. 53, 53-56 (1977) (describing the "unwarranted sentencing disparity" which was characteristic of the pre-Guidelines scheme); *see also* Berman, *supra* note 3, at 94 ("At the time Judge Frankel was writing, criminal justice researchers and scholars were growing acutely concerned about disparities stemming from discretionary sentencing system.").

17. Berman, *supra* note 3, at 94; *see also* Michael Goldsmith & Marcus Porter, *Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures*, 69 GEO. WASH. L. REV. 57, 57-58 (2000); Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272-84 (1977) ("The data on unjust sentencing have become quite overwhelming.")

18. Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 26

to be no underlying rationale or explanation for such disparities, other than the subjective predilections of an individual district court judge.[19]

This alarming disparity prompted Judge Marvin Frankel to proclaim that "[t]he evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the differences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes."[20] These and other criticisms[21] prompted an incisive report by the Twentieth Century Fund Task Force on Criminal Sentencing, which found that the federal sentencing system created "unexplained and seemingly inexplicable sentencing disparity" that mandated structural reforms to develop a "system that is both more just to individual defendants in terms of fairness and more effective in terms of reducing crime."[22] Indeed, the inequities created by pre-Guidelines sentencing practice became the cornerstone of intense reform efforts that ultimately led to the advent of the Federal Sentencing Guidelines.

(2000).

> By the early 1970s, criminal justice researchers and scholars became concerned with the unpredictable and often widely disparate sentences that this highly discretionary system produced. Empirical research and anecdotal evidence revealed that sentencing judges' exercise of broad and largely unreviewable discretion resulted in substantial and undue differences in both the length and types of sentences meted out to similar defendants.

Id.

19. *See* Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L. J. 393, 395-96 (1996) ("The identity of the judge became a better predictor of incarceration than the defendant and the crime."); *see also* Hon. William W. Wilkins, Jr., *Response to Judge Heaney*, 29 AM. CRIM. L. REV. 795, 797 (1992) ("The actual sentence imposed was too often a result of the luck of the draw or the assignment of a particular judge to a case.").

20. Frankel, *supra* note 9, at 21.

21. *See* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944 (1988) (detailing a "general consensus" in Congress and among judges, attorneys, and criminal justice commentators that the federal sentencing structure desperately needed reform); *see also* 130 Cong. Rec. 1644 (1984) (statement of Sen. Edward Kennedy) (exclaiming that sentencing disparity was "a national disgrace").

22. *See* Berman, *supra* note 18, at 27 (quoting TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 3-9 (1976)); *see also* DAVID FOGEL, WE ARE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS (2d ed. 1976).

II. THE CREATION AND IMPLEMENTATION OF THE FEDERAL SENTENCING GUIDELINES

In heralding the Sentencing Reform Act of 1984, Senator Edward Kennedy claimed that the courts' inability to develop rational, normative sentencing law was largely a problem caused by the legislature; the "legislature must bear the blame," he concluded, because Congress had not "built any standards or safeguards into the sentencing process."[23] Kennedy claimed that the federal criminal code created "disparity by conferring unlimited discretion on the sentencing judge" without any explanation "of purposes . . . criteria or Guidelines to be considered by the sentencing judge."[24] Similarly, Judge Frankel observed that "legislators had not done the most rudimentary job of enacting *meaningful* sentencing 'laws,'"[25] so as to explicate the purposes underlying the adoption of a particular criminal sanction for a particular criminal offense.[26]

Due to the overwhelming criticism of the extant federal sentencing system, Congress began to draft reform proposals designed to remedy the shameful sentencing disparity caused by the mercurial exercise of unchecked discretion.[27] By reforming the federal sentencing system, Congress sought to achieve both honesty in sentencing (i.e., the abolition of parole) and uniformity in sentencing (the similar treatment of similarly-situated offenders).[28] Despite Congress's laudable goals, what ultimately followed was a Guidelines structure that shamefully adopted the mathematical averages of pre-Guidelines sentencing decisions while simultaneously eliminating the ability of the courts to contribute a purposeful, principled body of sentencing law to the Guidelines' evolution.

---

23. *See* Berman, *supra* note 3, at 97 (quoting S. 2699, 94th Cong. (1975)).

24. *Id. See generally* Hon. Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1062 (1997) (noting that the Federal Sentencing Guidelines were adopted "to address judicial, congressional and academic concerns about lawlessness in sentencing").

25. *See* Frankel, *supra* note 9, at 7 (emphasis added).

26. *See generally* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1686-91 (1992).

27. *See* S. 2699, 94th Cong. (1975); S. REP. NO. 98-225, at 41, 49 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3224, 3232.

28. *See* Comment, *The Federal Sentencing Guidelines: A Need to Restore "The Balance,"* 9 J. SUFFOLK ACAD. L. 179, 182-83 (1994) ("The Sentencing Reform Act of 1984 came into being as a result of Congress' presumption that federal judges were giving disparate sentences to offenders convicted of similar crimes, committed under similar circumstances," and observing that it would "eliminat[e] the discretion of the judiciary and the parole commission.").

A. A Brief Overview of the Federal Sentencing Guidelines

Application of the Federal Sentencing Guidelines "involves an intricate, nine-step process in which a sentencing court assesses the seriousness of a defendant's current offense and past crimes to establish an 'offense level' and a 'criminal history score' which are then used to determine the defendant's applicable sentencing range from within a 258-box grid" known as the Guidelines Sentencing Table, or "heartland."[29] The criminal history category, reflected in the Sentencing Table on the horizontal axis, attempts to identify the defendant's disposition to criminal activity as reflected by the frequency and kind of the defendant's encounters with the justice system.[30] The offense level on the Guidelines' vertical axis measures the seriousness of the present crime as reflected by three components: (1) a "base offense level," (2) a set of "specific offense characteristics," and (3) further adjustments under Chapter Three of the Guidelines.[31] The base offense level is a numerical ranking reflecting the seriousness of the offense for which the defendant was convicted.[32] The "specific offense characteristics" are an effort to account for commonly occurring factors that accompany a particular criminal act and thereby affect the defendant's culpability.[33] The amount of monetary loss, for example, is a "specific offense characteristic," as a defendant who evades taxes totaling $50,000 will get a higher sentence than a defendant who evades taxes and causes the government a loss of $10,000. Chapter Three of the Guidelines provides for additional adjustments in the defendant's "offense level," based upon factors such as his role in the offense, whether the victim was a government official, and the existence of multiple counts of conviction.[34] Mitigating characteristics, such as the defendant's "acceptance of responsibility" for commission of the criminal act, will reduce the offense level through an analogous process.[35] At the conclusion of its analysis, the court arrives at an intersection between

29. Douglas Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity From Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 443 (2002).

30. *See* Frank O. Bowman III, *Departing is Such Sweet Sorrow: A Year Of Judicial Revolt on "Substantial Assistance Departures" Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 11 (1999).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 12.

35. *See id.*

the horizontal and vertical axes which provides a sentencing range. Absent extraordinary or unusual circumstances, this range outlines the parameters within which the judge must sentence a particular offender.

B. The Guidelines' "Heartland" — Simply the Mathematical Averaging of Purposeless, Unprincipled Pre-Guidelines Jurisprudence

Despite all of the criticism levied against the unguided judicial discretion model that characterized the pre-Guidelines sentencing regime, the Commission seemed more than willing to incorporate these "unjust," "widely-disparate," and "purposeless" sentences directly into the Guidelines' heartland. As a result, the heartland grid suffers from the same flaws that characterized pre-Guidelines sentences—there exists no explicit purpose or stated principle justifying the criminal sanctions that are applicable for each particular offense. In other words, the Commission never explained why the penalties adopted for each substantive offense furthered the policies of retribution, rehabilitation, deterrence, and incapacitation, the traditional purposes of criminal punishment. Instead, in its rush to adopt a heartland for the overwhelming majority of cases, the Commission merely averaged the sentences meted out in pre-Guidelines jurisprudence and placed this number on a corresponding position on the heartland grid.

The Commission also incorporated sentencing factors into the Guidelines that it deemed relevant during the pre-Guidelines era, and directed that these factors be considered in determining the base offense level for each particular offense. In addition, the Commission decided to ascribe numerical values to each factor, corresponding to the Commission's interpretation of its relative severity in relation to a particular offense. Lost in this process was any discussion as to why the adoption of particular sentences for each criminal offense furthered the goals of a just criminal sentencing system. In fact, not one sentence in the entire Guidelines Manual is devoted to explaining the justifications, reasons, or principles that governed imposition of the range for a particular offense. So what ultimately became the Guidelines' heartland was nothing more than a codification of pre-existing lawlessness, with the concomitant effect of creating a heartland devoid of purpose, principle, and meaning. In this light, frequent criticisms of the Guidelines as mechanistic, overly rigid,

bureaucratic, and incoherent seem not only appropriate but accurate.

The most alarming aspect of the Commission's approach was that it conceded that the heartland represented nothing more than mathematical averages of pre-Guidelines sentences:

> In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-Guidelines sentencing system . . . . While the Commission has not considered itself bound by pre-Guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing. . . . Guidelines sentences, in many instances, will approximate pre-Guidelines practice and adherence to the Guidelines will help to eliminate wide disparity.[36]

This fact greatly undermines the Guidelines' credibility because it suggests that the Commission engaged in little independent thought as to why the adoption of pre-Guidelines averages would further the goals, or any goal, of criminal punishment. The Commission placed too high a value on the one principle it upheld—uniformity—achieving this objective without proper deliberation about the underlying normative principles. As Professor Paul H. Robinson suggests:

> [C]ould one persuasively argue that the Guidelines are calculated to do justice? The Guidelines' well known birth process makes such a claim implausible . . . the Commission did not deduce sentencing Guidelines from principles of justice, or logical principles of any sort. The Sentencing Reform Act took judges out of the sentencing philosophy business so that a single, centralized authority—the Commission—could sort through the competing arguments and come to a single conclusion on sentencing philosophy for a given case. *But, the Commission never undertook this analysis.* Instead, it based its sentences on mathematical averages of past practice of federal sentencing judges, with minor and equally irrational adjustments.[37]

As a result, although it remedied the problem of lawlessness in sentencing, the Commission failed to adopt a principled replacement system. Professor Robinson very well explained the results of this desultory approach:

> The effect of this foundation of the Guidelines is that no one, Commissioner or judge, can give an explanation for *any Guidelines sentence* other than to say that the sentence is what has

36. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2002).

37. Paul H. Robinson, *The Federal Sentencing Guidelines: Ten Years Later: An Introduction and Comments*, 91 NW. U. L. REV. 1231, 1241 (1997) (emphasis added).

> been done in the past, or worse, that the sentence is a mathematical average of what has been done in the past . . . such mathematical averaging often ensures irrational sentences. Judges may have disagreed, for example, whether it is best to give drug users who sell to support their habit a purely rehabilitative, non-prison sentence to a drug treatment program, or whether it is better to give a long prison term to provide a dramatic deterrent. Both approaches have a logic and can be rationally defended. The same cannot be said for a mathematical average of the two, which may be too short for the dramatic deterrent and yet not provide the drug rehabilitation.[38]

Consequently, he concludes, "the Guidelines have survived, but in a form that risks a long-term if not permanent disrespect arising from their lack of principle."[39]

Perhaps anticipating this criticism, the Commission depicted the heartland as just "the first step in an evolutionary process."[40] The most efficacious method to bring purpose and reason into the Guidelines would have been to engage the judiciary in a substantive discourse on sentencing policy and purposes with the ultimate aim of adding principle to the heartland. Amazingly, however, despite its "evolutionary" intent, the Commission subsequently strictly limited the courts' discretionary authority, ensuring that the heartland would continue to rest upon a "politically pragmatic but unprincipled foundation."[41]

C. The Commission's Restrictions on Judicial Departures—Insurance Against the Creation of a Purposeful Heartland

To fully appreciate the severity of the constraints placed upon the courts' departure authority, one must first consider the statutory language of 18 U.S.C. § 3553(b). The statute grants courts authority to depart from the heartland when 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."[42]

Thus, a court must first assess whether the Commission "adequately considered" a particular sentencing factor when drafting

38. *Id.* at 1241-42.
39. *Id.* at 1242.
40. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2002).
41. Robinson, *supra* note 37, at 1243.
42. 18 U.S.C. § 3553(b) (2000) (emphasis added).

the Guidelines; second, the court must decide whether the facts of a particular case should result in a sentence outside the Guidelines. The first prong sets forth a descriptive test, one that focuses the courts' inquiry upon what the Commission did; the second prong then directs the courts to ask how and why an alternative sentence will better further the purposes of criminal punishment.[43]

On its face, therefore, the departure standard appears to grant courts the discretionary authority to engage in a normative analysis with respect to sentencing and thereby contribute purposeful sentencing opinions to aid in the evolution of a principled doctrine. The Commission, however, viewed matters differently, and through its directives to the courts, as well as its own policy statements, cast the courts as strict enforcers of the Commission's heartland dictates rather than as positive lawmakers in the development of a principled sentencing jurisprudence.

Rather than encourage judicial discretion, the Commission endorsed what it called the heartland approach to federal sentencing.[44] Under the heartland model,

> [t]he Commission intend[ed] the sentencing courts to treat each guideline as carving out a 'heartland,' a *set of typical cases* embodying the conduct that each guideline describes. When a court finds an *atypical* case, one to which a guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted."[45]

Thus, a court could decide to depart from the heartland, but only "where atypical characteristics or specialized circumstances occur."[46] In so doing the "Commission intimated that the Guidelines were comprehensive and complete," and that departures must be considered in light of whether the Commission inadequately considered the relevant factors.[47]

Unfortunately, the Commission all but eliminated the courts' power to act as lawmakers and contribute to the Guidelines' evolution. The Guidelines manual is now over four hundred pages in length and contains over 100 multi-section Guidelines, indicating that the Commission "adequately considered" all but the most esoteric

43. *See* Berman, *supra* note 18, at 70.

44. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2002).

45. *Id.*

46. Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 573 (1998).

47. Berman, *supra* note 3, at 101.

sentencing factors.[48] In fact, the Commission specifically stated that the courts' departure power would rarely be needed "because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-Guidelines sentencing practice."[49]

Furthermore, the Commission specifically delineated many sentencing factors that would not be "ordinarily relevant" to whether a departure was warranted in a specific case.[50] The message to glean from the Commission's approach is ineluctable: belying its claim that the Guidelines "were but the first step in an evolutionary process," the Commission embarked on intense efforts to "minimize the discretionary powers of the sentencing court."[51]

The Commission's own policy statements eschewed the courts as possible contributors to a principled, evolving sentencing jurisprudence.[52] For example, the Commission explained that "despite the courts' legal freedom to depart from the Guidelines, they will not do so very often."[53] The Commission further explained that departures should be extremely rare because the Guidelines "heartland" represented a comprehensive, nearly exhaustive approach to criminal sentencing reform. [54] Importantly, the Commission also stated that cases in which departures are based upon factors not expressly endorsed by the Commission in the Guidelines "will be highly infrequent."[55] Thus, through its own policy statements, the

48. *Cf.* Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1275 (1997) (describing the Guidelines' complexity).

49. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2002).

50. *Id.* ch. 5, pt. H, introductory cmt. The following are a list of offender characteristics that the Commission deemed not ordinarily relevant to a determination as to whether a departure was warranted: Age; Education and Vocational Skills; Mental and Emotional Conditions; Physical Condition, Including Drug or Alcohol Dependence or Abuse; Employment Record; Family Ties and Responsibilities and Community Ties; Race; Sex; National Origin; Creed; Religion; Socio-Economic Status; Military, Civic, Charitable, or Public Service; Employment-Related Contributions, Record of Prior Good Works; and Lack of Guidance as a Youth and Similar Circumstances. The only way that factors deemed "not ordinarily relevant" could form the basis for a departure would be if they were so exceptional as to take them out of the heartland.

51. *Id.* ch. 1, pt. A, introductory cmt. 4(b) (2002).

52. "[D]issatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the Guidelines is not an appropriate basis for a sentence outside the applicable guideline range." *Id.* § 5K2.0 cmt.

53. *Id.* ch. 1, pt. A, introductory cmt. 4(b).

54. *Id.*

55. *Id.* As a matter of background, the Guidelines authorize both guided and unguided departures. "Guided" departures are those in which a factor that may warrant a departure from the applicably sentencing range is expressly listed in the Guidelines as a permissible basis for departure. Other factors are forbidden or discouraged as a basis for departure. In

Commission reflected its belief that "courts will rarely in fact need to exercise their legal freedom to depart from the guidelines."[56]

Cognizant of the directives issued by the Commission, courts had little choice but to enforce the "heartland" strictures and limit their use of departures to the most extraordinary cases.[57] Many district courts reluctantly noted that "valid departures are likely to be few in number," because the Commission "has already considered all but the most esoteric factors."[58]

Similarly noting that departures are only to occur when the Commission has not "adequately considered" a particular factor, the Circuit Courts have focused primarily upon whether a given case fell within the Guidelines' heartland, thereby prohibiting a departure.[59] In this way, the Commission forced appellate courts to utilize a backward-looking, mechanistic analysis that focused on what the Commission did, not on what would best serve the principles and purposes of punishment.[60] As Professor Reitz noted, "Perhaps the most disappointing aspect of the appellate departure jurisprudence has been its divorce from the underlying goals of punishment:"[61]

---

the case of discouraged factors, the Commission's standard language is that certain factors are not "ordinarily relevant" and thus may form the basis for a departure only if the factor is present to an extraordinary or exceptional degree. Finally, "unguided" departures are those in which a court departs from the guideline based upon a factor not explicitly mentioned (i.e., encouraged, discouraged, or forbidden) in the Guidelines. The Commission, recognizing that it could not contemplate the existence of every perceivable sentencing factor, does permit "unguided departures but believes that the occurrence of such departures should be 'highly infrequent.'" *Id.* § 5K2.0.

56. Terence F. MacCarthy & Nancy B. Murnighan, *The Seventh Circuit and Departures From the Sentencing Guidelines: Sentencing By Numbers*: 67 CHI.-KENT L. REV. 51, 56 (1996).

57. *See, e.g.*, United States v. Jackson, 921 F.2d 985, 988 (10th Cir. 1990) ("Because a judge who departs no longer strictly follows the standards of the Guidelines, uniformity is threatened."); United States v. Uca, 867 F.2d 783, 787 (3d Cir. 1989) (noting that because Congress sought in passing the Sentencing Reform Act, to achieve uniformity in sentencing similarly situated offenders, "attempts to impose uniformity will be destroyed if courts depart often from the Guidelines").

58. United States v. Bethancurt, 692 F. Supp. 1427, 1430 n.12 (D.D.C. 1998); *see also* United States v. Bell, 974 F.2d 537, 538 (4th Cir. 1992) (downward departures are only permitted in a "rare case"); United States v. Bowser, 941 F.2d 1019, 1027 (10th Cir. 1991) (Baldock, J., concurring in part and dissenting in part) ("Given the Sentencing Commission's comprehensive treatment of the factors involved in sentencing . . . we have determined that 'departures should rarely occur.'" (quoting United States v. Jackson, 921 F.2d 985, 989 (10th Cir. 1990) (en banc))).

59. *See, e.g.*, United States v. Crawford, 883 F.2d 963, 964-65 (11th Cir. 1989); United States v. Roberson, 872 F.2d 597, 601-04 (5th Cir. 1989).

60. *See* Reitz, *supra* note 9, at 1466 ("For the first decade under sentencing guidelines, most federal courts of appeal chose the high enforcement/low judicial creativity road rather than its alternative.").

61. *Id.* at 1468.

> Attempted applications of policies of deterrence, incapacitation, rehabilitation, and desert have more often been the stuff of dissenter's laments, or district court opinions overturned on appeal, than the basis of majority rulings on appeal. When district courts have premised departures on the conclusion that there is an unusually small likelihood that the defendant will re-offend, the courts of appeals have brushed such reasoning aside. When district judges have found that defendants show good prospects for rehabilitation, or have already, prior to sentencing, made unusual strides in treatment programs, the circuit courts have almost always invalidated the resulting departures. The appellate opinions . . . seldom make any nod to the statutory authorization to evaluate sentences in light of the underlying goals of punishment . . . . Presumably, in the jurisprudential world of federal guideline appeals, such cornerstone policies have already been "adequately considered" by Congress and the Commission.[62]

By rejecting a more normative, lawmaking approach for the courts in post-Guidelines jurisprudence, the Commission ensured that "[d]eparture decision-making did not address what factors should impact sentences within the guidelines scheme, as judges failed . . . to focus on whether factors in the case at hand might normatively justify a sentence above or below the sentencing range specified by the Guidelines."[63] In other words, by requiring courts to divine what the Commission did rather than what it ought to have done, the Commission's approach "undermined . . . the development of principled sentencing law" and "allowed for purposeless departure decisions in individual cases and produced a purposeless departure jurisprudence across cases."[64] These decisions were driven by the Commission's restrained view of departure authority, and "[t]he narrowness of this jurisprudence undermined the development of a principled sentencing law under the Guidelines."[65]

Ultimately, the Commission's approach undermined its stated goal of achieving uniformity, as the courts, confronted with an unprincipled heartland and an overly restrictive departure authority,

---

62. *Id.* at 1468-70; *see also* Gary S. Gilden, *Appellate Determinacy: The Sentencing Philosophy of the United States Court of Appeals for the Third Circuit*, 40 VILL. L. REV. 610-15 (1995).

63. Berman, *supra* note 18, at 65. Professor Berman continues: "[d]eparture cases involved significant 'descriptive deliberation' as courts contemplated and discussed what the Commission had described in the Guidelines' heartlands, but they lacked serious 'prescriptive deliberation,' as courts did not contemplate or discuss what they prescriptively thought should result in a sentence outside the Guidelines." *Id.*

64. *Id.*

65. *Id.*

undertook methods to circumvent the Guideline's application.

III. THE FEDERAL JUDICIARY'S RESPONSE TO AN UNPRINCIPLED HEARTLAND AND OVERLY RESTRICTIVE DEPARTURE PARADIGM

For the reasons discussed in Part II, it is unsurprising that "the Guidelines are seen as mechanistic and unprincipled," possessing "a serious credibility problem with many sentencing judges."[66] Judge Jose Cabranes described the Guidelines as a "dismal failure,"[67] later adding that the heartland itself substitutes moral judgment with "bureaucratic penalization,"[68] thereby "threaten[ing] to transform the venerable ritual of sentencing into a puppet theater."[69] Other judges have called the Guidelines a "dark, sinister, and cynical crime management program" and "the greatest travesty of justice in our legal system in this century."[70]

It is similarly unsurprising that the unprecedented restrictions on judicial discretion introduced by the Guidelines would eventually undermine the Commission's efforts to achieve uniformity, as courts attempted to circumvent what was perceived to be a vacuous heartland. Judges did so through two means: "hidden departures" that deprived the courts and the Commission of a substantive policy debate over sentencing policy, and "overt departures" that created innumerable inter-circuit conflicts. Ultimately, the very disparity that the Guidelines were intended to eliminate was reintroduced.

A. "Hidden Departures": Driving the Sentencing Discourse Underground

By accepting, encouraging, or otherwise promoting controversial plea bargains between prosecutors and defendants in ordinary heartland cases, a judge could impose sentences that, in his view, were more just than those specified by the applicable Guideline ranges. Since plea bargaining is largely hidden from Commission

66. Robinson, *supra* note 37, at 1240.

67. José A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y. L.J., Feb. 11, 1992, at 2.

68. Stith & Cabranes, *supra* note 48, at 1254.

69. STITH & CABRANES, *supra* note 14, at 84.

70. G. Thomas Eisele, *The Sentencing Guidelines System? No. Sentencing Guidelines? Yes.*, FED. PROBATION, Dec. 1991, at 16, 20-21. *But see* Andrew J. Kleinfeld, *The Sentencing Guidelines Promote Truth and Justice*, FED. PROBATION, Dec. 1991, at 16. These two articles are presented as a point-counterpoint piece, *The Sentencing Guidelines: Two Views From the Bench*, FED. PROBATION, Dec. 1991, at 16.

scrutiny, this practice effectively removed departing judges from the debate regarding sentencing policy and the evolution of a principled heartland. Yet since the original heartland was merely the mathematical average of unprincipled pre-Guidelines sentences, the necessity for open, robust, and honest debate was paramount. By limiting a court's discretion to the atypical case, rather than seeking its input, the Commission precluded this much-needed debate on principled sentencing policy. "Hidden departures," which amount to nothing more than unauthorized judicial departures in a heartland case, became a widely-accepted method by which courts could circumvent the Guidelines.

Charge bargaining, or the dismissal of readily provable counts against a defendant, is arguably the most effective means to circumvent the Guidelines.[71] As Professors Stephen Schulhofer and Ilene Nagel note, "Charge bargaining is particularly common in cases in which the facts support an assumption that a charge carrying a mandatory minimum sentence is applicable."[72] For example, courts often accept, even promote, plea bargains that reduce charges for drug distribution, which carry stiff penalties under the Guidelines, to counts of drug possession or illegal use of the telephone.[73] Courts can therefore arrive at a "heartland" sentencing range far lower than the range which would have been applicable had all "readily provable" counts been considered at sentencing.[74]

What identifies this behavior as a circumvention is that "the Guidelines range has been manipulated to achieve the same result as a downward departure," except that the case is not sufficiently atypical to warrant a departure under the Guidelines. As Professors Schulhofer and Nagel hypothesize, "[I]n many of the cases in which the Guidelines have been circumvented, the ultimate sentence imposed probably could not be justified, due to an absence of the unusual factors that justify departures from the Guidelines system."[75]

---

71. *See* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guidelines Circumvention in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284, 1293 (1997).

72. *Id.*; *see also* U.S. SENTENCING COMM'N, A SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

73. Schulhofer & Nagel, *supra* note 71, at 1293-94.

74. Another means to evade the Guidelines' severity is the section 5K1.1 "substantial assistance" motion, often made on behalf of "'sympathetic' defendants who have offered either minimal assistance, assistance that did not bear fruit in the way that section 5K1.1 requires, or no assistance at all." *Id.* at 1293; *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002).

75. Schulhofer & Nagel, *supra* note 71, at 1291.

Circumvention of the Guidelines, therefore, represents nothing more than a departure from the heartland.

More disturbing is the fact that circumvention of the Guidelines occurs with regularity throughout the federal system.[76] Research by Professors Schulhofer and Nagel suggested that Guidelines evasion or circumvention occurred in roughly 20-35% of federal criminal cases resolved by guilty plea between 1989 and 1994.[77] Moreover, the extent to which Guideline circumvention lowers the heartland from that which would otherwise be applicable is alarming. While hypothesizing that Guidelines evasion often results in a sentence 10-25% below the proper heartland range, Schulhofer and Nagel note that "much of the evasion is far greater, and in a few jurisdictions huge discounts are not uncommon."[78] For example, "in one district . . . discounts of 70-90% (for example, from 74 to 14 months, or from 69 to 9 months) were frequent occurrences."[79]

Widespread evasion of the Guidelines effectively reintroduces the very disparity sentencing reforms attempted to eliminate. By encouraging plea bargains for certain types of offenses and offenders, courts rely upon individual, subjective notions of justice while simultaneously ignoring the heartland they are mandated to apply. These "hidden departures" closely resemble the unchecked discretionary power possessed by courts in the pre-Guidelines era, and the consequences that stemmed from pre-Guidelines lawlessness—intolerable disparities—are once again creeping into the federal sentencing process.

The problem of heartland circumvention can only be adequately addressed after determining and understanding its causes. Not surprisingly, circumvention represents a direct response by the judiciary to what it perceives as both an unprincipled, purposeless heartland and an overly restrictive departure mechanism. It was the structure of the Guidelines, therefore, that prompted circumvention and ultimately undermined the objective of achieving uniformity in the federal sentencing process. The unprincipled origins of the heartland caused many judges to consider the resulting grid overly technical and unnecessarily severe, prompting reticence to apply the applicable "heartland" range in cases where a lower sentence seemed

76. *Id.* at 1292.
77. *Id.* at 1290 (noting that frequency estimates are "inherently problematic").
78. *Id.* at 1292.
79. *Id.*

more appropriate. Professors Schulhofer and Nagel explain as follows:

> Rightly or wrongly, many trial judges view the Guidelines as too rigid . . . [J]udges confront cases in a highly individualized, highly contextualized micro framework. They are most sensitive to the impact of the sentence on the particular defendants and their family, because these are the people with whom they deal. Many judges believe that offender characteristics that should have a bearing on sentences were wrongfully de-emphasized by Congress and are not adequately accounted for by the Guidelines . . . . Further, many judges think that the overall sentence lengths that result from the Guidelines are simply too long . . . .[80]

Indeed, "the Guidelines sometimes are perceived as insufficiently sensitive to differences in culpability among offenders [in large part because] . . . the Guidelines deliberately have been structured to minimize reliance on sentencing factors that are highly subjective or easily manipulated."[81] Such a de-personalized approach, of course, "has been dominated by the imperative to reduce disparity" in sentencing.[82]

Although some judges seem reluctant to apply the Guidelines as written, others hesitate to depart from the applicable heartland under the provisions provided by the Guidelines, even where it seems that the Commission may not have "adequately considered" a given sentencing factor. One possible explanation for this phenomenon is the common perception that the downward departure mechanism is too restrictive to permit meaningful consideration of an offender's specific characteristics.[83] Indeed, "the device that was expected to permit appropriate individualization—the structured power to depart—seems not to be working quite as intended."[84] Since the Guidelines do not sanction departure for many sentencing factors viewed as relevant to a fair, individualized sentence, courts have resorted to circumventing the Guidelines in an attempt to achieve what the departure mechanism will not permit. Professors Schulhofer and Nagel suggest that "[i]n many of the cases in which the Guidelines have been circumvented, the ultimate sentence imposed probably could not be justified, due to an absence of the unusual

80. *Id.* at 1299, 1301.
81. *Id.* at 1306.
82. *Id.*
83. *Id.* at 1299, 1301-02.
84. *Id.* at 1301.

factors that justify departures from the Guidelines system."[85] Consequently, the inevitable judicial "subterfuge and manipulation" creates sentencing disparities which undermine Congress's objective to achieve uniformity in sentencing.[86]

Perhaps the most obvious harm of systemic "hidden departures" is the lack of openness. In such cases, "there is no procedural mechanism to make the basis of the departure visible and to permit judicial review. Covert departures may be defensible on a substantive basis, but they provide no procedural guarantees of regularity and legitimacy . . . ."[87] Neither the Commission nor any appellate court can ever review the bases for such hidden departures, since they are, by definition, detached from any principle. As a result, otherwise invalid departures are "driven underground as participants find covert means to guarantee that the sentence they consider appropriate will not be derailed by strict interpretation of the departure provisions."[88]

Ultimately, however, the most disastrous consequence of circumvention by "hidden departures" is the preclusion of open, forthright debate between courts and the Commission regarding a purposeful, principled sentencing policy. The Commission conceded that the heartland was predicated upon mere averages of pre-Guidelines sentences, thereby lacking a principled foundation, yet expected that heartland to govern all typical cases—that is, the overwhelming majority of cases for which the Commission had adequately considered the relevant sentencing factors. The true challenge for the Commission was to develop a principled heartland that linked offense-specific sentences to the sentencing policies they were expected to advance. Absent an initial comprehensive catalogue of such correlations, which the Commission elected not to prepare, the creation of a principled heartland would require a sophisticated evolutionary process. The best way to begin this process would have been to partner with the judiciary, the institution that partakes in the sentencing process daily and which is therefore best situated to engage the Commission in a discourse on sentencing policy.

The Commission, in what was perhaps its most troubling assumption, opted to eliminate judicial discretion entirely in typical cases, permitting such discretion only for extraordinary, rare, non-

85. *Id.* at 1291.
86. *Id.* at 1301.
87. *Id.* at 1290, 1299.
88. *Id.* at 1303.

heartland cases. Their attempt to compel judicial enforcement of an unprincipled heartland backfired, however, as the judiciary circumvented the Guidelines to implement "unauthorized departures" in what would otherwise be typical cases. Sadly, the heartland's attempts to mandate uniformity merely drove judicial discretion underground, therefore stifling the debate that should have occurred between the courts and the Commission in order to develop a principled heartland. The heartland approach did not eliminate the exercise of discretion; it simply caused the courts to exercise it more surreptitiously.

The thrust of this Article is that "unauthorized" judicial departures from the heartland should not be hidden or deemed illegitimate. Instead, they should be emphasized so the Commission and the judiciary can engage in purposive discourse, a crucial component for the evolution of a principled sentencing paradigm. Such a process will promote greater uniformity because the heartland itself will then be premised upon principles accepted by the judiciary.

B. "Overt Departures": Creating Substantive Disparities in Atypical Cases

The use of "overt" or "legitimate" departures pursuant to the extant departure mechanism has proved as troubling as the "hidden departures," in that similarly-situated defendants are treated inconsistently. As courts have struggled to reconcile their perceptions about the proper use of departures with the literal constraints of the Guidelines, system-wide disparity has resulted, both regarding the frequency with which downward departures are utilized and the reasons cited for such departures.[89] For example, the Ninth Circuit's downward departure rate[90] of 38.7 percent far exceeds the national

89. *See generally* Kirby D. Behre & A. Jeff Ifrah, *You Be the Judge: The Success of Fifteen Years of Sentencing Under the United States Sentencing Guidelines*, 40 AM. CRIM. L. REV. 5, 7 (2003).

90. The statistics provided in this section do not include downward departures under §5K1.1 (substantial assistance to government authorities during the course of an investigation), since such departures can only be granted upon the request of the prosecutor. Notably, significant variations also occur in the frequency with which §5K1.1 departures are granted. *See id.* at 8-9.

> Although nationally such departures are granted in approximately seventeen percent of all cases, in the Third and Sixth Circuits they are granted almost thirty percent of the time, whereas in the Fifth and Ninth Circuits they are generally granted in approximately eleven percent of all cases. The variance is even greater between states. For example, in the Central District of Illinois and the Eastern District of Pennsylvania forty percent of all defendants receive a substantial assistance departure, while in Arizona, South Dakota and the Eastern District of

average of 18.3 percent.[91] Similarly, the Second and Tenth Circuits have departure rates of 20.4 percent and 23.3 percent, respectively.[92] Conversely, the Fourth Circuit departed in only 5.2 percent of its cases in 2001; the Third, Sixth, Seventh, and Eleventh Circuits had similarly low departure rates.[93]

Furthermore, the departure rates of district courts in a given circuit are also alarmingly disparate. For example, while the Western District of New York grants downward departures in 9.3 percent of its cases, the Eastern District of New York lists a 28.4 percent departure rate.[94] The Western District of Oklahoma has a scant departure rate of 4.9 percent, while the Eastern District of Oklahoma boasts a departure rate of 20.4 percent. Similarly, the Western District of Texas departs from the Guidelines more than four times as frequently as the Northern District of Texas.[95]

As these statistics indicate, overt departures are as problematic as hidden departures in that they reintroduce disparity in the federal sentencing process. This may be partially attributed to the courts' failure to develop principled sentencing. As Professor Weinstein notes, circuit courts have done "a very poor job explaining *why* a given case comes out as it does."[96] Yet the problem ultimately lies with the Commission's adoption of the "heartland" approach. By definition, this approach required courts to engage in a hyper-technical analysis as to whether a given case was sufficiently extraordinary as to be classified "outside the heartland." Even in such cases where departures were warranted, no principled discussion regarding the purposes of criminal punishment furthered by such a departure occurred. As Professor Berman explains:

> Departure decision-making did not address what factors *should* impact sentences within the guidelines scheme . . . . Departure cases involved significant "descriptive deliberation" as courts contemplated and discussed what the Commission had described in

---

Virginia, a mere six percent of defendants receive such a departure. *Id.* at 9.

91. U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.26, http://www.ussc.gov/annrpt/2001/table26.pdf.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* The departure rate for the Northern District of Texas in 2001 was 6.5%; the Western District's departure rate was 25.7%.

96. Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion:* Koon's *Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 549 (1999) (emphasis added).

> the Guidelines' heartlands, but they lacked serious "prescriptive deliberation," as courts did not contemplate or discuss what they prescriptively thought should result in a sentence outside the Guidelines.[97]

Such normative discussions about the function of criminal punishment are conspicuously absent from judicial decisions.[98] The Commission could have—and likely should have—issued more frequent amendments to the Guidelines in order to resolve departure conflicts among the circuits. Yet their failure to do so cannot excuse the courts' failure to contribute to the Guidelines' evolution by attempting to create a principled sentencing jurisprudence. Because courts generally acted only as enforcers of the heartland, overt departures necessarily became as disparate and purposeless as hidden departures. In short, departure jurisprudence has been reduced to a game of chance, with the likelihood of a departure depending upon where a defendant lives, not upon the application of a principled body of sentencing law.

IV. INTRODUCING THE "HEARTLAND DEPARTURE"

A. Reviewing the Problem—Competing Objectives in Sentencing Policy

Today, Federal Sentencing Guidelines' heartland closely resembles pre-Guidelines jurisprudence eighteen years ago. In the Sentencing Reform Act of 1984, Congress charged the Commission with a two-fold task: to ensure that similarly-situated criminal defendants were treated uniformly and to permit sufficient judicial discretion for

---

97. Berman, *supra* note 18, at 65. He continues:

> This problem of "purposeless" departures was most apparent in cases involving factors such as family ties that the Sentencing Commission had declared "not ordinarily relevant" to a decision to depart below the applicable guideline range. Courts were quick to interpret the Commission's instruction to mean that, though not ordinarily relevant, family circumstances that were "unusual" or "extraordinary" could serve as the basis for a departure . . . . Consequently, the determinative issue . . . became exactly what sorts of family circumstances were "extraordinary" as opposed to being simply "ordinary." . . . Though consistent in their doctrine, these cases were also consistent in their pedantry—missing in the dickering over what circumstances merited the label "extraordinary" was any serious or developed inquiry into why a defendant's family circumstances should result in a sentence below the applicable guideline's sentencing range.

Id. at 66-67.

98. *Id.* at 68 ("[T]hese sorts of normative considerations about culpability and crime out to have been the centerpiece of early case law debates over [overt] departures from the Guidelines . . . .").

individualized sentences based on specific factors presented by a particular defendant. In short, the Guidelines were intended to result in uniform yet individualized sentencing, eliminating disparity while ensuring that sentences were both fair and credible. Congress recognized that a sentencing system which reconciled these two seemingly antithetical concepts would require thoughtful analysis regarding the purposes of criminal punishment and their furtherance through the imposition of particular sentences for specific crimes. Consequently, the Commission's true responsibility was to develop a purposeful sentencing policy that would engender moral credibility with those responsible for its application.

Confronted with this daunting task, the Commission failed. Its apparent haste to remedy pre-Guidelines disparities resulted in a heartland that is as breathtaking in its complexity as it is in its lack of purpose or principle. The Commission never enunciated how the traditional purposes of punishment were furthered by the adoption of a particular sentencing range for a particular offense. Nor did it explain how to reconcile seemingly harsh punishment for certain crimes (i.e., drug possession) with more lenient punishment for crimes that could be considered equally or more culpable (i.e., economic crimes). Nor could the heartland's genesis be described as "principled," because it simply averaged the sentences that Congress had deemed "lawless." Instead, by prohibiting the judiciary from exercising discretion in ordinary cases, the Commission stifled critical dialogue.

The departure mechanism was similarly flawed. Departures which could have facilitated such debate were often intentionally hidden because they were technically illegitimate under the Guidelines. Further, since overt departures were explicitly limited to extraordinary or otherwise anomalous cases, such "legitimate" departures could never systematically impact sentencing policy. The resulting tension between the Commission and courts reintroduced disparity reminiscent of pre-Guidelines randomness.

Finally, the Guidelines never gained credibility with the courts; they were seen as an inflexible, bureaucratic method by which to obtain a quick fix to a problem whose true solution would require meaningful answers to serious questions. Professor Robinson explains it this way:

> No simple manipulation of the current Guidelines system will avoid this anger and frustration. The Guidelines must be reworked

> to bring them moral credibility with the judges . . . . All of the difficulties that faced the original Commission still exist, particularly the difficulty of deciding among conflicting sentencing purposes and drafting Guidelines that logically follow from the sentencing purposes sought to be achieved.[99]

Ultimately, the quest for a meaningful solution must triumph over preoccupation with the apparent deficiencies in the extant Guidelines.

B. An Overview of the Proposed Solution—The "Heartland Departure"

This Article proposes a "heartland departure" to attempt to merge true uniformity with individualization, principled sentencing policy with practicality, and ultimately the purposes of criminal punishment with sentences that are fair and rational for varying criminal offenses. Conceptually, the "heartland departure" rests upon principled assumptions fundamentally at odds with some of those upon which the Guidelines rest. As detailed *infra*, the "heartland departure" is predicated upon the notion that courts must have sufficient discretion in both atypical and typical cases so as to engage the Commission in a substantive debate on sentencing policy.

The "heartland departure" also presupposes that uniformity in sentencing can readily be achieved through limiting the *extent* to which judges may depart from the heartland, and not through the current constraints upon the courts' *threshold* decision to depart. In other words, by repositioning the constraints on judicial discretion, the courts will be enabled to render principled, purposeful sentencing decisions without perpetuating the disparities that currently exist under the Guidelines.

In essence, the "heartland departure" fundamentally recasts the courts as lawmakers in an evolutionary sentencing process, a process intended to achieve true uniformity through the exercise of guided, principled discretion. In this way, the Commission and the courts can participate in a purposeful debate on sentencing policy. As they develop a principled heartland together, the federal sentencing process will gain increased credibility.

---

99. Robinson, *supra* note 37, at 1241-42.

C. The "Heartland Departure" Will Enable the Evolution of a Principled Heartland Through Lawmaking by Trial and Appellate Courts as Well as the Sentencing Commission

The motivation for encouraging judicial discretion in typical cases is to promote a debate on sentencing policy between the Commission and the judiciary; this is expected to enable the evolution of a principled heartland. True uniformity in sentencing can then occur because courts will know that justice is being effectuated through adherence to a heartland that has a principled, purposeful foundation. Adherence to the Guidelines, and thus uniformity in sentencing, is more likely because "[w]hatever the effect on the egos of judges, guidelines that manifestly seek to do justice are guidelines that judges would, however reluctantly, embrace."[100] This proposal assumes that the heartland's development is an evolutionary process, in which the Commission solicits and utilizes doctrinally-driven sentencing decisions from the judiciary.

The "heartland departure" rests upon three assumptions. First, and most importantly, a principled heartland may develop only if the judiciary is provided with discretionary authority in *both* typical and atypical cases. This is contrary to the Commission's assumption, which limited judicial discretion to the rarest of cases, thus leaving the courts powerless to effectuate principled change to the heartland.

The second assumption is that uniformity in sentencing similarly situated criminal offenders is a worthwhile goal, and therefore must effectively co-exist with the principle of individualization of sentencing. To this end, the "heartland departure" restricts the extent of departures while granting courts the freedom to depart from the "heartland" where it is believed that an alternative sentence will more effectively further the purposes of criminal punishment. By changing the constraints on judicial discretion from the threshold decision to depart to the extent of such departures, courts are able to issue principled, doctrinally-rich sentencing opinions without reintroducing intolerable disparities into the federal sentencing process. This premise challenges the Commission's assumption that *all* judicial discretion must be circumscribed with respect to the "heartland" if uniformity in sentencing is to be achieved. Uniformity can still be realized by substantially restricting the extent to which a court may depart from the "heartland" without imposing wholesale prohibitions

100. Robinson, *supra* note 37, at 1241.

upon the exercise of judicial discretion.

The third and final assumption underlying the "heartland departure" is that the Federal Sentencing Guidelines can engender moral and legal credibility with the courts only if it is premised upon a principled, purposeful foundation. The formation of the heartland by averaging pre-Guidelines sentences led to widespread beliefs that the Guidelines were overly rigid and hyper-technical. Since many judges saw the Guidelines as an impersonal, bureaucratic formula that labeled courts as "judicial accountants," hidden departures were motivated by a desire to achieve a more just result than that specified by the applicable heartland were inevitable. The "heartland departure" legitimizes previously-hidden departures in order to surface the critical debate regarding sentencing policy that can ultimately lead to a principled heartland.

The "heartland departure" standard, if adopted by the Commission, may resemble the following form:

> When drafting the initial "heartland," the Commission arrived at the applicable sentence ranges primarily through a mathematical averaging of pre-Guidelines sentencing decisions. While this may not be the most precise or principled manner by which to arrive at sentencing ranges for particular offenses, it was seen as an effective, expeditious way to reduce existing disparities in sentencing and promote uniform treatment of similarly situated criminal defendants.
>
> Notwithstanding, in recognition of Congress's directive that federal sentencing be premised so as to further the traditional purposes of criminal punishment, application of the initial "heartland" ranges will be presumptive in nature, to be overcome only where the sentencing court determines that there are "substantially persuasive" reasons that justify a departure from the applicable "heartland" range. If a sentencing court determines that a "heartland departure" is warranted by the individual facts of a particular case, the court will be required to provide a written, deliberative, and reasoned sentencing decision in which the justifications for departing from the "heartland" are referenced solely with respect to why the alternative sentence more effectively furthers justice in the particular case and one or more of the specific purposes of criminal punishment as enumerated by Congress (rehabilitation, retribution, incapacitation, and deterrence). In any event, the extent of the sentencing court's departure from the Guidelines shall not deviate more than 15 percent from the presumptive range.
>
> The district court's decision to depart from the "heartland" will

> thereafter be subject to de novo review by the circuit court of appeals. Affirmance or reversal of the district court's decision will be in the form of a written decision and will be premised solely upon reference to the purposes of criminal punishment as enumerated by Congress. When a departure is invoked pursuant to 28 U.S.C. § 3553(b) (cases in which the Commission has not "adequately considered" a particular factor), the appellate courts shall employ an abuse of discretion standard, consistent with the United States Supreme Court's holding in *United States v. Koon*, 518 U.S. 81 (1996).
>
> Upon review by the circuit court, the Commission will have the authority, within 180 days of the circuit court's decision, to review and, if necessary, revise the relevant heartland range to reflect the principled contributions of the judiciary. The Commission will retain sole authority to revise the "heartland." Where courts otherwise find that the factors presented by particular cases are atypical or particularly unusual, the provisions of 28 U.S.C. § 3553(b) shall govern.

The "heartland departure" therefore involves lawmaking by three distinct groups: trial courts, appellate courts, and the Commission itself.

1. Trial Court Lawmaking

Before the advent of the Federal Sentencing Guidelines, reformers sought to devise principled federal sentencing law by involving the legislature and the judiciary in the development of a common law of sentencing jurisprudence.[101] At the center of such reforms was the vision of an institutional partnership whereby the legislature would prescribe broad, normative guidelines for application to particular cases and the judiciary, through written, deliberative sentencing decisions, would bring "policy and purpose" into the federal sentencing process.[102] The reformers' model envisioned a collaborative, evolutionary sentencing process that would "facilitate the judiciary's 'development of a "common law of sentencing" to buttress and supplement'" the broad, normative principles established

---

101. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 3 (1988) ("At the federal level before 1985, scholars and practitioners in the criminal justice community almost unanimously favored the concept of guidelines."). Importantly, the discussion that follows in this section does not refer to the Federal Sentencing Guidelines but to early reform efforts and their envisaged structure for bringing law and purpose into the federal sentencing process.

102. Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 368 (1989).

by Congress.[103] The partnership model thus posited a critical role for the courts, one in which judicial lawmaking was seen as essential for developing purposeful, policy-based sentencing law.[104]

Recognizing that "judges had special knowledge and insights as a result of their fact-specific, case-by-case consideration of sentencing policy," the reformers viewed the judiciary as a critical contributor to the development of a common law of sentencing.[105] While unregulated discretion created the potential for unjust and widely disparate sentences, reformers realized that "a fair and effective sentencing process must retain for judges some discretion to 'fine tune' punishments based upon the unique circumstances of individual cases."[106] Thus, early reform efforts envisioned the courts as active, integral participants in an evolving, substantive, and principled sentencing paradigm:

> The courts would have responsibility . . . for developing a jurisprudential approach to those occasions in which it is appropriate to set guideline presumptions aside. The [sentencing] commission, for its part, would benefit from the ongoing elaboration of such a common law of sentencing. Over time, the substantive principles developed by judges could coexist with, or even be incorporated into, the guidelines themselves. Such a partnership model of shared institutional powers was thus a core component of the reformist ideal.[107]

As a result, early reform efforts considered normative guidelines presumptive, from which courts could depart as needed to better serve

---

103. Berman, *supra* note 3, at 96 (quoting MODEL SENTENCING AND CORR. ACT § 3-208 cmt. at 166 (1979)).

104. *See, e.g.*, Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 559 (1978).

105. *See* Berman, *supra* note 18:

> [D]eparture authority [from early guideline models, which merely set presumptive sentences], was seen as especially valuable because it fostered judicial contributions, through the development of a "common law of sentencing," to the principled evolution of the guidelines system. The initial drafting of the sentencing guidelines would make certain policy determinations and set a course for the development of substantive sentencing rules. But then trial and appellate judges, through their articulation and review of reasons supporting decisions to depart from the guidelines in individual cases, would have their say in the evolution of principled and purposeful sentencing law and policy.

Id. at 35; *see also* Reitz, *supra* note 9, at 1455.

106. Berman, *supra* note 3, at 96; *see also* Rachel Konforty, *Efforts to Control Judicial Discretion: The Problem of AIDS and Sentencing*, 1998 ANN. SURV. AM. L. 49, 52-53; Saris, *supra* note 24, at 1027; Morris, *supra* note 17, at 275-85.

107. Reitz, *supra* note 9, at 1455.

the established purposes and principles of sentencing.[108]

By granting courts broad authority to individualize sentences, the evolution of a guidelines structure would be based upon a common law of sentencing that found expression in the purposes and principles underlying criminal punishment.[109] The *Model Sentencing and Corrections Act*, drafted in the late 1970s, states as follows:

> Although courts are generally instructed to follow the Guidelines of the sentencing commission, Section 3-207 authorizes departures from the Guidelines *if the sentencing judge believes it would better serve the purposes and principles of sentencing.* The discretion of the court was retained because of the difficulty a legislature or the sentencing commission would face if it were obliged to consider in advance all of the potential cases that could arise.[110]

In this way, reformers sought to benefit from "the interlocking substantive lawmaking competencies of the commission and the judiciary."[111] In furtherance of this objective, "reformers envisioned a judicial role in the guideline system that was even more profound than merely tailoring sentences to the individual case."[112] Indeed, the courts' contribution to positive sentencing law was to take the form of detailed, written sentencing opinions, in which the principles and purposes of sentencing would form the basis for justifying, and

---

108. *See* MODEL SENTENCING AND CORR. ACT § 3-208 cmt. at 166 (1979).

109. *See id.* Under the Model Sentencing and Corrections Act, guideline sentences were merely presumptive in nature, allowing the courts to depart when they believed it would better serve the purposes and principles of sentencing. In this way, reformers sought to receive judicial input in the evolution of the Guidelines, and to gather from the judiciary reasoned opinions that intertwine criminal sanctions with the purposes underlying imposition of punishment.

110. *Id.*

111. Reitz, *supra* note 9, at 1455.

112. Berman, *supra* note 3, at 96. Professor Berman explains as follows:

> Through their written and deliberative sentencing decisions, judges were to play an integral role in developing principled sentencing law and procedure within the guideline system. The guidelines model called upon sentencing judges to state, and authorized appellate courts to review, reasons for sentencing determinations, with particular attention to be given to "departures" from the guidelines. Through such an articulation and review of sentencing decision-making under the guidelines, both trial and appellate judges would provide meaningful feedback to the Commission and other judges concerning the operation of the system. In other words, by granting judges authority to depart from guideline provisions, while at the same time requiring written sentencing decisions and instituting appellate review, the guidelines model provided for continuous judicial contribution to the ongoing evolution of the system. As one set of reformers out it, the guidelines model would facilitate the judiciary's "development of a 'common law of sentencing' to buttress and supplement the guidelines" in the advancement of principled sentencing law.

Id.

subsequently implementing, a particular criminal sanction.

When drafting the Federal Sentencing Guidelines, however, the Commission failed to involve the judiciary as an institutional partner in the evolution of a principled heartland. The Commission instead eliminated any exercise of judicial discretion in what it considered typical cases, and in so doing, foreclosed the judiciary's ability to "fine tune" the broad, normative principles of the Guidelines' heartland. Unsurprisingly, the Guidelines were initially viewed as impersonal, mechanistic, and overly rigid. Indeed, the Commission devised the "heartland" as if uniformity in sentencing was the preeminent objective. From this perspective, it was impossible for the Commission to develop a heartland that addressed the various nuances that might confront a sentencing court and to individualize the heartland in a manner that truly reflected the full range of considerations that should bear upon the sentencing of a criminal defendant. Consequently, although sentencing courts view the process from an individualized, case-specific perspective, they could not adequately reconcile the normative principles of the Guidelines with adjustments for the individual circumstances of a particular defendant. The "heartland departure" is intended to vitiate the distinction between typical and atypical cases and permit judicial discretion under either scenario. Indeed, the purpose of the "heartland departure" is to permit the courts discretion with respect to the threshold decision to depart, regardless of whether the case is typical or atypical.

The "heartland departure" also seeks to promote uniformity in sentencing and, to this end, limits the extent to which a court may depart from the otherwise applicable "heartland" range. Consequently, the constraints upon judicial discretion will simply be repositioned; courts will be permitted to determine whether departure is appropriate, while the Guidelines will limit the degree of such departures in order to prevent inappropriate sentencing disparities. As such, judicial discretion is not being expanded but resituated.

Moreover, the existing "heartland ranges" established by the Commission through its mathematical averaging of pre-Guidelines sentences will operate as the presumptive sentence in a given case. This presumption can be overcome only if the courts find "substantially persuasive" reasons that support a determination that an alternative sentence will more effectively promote one or more of the traditional purposes of criminal punishment. Additionally, if a trial

court determines that a "heartland departure" is appropriate, it will be required to issue a written, deliberative, and principled sentencing decision that justifies the departure solely with reference to how the departure more effectively furthers one or more of the purposes of criminal punishment as enumerated by Congress. Thus, "heartland departures" premised upon sympathetic defendants or other factual nuances will not serve as a valid basis upon which to depart from the "heartland," because deviation from the heartland must be premised upon a principled, purposeful, and doctrinally-rich foundation.

2. *Appellate Court Lawmaking*

An integral, if not indispensable, aspect of the reformers' vision of a doctrinally-rich, common law of sentencing jurisprudence was the involvement of the appellate courts as substantive lawmakers of an evolutionary sentencing jurisprudence.[113] The development of sentencing precedent, by which guideline models could be supplemented and trial courts guided in the application of sentencing factors, was seen as essential to the development of principled sentencing law:

> [S]entencing [is] so central to justice under law, defining as it does the largest power the state ever assumes over the citizen, that appellate review seems an obvious necessity and an obvious precondition of the evolutionary and principled development of a common law of sentencing.[114]

Drafters of the *Model Sentencing and Corrections Act* also echoed these sentiments:

> Appellate review of each sentencing court's decisions in these matters will insure that departures from the guidelines are consistent with the standards established in the act and also that new situations will be uniformly handled throughout a state. Appellate review will facilitate the development of a "common law of sentencing" to buttress and supplement the guidelines of the

---

113. *See* Peter A. Ozanne, *Judicial Review: A Case for Sentencing Guidelines and Just Deserts*, *in* SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 177, 188 (Martin L. Forst ed., 1982).

> Judicial sentence review, as a means of assuring fair and accurate individual sentencing decisions and as a check on the discretion exercised by administrators in making rules, is a natural ingredient in a sentencing guidelines system. Furthermore, because of the nature of sentencing guidelines, traditional obstacles to substantive sentence review can be substantially reduced, if not eliminated.

Id.

114. Morris, *supra* note 17, at 284.

commission.[115]

As lawmakers in addition to enforcers,[116] the appellate courts could provide an analytical framework to guide the discretion of trial courts not only for factually similar cases, but through the appellate courts' elucidation of substantive sentencing principles:

> The appeals bench can give substantive content to authorized departure factors by charting the analytical steps courts must take in applying a given factor to a particular fact pattern . . . . Especially here, the underlying philosophy and grounds for invention of such judge-made factors are substantive concerns that can be elucidated by appellate court decisions. . . . A creative appellate judiciary can institute a policy-based approach to the effectuation of guideline presumptions.[117]

Thus, under the reformers' vision both trial and appellate courts would act as institutional partners with the legislature or sentencing commission in the elaboration of a system-wide sentencing law.[118]

The notion of an institutional partnership was at the heart of the reformers' model of sentencing jurisprudence, and it required the active participation of the appellate panels in the development of principled sentencing policy. Equipped with a written sentencing decision from the trial court, the appellate courts were now in a position not merely to issue pro forma affirmance or enforce a mandatory guideline but also to act as lawmakers and therefore become integral contributors to a positive body of sentencing law. Through this evolutionary process of sentencing, a system of guidelines could develop that reflected a common law of principled sentencing, one that was the product of the judiciary and Commission's contributions.

The "heartland departure" strives to provide the appellate courts with the discretion to act as substantive lawmakers in the

---

115. MODEL SENTENCING AND CORR. ACT § 3-208 cmt. at 166 (1979); *see also* Hans Zeisel & Shari Seidman Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 AM. B. FOUND. RES. J. 883, 934-36; Gregory N. Racz, Note, *Exploring Collateral Consequences,* Koon v. United States, *Third Party Harm, and Departures From the Federal Sentencing Guidelines*, 72 N.Y.U. L. REV. 1462, 1469-71 (1997).

116. *See* Reitz, *supra* note 9, at 1451-57 (describing the appellate court as being creative lawmakers while simultaneously enforcing already-established legal principles).

117. *Id.* at 1455 ("Something along these lines [i.e., appellate lawmaking] was at the heart of the reformist image of sentence review dating to the 1970s.").

118. *See id.* Professor Reitz goes even further, arguing that "appellate courts must be seen not only as collaborators, *but as potential competitors*, with the sentencing commission in the production of system-wide, binding substantive law." *Id.* at 1456 (emphasis added).

development of a principled guidelines jurisprudence. To provide further constraints against unwarranted or unreasonable departures, the trial court's decision will be subjected to a two-tiered standard of review, depending whether a court finds the case to be typical, thereby invoking the "heartland departure" mechanism, or atypical, thereby invoking the already established departure mechanism pursuant to 28 U.S.C. § 3553(b). If a trial court invokes the "heartland departure," the circuit court of appeals will possess de novo review and thus have plenary authority to assess the reasons, justifications, and rationale proffered by the trial court in exercising its discretion to depart from the presumptive range. De novo review will serve as a disincentive to trial courts tempted to depart unjustifiably from the heartland, because they will be aware that such a decision will be subject to exacting scrutiny by the circuit court. Further, de novo review can act as a mechanism by which the appellate court will be required, whether affirming or reversing the trial court, to provide written, deliberative, and principled sentencing opinions in which the reasons for affirmance or reversal are referenced solely with respect to the purposes of criminal punishment as enunciated by Congress. Thus, de novo review in this context not only bestows the appellate courts with plenary review power, but also provides the mechanism by which appellate courts will fulfill their obligation to engage in a purposeful, principled, lawmaking capacity.

3. Commission Lawmaking

Finally, as is consistent with its statutory imperative, the Commission will be equipped with principled sentencing decisions from trial and appellate courts so that it can determine whether substantive revisions to the heartland are necessary to effectuate justice. The Commission will retain final authority with respect to whether a particular "heartland departure" merits reconstitution of a particular sentencing range, and the predicate for the Commission's decision will rest upon the existence of a principled, common law of sentencing in which the purposes of criminal punishment find their expression.

D. Suggested Policy Statements Regarding the "Heartland Departure"

To implement the "heartland departure," the Commission should promulgate initial policy statements, similar in form to those which

follow the existing departure standard, to explain the rationale underlying such a departure. A suggested initial policy statement follows:

> The Commission recognizes that judicial discretion, in and of itself, is not an evil that the Guidelines should seek to eliminate entirely. Instead, the Guidelines seek to establish a sentencing structure in which the exercise of judicial discretion is channeled in a purposive, principled manner. The Commission's approach is premised upon the knowledge that the judiciary can, and should, be an integral aspect of the evolution of a purposeful, principled "heartland," and upon the assumption that elimination of unwarranted uniformity in sentencing does not automatically entail elimination of the beneficial aspects of sentencing discretion.
>
> To this end, the Guidelines provide for the principled exercise of judicial discretion, both at the district and circuit court levels, in the form of the "heartland departure." By "principled exercise of judicial discretion," the Commission expects that invocation of the "heartland departure" mechanism will be seen as warranted only where the court believes that an alternative sentence outside the presumptive range will more effectively (i) reflect the individual characteristics presented in an individual case; and (ii) further the purposes of criminal punishment. Consequently, the "heartland departure" is designed to enable the courts to individualize sentences where necessary, while simultaneously issuing principled, policy-based sentences with the potential for system-wide effect and application. The Commission believes that, in serving these dual purposes, the "heartland departure" can effectuate justice and can contribute to a principled sentencing jurisprudence without undermining the goal of achieving uniformity in sentencing.
>
> Importantly, however, the "heartland departure" is not to be seen as a signal that the current "heartland" is merely advisory or without a strong presumption as to its application. Rather, courts are to treat the guidelines as presumptively valid and subject to departure only if there truly exist substantial and compelling reasons. Thus, a desire to individualize a particular sentence merely because it comports better with a court's individualized, subjective notions of justice shall not constitute proper grounds for departure and is subject to reversal by the circuit courts. The "heartland departure" is designed to apply only where individualized circumstances, coupled with rational, purposeful justifications that the court believes mandate a systemic change in sentencing policy for a particular offense, counsel in favor of a departure. Thus the "heartland departure" is not designed, nor is it intended, to "open the door" to frequent deviations from the

> Guidelines. It is, rather, designed to increase the breadth and depth of the Guidelines themselves, with an eye towards developing a principled sentencing jurisprudence.
>
> To this end, it is the Commission's hope that, through an ongoing, principled, and evolutionary discourse on sentencing policy, in the future the "heartland" will ultimately shift from presumptive to mandatory Guidelines, reflecting its principled foundation and the achievement of true uniformity in sentencing.

Through such policy statements, the Commission will not only encourage the principled use of discretion, but will also recognize that "[i]f the Guidelines are to gain credibility as principled and as doing justice in the eyes of those called upon to enforce them, they must be based upon thoughtful analysis . . . ."[119]

E. Possible Implementation of the "Heartland Departure" in Light of the Hatch-Sensenbrenner Amendment to the PROTECT Act

The recently-enacted Hatch-Sensenbrenner amendment to the PROTECT Act placed significant limitations upon the federal courts' power to depart from the Guidelines.[120] It was intended to compel adherence to the Guidelines' heartland and significantly reduce the incidence of downward departures. In addition to departure restrictions applicable exclusively to cases involving child abuse and/or abduction, the Hatch-Sensenbrenner Amendment listed other limits upon departures which would apply to all federal cases. These restrictions include limitations upon age and physical impairment departures; a prohibition against departures based on gambling dependence, "aberrant behavior," military service, and "other good works;" the establishment of de novo appellate review of departures; a prohibition against departures on remand based upon "new grounds;" the requirement of a government motion for an extra one-level adjustment based upon extraordinary acceptance of

---

119. *Id.* at 1243.

120. The PROTECT Act contains the "Federal Amber Alert Bill" that, *inter alia*, established a national communications network to facilitate the recovery of abducted children, and prohibited the pandering or soliciting of anything represented to be child pornography; it was signed into law by President George W. Bush on April 30, 2003. Rep. Tom Feeney had introduced an amendment that would have outlawed all downward departures from the Guidelines except upon grounds specifically enumerated in the Guidelines. The amendment was subsequently replaced by a similar, but less restrictive amendment proposed by Sen. Hatch and Rep. Sensenbrenner (known as the "Hatch-Sensenbrenner Amendment") and subsequently enacted. Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified in scattered sections of 18, 28, and 42 U.S.C.).

responsibility and a related prohibition permanently enjoining the Commission from amending this requirement; the imposition of more burdensome reporting requirements for judges exercising departures and permission for the Department of Justice to access the Commission data files that identify each judge's departure practices; and lastly a two-year prohibition upon the Commission from adding new departure grounds or passing amendments inconsistent with these departure restrictions.[121]

In passing these restrictions, Congress specifically directed the Sentencing Commission to amend the Guidelines and policy statements "to ensure that the incidence of downward departures are [sic] substantially reduced."[122] Despite the fierce criticism that the Hatch-Sensenbrenner amendment has engendered from judges, scholars, and the Commission itself, Congress has remained steadfast in its commitment to mandating district court adherence to, and circuit court enforcement of, the existing heartland strictures. One crucial question is whether the "heartland departure" proposed by this Article could exist within such a framework. The answer turns upon one's perceptions of the motivations underlying Congress's enactment of the Hatch-Sensenbrenner Amendment and an acknowledgment of the prohibitions that Congress did not include in this amendment, both of which reveal that Congress and the Commission are likely to be receptive to the type of jurisprudence that the proposed "heartland departure" contemplates.

Over the past ten years, scholars, the Commission, and Congress have become increasingly aware of the existence of guideline circumvention and the threat to uniformity in sentencing that such circumventions pose. Viewed in this context, the Hatch-Sensenbrenner Amendment can be properly understood as a reaction to the problem of circumvention, and not simply as a wholesale attempt to reformulate the entire federal sentencing process. It can be inferred, therefore, that the potential for disparity in sentencing is what ultimately motivated Congress to enact legislation designed to ensure that such disparities never materialize. In this way, the Hatch-Sensenbrenner Amendment was not simply a revolt against discretion per se, but rather a response to the illegitimate use of the current departure mechanism. Indeed, if Congress had so desired, it could have enacted legislation prohibiting judicial departures in all cases

121. *Id.* § 401.
122. *Id.*

except those enumerated by the Commission in the Guidelines.[123]

It is precisely what Congress did *not* do that underscores its commitment to curbing the unlawful exercise of judicial discretion, not to its elimination entirely. For example, in § 1A(4)(b) of the Guidelines, the Commission specifically indicates that there may be grounds for departures that are *not* mentioned in the Guidelines, and intimates that departures based upon such grounds may serve, over time, to effectuate progressive changes in the Guidelines' heartland. In the 2002 Guidelines Manual, the Commission states as follows:

> When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 [*et seq.*] . . . list several factors that the court cannot take into account as grounds for departures. With those specific exceptions, however, *the Commission did not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.*[124]

Indirectly acknowledging that the heartland, as it currently stands, is not yet based on a principled foundation, the Commission further explained its reasons for permitting departures, based upon unmentioned grounds, as follows:

> The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. *The Commission is a permanent body, empowered by law to write and rewrite Guidelines, with progressive changes, over many years. By monitoring when courts depart from the Guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the Guidelines to specify more precisely when departures should and should not be permitted.*[125]

These policy statements, coupled with the fact that the departure mechanism does not limit the types of factors upon which a court may base its departure, indicate that the Commission viewed the courts, at least to some extent, as performing a positive role in the Guidelines'

123. This was the view of the Feeney Amendment, which Congress rejected. *See supra* note 120.

124. U.S. SENTENCING GUIDELINES MANUAL § 1A4(b) (2002) (emphasis added).

125. *Id.* (emphasis added).

evolution. Congress has not altered, amended, or otherwise addressed these provisions, and the Hatch-Sensenbrenner Amendment in no way limits a court's ability to depart from the Guidelines based upon factors not mentioned in the Guidelines.[126] Rather than seeking to eliminate the exercise of judicial discretion per se, the Hatch-Sensenbrenner Amendment is more appropriately viewed as a reaction to the problem of circumvention that has caused increasing disparity in sentencing and thereby undermined Guidelines jurisprudence.

Further, the Hatch-Sensenbrenner Amendment highlights the inherent problems with the current departure standard. The extant departure standard simply does not provide the courts with the requisite flexibility to make principled, policy-based sentencing decisions that may ultimately effect systemic change to the Guidelines' heartland. In an attempt to expand their authority beyond the occasional extraordinary or atypical case, the courts have devised, primarily through charge bargaining, a mechanism whereby purportedly just results could be achieved yet remain virtually undetected by the Commission. Because hidden departures amount to nothing more than a manipulation of the applicable heartland range, they could be presented to the Commission as decisions in accordance with the stated heartland; as such, they did not produce the type of policy-based sentencing decisions useful to the evolution of a principled heartland. The unfortunate effect of these hidden departures was to reintroduce disparities in sentencing. In reacting to this problem, therefore, Congress was also implicitly expressing its displeasure with a departure mechanism that ultimately failed to achieve its stated purposes and to ensure uniformity through limits upon judicial discretion.

Unfortunately, however, the Hatch-Sensenbrenner Amendment is also poised for failure because it does not effectively shape judicial discretion nor provide the freedom for courts to exercise discretion in a limited, purposeful manner. For example, the Hatch-Sensenbrenner Amendment does not seek to limit the extent to which courts may depart from the Guidelines. Likewise, the Commission has introduced no amendment that would provide a specific range or percentage from which the courts could depart from the Guidelines in a given case. In addition, while the Hatch-Sensenbrenner Amendment required judges

126. The rejected Feeney Amendment attempted to limit departures to those enumerated in the Guidelines. *See supra* note 120.

to "report" all departures from the Guidelines, it did not also require judges to write sentencing opinions that explain their rationale for departing with respect to the policies, purposes, and principles of criminal punishment. Thus, while the true goal of the Hatch-Sensenbrenner Amendment was to reduce the potential for disparities in sentencing it did not establish a means to do so effectively. Sadly, its provisions will not further the evolution of a principled, policy-driven federal sentencing law.

The "heartland departure" proposed by this Article, however, allows courts to engage in policy-based sentencing while simultaneously maintaining effective constraints upon the extent of departures in order to preserve uniformity in sentencing. In essence, the "heartland departure" represents the legitimization of "hidden departures" from the heartland that already occur. This mechanism would promote a substantive, policy-based sentencing dialogue between the courts and the Commission. Moreover, by limiting the extent to which courts may depart from the heartland, the "heartland departure" preserves uniformity in sentencing while enabling courts to engage in a normative, prescriptive analysis of the principles that should underlie imposition of a particular criminal penalty in a given cases. In this way, the "heartland departure" effectively furthers the purpose of the Hatch-Sensenbrenner Amendment (viz., uniformity in sentencing), while simultaneously surfacing "hidden departures," thus eliminating their perpetuation and enabling the courts and the Commission to engage in a substantive colloquy on principled sentencing policy. Unlike the Hatch-Sensenbrenner Amendment, the "heartland departure" will not only reduce the incidence of Guidelines circumvention, but it will ultimately promote greater uniformity through the establishment of principled sentencing law.

F. Lessons from the Minnesota Sentencing Guidelines Regarding the Development of a Purposeful, Principled Sentencing Jurisprudence

The Minnesota Sentencing Guidelines have been widely praised as a model for achieving uniformity in sentencing with an evolving, principled, doctrinally-rich sentencing jurisprudence. Minnesota's success can be traced to a system that views judges as positive, institutional lawmakers whose discretion motivates the guidelines' continued development. The Minnesota Guidelines also show that the "heartland departure" could exist as a workable paradigm.

Minnesota's guidelines allow trial courts to individualize sentences where appropriate as long as a written opinion detailing the value of the alternative sentence in relation to that applicable under the sentencing guidelines. The relevant provision reads as follows:

> The judge shall utilize the presumptive sentence provided in the sentencing guidelines unless the individual case involves substantial and compelling circumstances. . . . When departing from the presumptive sentence, the court should pronounce a sentence which is proportional to the severity of the offense of conviction and the extent of the offender's prior criminal history, and should take into substantial consideration the statement of purpose and principles [set forth earlier in the guidelines]. When departing from the presumptive sentence, a judge must provide written reasons which specify the substantial and compelling nature of the circumstances, and which demonstrate why the sentence selected in the departure is more appropriate, reasonable, or equitable than the presumptive sentence.[127]

Indeed, by adopting a guideline structure in which presumptive sentences may be overcome only where "substantial and compelling" reasons exist to depart from its strictures, the Minnesota Sentencing Commission has effectively directed both enforcement of the presumptive sentences and substantive lawmaking by the courts where necessary to effectuate justice. Professor Kevin Reitz highlights the positive, yet purposeful, role of the courts under Minnesota's system:

> This is a guideline departure standard that should be, and has been, emulated by other systems planners. First, it focuses thought directly upon the cases before the courts. It does not follow the federal law in diverting attention to collateral issues such as the commission's drafting history and work product. Second, it expresses the core policy that the guideline sentence should be treated as presumptively correct, but articulates a role for judicial discretion when "substantial and compelling reasons" can be cited to put aside the presumption. Again, application of this verbal formula is to be performed by a thought process that is focused on the case at hand: The judge must explain "why the [departure] selected . . . is more appropriate, reasonable, or equitable than the presumptive sentence." There is no intermediate necessity of demonstrating that the commission gave "inadequate consideration" to one factor or another. Finally, the departure standard makes explicit reference to the purposes of punishment laid out elsewhere in the Guidelines and states that "substantial

127. MINN. STAT. ANN. § 244 app. § II.D (West 2003).

consideration" should be given to these purposes.[128]

The Minnesota Sentencing Commission clearly recognized that its guideline structure would benefit from the lawmaking capacities of the courts; in fact, Minnesota has developed a doctrinally-rich body of sentencing law designed to impose just sentences in specific cases.[129]

By directing trial courts to engage in a policy analysis regarding sentencing decisions, the Minnesota Sentencing Guidelines derivatively, if not directly, provided appellate courts with the freedom to engage in the same type of principled, purposeful analysis. They state:

> [T]he [appellate] court may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court.[130]

Minnesota appellate courts have relatively broad discretion because "[t]he substantive grounds for review, and the applicable standards on review, are never particularized beyond these terms."[131] However, by requiring trial courts to premise their departures from the Minnesota Guidelines upon principled, policy-based grounds, this review standard enables appellate courts to act in a substantive lawmaking capacity, instead of simply enforcing the relevant guidelines.

> [T]he appeals bench in Minnesota usually receives high marks for its contributions to the state's guideline system . . . . "The appeals rights granted to defendants and prosecutors under the [Minnesota] Guidelines have generated a rich body of appellate case law, fully realizing [Norval] Morris's idea of an evolving 'common law of sentencing.'" Other commentators have concurred that the Minnesota Supreme Court in particular has attached high importance to its sentence review function, has engaged in a policy-based analysis of cases, and has contributed both to the substantive and procedural law of sentencing in the state. As opposed to the federal system, the appeals bench in Minnesota has not acquired a reputation for mechanistic and unforgiving enforcement of the guidelines.[132]

---

128. Reitz, *supra* note 9, at 1482.

129. *See id.* at 1480-81.

130. MINN. STAT. ANN. § 244.11(2)(b) (West 2003).

131. *Id.*

132. Reitz, *supra* note 9, at 1480-81 (second and third alterations in original) (quoting Richard S. Frase, *Sentencing Principles in Theory and Practice*, *in* 22 CRIME AND JUSTICE: A REVIEW OF RESEARCH 363, 398 (Michael Tonry ed., 1997)).

Indeed, the principled sentencing jurisprudence that has developed in Minnesota (and continues to do so) is directly related to a guideline structure that promotes principled sentencing decisions at the trial level, coupled with an appellate review standard that enables a policy-based review of trial court departures.

In contrast, the current Federal Sentencing Guidelines achieve the opposite result. By constraining district court discretion and encouraging appellate courts to enforce the existing heartland, principled sentencing decisions have been far and few between. Thus, although the Hatch-Sensenbrenner Amendment granted appellate courts de novo review over district court departures, this will ultimately prove ineffective in promoting a substantive common law of sentencing jurisprudence. The district courts, constrained by the Guidelines in the exercise of their discretionary authority, are extremely unlikely to produce principled, policy-based decisions for circuit court review. Congress reinforced this view by instructing the Commission to direct its efforts to reducing, rather than encouraging, the incidence of district court departures.[133] Thus, the current status of the Guidelines—overly mechanistic and designed simply to compel enforcement to the extant heartland—is likely to remain unchanged. Ultimately, this leaves us where we started, with most federal sentencing decisions likely to be comprised of "more complication of detail than richness of concept."[134]

V. CONCLUSION

The "heartland departure" is not expected to become a permanent fixture in the Federal Sentencing Guidelines; instead, it should facilitate the development of a principled heartland which, in the final analysis, would warrant mandatory application of its strictures. However, until mandatory application of the heartland is appropriate, the heartland must build credibility with the judiciary, for the courts are ultimately responsible for enforcing its strictures. Compelling adherence to the current heartland, which is nothing more than a mathematical averaging of pre-Guidelines jurisprudence, will not only be viewed as mechanistic and illegitimate, but will reintroduce unjustifiable, even unconscionable, disparities in the federal sentencing process.

---

133. Prosecutorial Remedies and Tools against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401(m), 117 Stat. 650.

134. Weisberg, *supra* note 1, at 168.

Implementation of the "heartland departure" proposed by this Article is designed to achieve precisely the same objectives sought by Congress and the Commission, but to do so in a manner that brings purpose, principle, and policy to the federal sentencing process. The means to achieve this objective is not strict enforcement of the current heartland, but rather a system of guided discretion in which the judiciary's role as substantive lawmakers can be fully realized. As the Guidelines mature into a principled sentencing paradigm, the incidences of departures should decrease as the Guidelines' moral and legal legitimacy increases.

Ultimately, the method to achieve a principled heartland lies not in reconciling the seemingly antithetical concepts of discretion and uniformity, but by recognizing that that these concepts share the potential to complement one another in a manner that produces a heartland worthy of faithful application and dedicated enforcement. For the Federal Sentencing Guidelines to evolve into a just system, the Commission must recognize that it is only through the exercise of limited judicial discretion that meaningful uniformity in sentencing can ever be achieved.