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Why do Judges Depart? A Review of Reasons for Judicial Departures in Federal Sentencing

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ABSTRACT AND ARTICLE INFORMATION

Over the past decade, scholars have produced a fairly large body of research evaluating the factors that predict the use of judicial departures following the Booker/Gall Supreme Court decisions, which transformed the guidelines from presumptive to advisory. With few exceptions, studies reveal that these decisions have not led to an increase in unwarranted disparities. Less is known, however, about the factors that motivate judges to impose sentences that are more punitive or more lenient than those specified by the guidelines. The purpose of this research note is to provide a comprehensive empirical analysis of the reasons federal judges give for downward and upward departures and to identify the themes that animate these decisions. We use 2013 federal sentencing data to identify six themes found in the reasons judges give for departing from the presumptive sentence. We find that judges' explanations reflect their individual philosophies of punishment, their evaluations of the defendant, the victim and the offense, their attempts to correct what they view as problematic guideline issues, and/or their concerns about various court and correctional contexts and constraints. The results of our study provide a deeper and more nuanced understanding of the factors federal judges consider as they attempt to tailor sentences to fit offenders and their crimes. The results of our study enhance understanding of how judges interpret sentencing guideline policies. We discuss the implications of these findings for theory and policy.

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Federal sentencing policies and practices have changed dramatically over the past three decades. Concerns about disparity and disproportionality in sentencing led Congress to enact the Sentencing Reform Act of 1984. This act established the United States Sentencing Commission (USSC) and directed the Commission to develop presumptive sentencing guidelines that would promote certainty, proportionality, and fairness in sentencing, and, thus, would reduce unwarranted disparity (28 U.S.C. § 991 (a)). The federal sentencing guidelines, which went into effect in 1987, are based on the severity of the offense and the offender's criminal history (Stith & Cabranes, 1998). The guidelines also specify the factors that judges are not to take into account in determining the appropriate sentence,¹ as well as the factors that are "not ordinarily relevant" in determining whether the sentence should be outside the applicable guideline range.² As a result of these changes, sentencing discretion was tightly constrained and, some have argued, shifted from the judge at sentencing to the prosecutor at charging (Cano & Spohn, 2012; Nagel & Schulhofer, 1992; Schulhofer & Nagel, 1997; Tonry, 1996).

Beginning in 2005,³ the federal sentencing process was reshaped by a series of decisions handed down by the U.S. Supreme Court. In *U.S. v. Booker* (2005), the Supreme Court invalidated the U.S. Sentencing Guidelines, reasoning that the presumptive sentencing scheme was in violation of defendants' Sixth Amendment right to a jury trial. The Court's ruling in *Booker* rendered the federal guidelines "effectively advisory" and established a "reasonableness" doctrine as the standard of review for legal challenges made to sentences outside of the presumptive guideline range. The interpretation of *Booker*—that is, that judges retained discretion to depart from the guidelines—was confirmed in *Gall v. U.S.* (2007), as the Supreme Court reasoned that judges were not mandated to automatically presume that the guideline range was reasonable. Rather, judges' determination of reasonableness was to be framed by "an individualized assessment based on the facts presented." Lastly, in *Kimbrough v. U.S.* (2007), the Supreme Court further broadened judicial discretion by holding that departing from the guidelines was permissible on grounds of policy disagreement.

It is clear that these landmark rulings have restructured the federal sentencing process. The federal guidelines, which until *Booker* were presumptive, are now advisory, and although judges must consider the guideline range in determining the appropriate sentence, they have discretion to sentence outside the range and are allowed to do so based on disagreement with the policies that undergird the

guidelines. In the wake of these decisions, sentencing scholars (Engen, 2009; 2011; Frase, 2007; Hofer, 2007; Spohn, 2011) have called on researchers to "identify and quantify the effects of this change and to learn whatever lessons this natural experiment might tell us about the federal sentencing system" (Hofer, 2007, p. 437). There is now a fairly large body of research evaluating post-*Booker/Gall* sentence outcomes. With few exceptions, these studies reveal that judicial decision making has not changed dramatically and that unwarranted disparity has not increased (Fischman & Schanzenbach, 2012; Scott, 2010; Starr & Rehavi, 2012; Tiede, 2009; Ulmer & Light, 2010, ; Ulmer, Light, & Kramer, 2011a, 2011b; but see U.S. Sentencing Commission, 2010, 2012; Kim, Cano, Kim, & Spohn, 2016).

There also is some evidence that judges, in line with the *Gall* and *Kimbrough* decisions, are using their discretion to depart from the guidelines because of disagreement with sentencing guideline policies (Kaiser & Spohn, 2014). Beyond this finding, however, we know very little about the reasons why judges impose sentences that are more punitive or more lenient than those specified by the guidelines. Understanding how and why judges depart can provide important insights into the decision rules they use in determining the appropriate sentence and the factors that guide judicial departure decisions. Moreover, identifying commonalities in the reasons given by judges for sentencing departures can pinpoint areas of disagreement with current sentencing guidelines and provide a tool for evaluating and revising sentencing policy. As the USSC has noted, "by monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so[,]... the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted" (USSG, §1A1(b)). The fact that sentencing is more discretionary in the post-*Booker* era, coupled with the fact that there is a broad range of guideline-sanctioned reasons for departures and variances,⁴ highlights the importance of examining judges' justifications for departing. Downward and upward departures are an important and frequently used component of federal sentencing,⁵ and understanding how and why judges depart can provide important insights about the implementation of sentencing policies and practices.

The purpose of this research note is to provide a comprehensive analysis of the reasons that federal judges give for downward and upward departures and to identify the themes that animate these decisions. We systematically review guideline policies and statutes regarding departures, and we employ a grounded theory approach to categorize judges'

justifications for departing from the guidelines. Our overarching goal is to provide a policy-focused evaluation of judicial sentencing decisions.

Theoretical Framework for Understanding Departures

Prior to the 1990s, there were few attempts to develop theoretical explanations about the decisions that affected sentencing outcomes (Blumstein, Cohen, Martin, & Tonry, 1983; Spohn, 2000). Recent decades, however, have seen the emergence of theoretical frameworks to explain judicial decision-making. Although there are a number of complementary and compatible theories (see Ulmer, 2012, for an overview), the focal concerns perspective is currently the leading theoretical model guiding research on and explanations of judicial decision-making in state (e.g., Kramer & Ulmer, 2002; Spohn & Holleran, 2000; Steffensmeier, Kramer, & Streifel, 1993; Steffensmeier, Ulmer, & Kramer, 1998) and federal courts (e.g., Anderson & Spohn, 2010; Brennan & Spohn, 2009; Hartley, Maddan, & Spohn, 2007a; Spohn, 2009; Steffensmeier & Demuth, 2000); it also has been used to explain the decisions of prosecutors (Hartley, Maddan, & Spohn, 2007b; Spohn, Beichner, & Davis-Frenzel, 2001; Spohn & Fornango, 2009).

The roots of the focal concerns perspective can be traced to Steffensmeier's (1980) research on gender differences in sentencing outcomes, which identified perceived dangerousness and future criminality as factors that explained disparity in sentencing outcomes for men and women. Later work by Steffensmeier and his colleagues (Steffensmeier et al., 1993; Steffensmeier et al., 1998) refined the theoretical perspective to include three focal concerns: the blameworthiness of the offender, the dangerousness of the offender and his/her threat to the community, and the practical consequences or social costs of the sentencing decision.

Scholars have long recognized that severity of offense and prior criminal history are the strongest predictors of sentencing outcomes (Spohn, 2000; Zatz, 2000). As noted above, the first focal concern that judges use is the harm done by the crime and the blameworthiness or culpability of the offender. According to the perspective, judges' assessment of the harm done by the crime rests on the nature and seriousness of the crime (Steffensmeier et al., 1998) and reflects the statutory seriousness of the offense, the gravity and consequences of the crime, and the harm to the victim. Additionally, judges' assessments of the blameworthiness or culpability of the offender are based on the offender's criminal history, prior victimization, and role in the offense.

The second focal concern is the judges' desire to protect the community by incapacitating dangerous offenders and deterring dangerous would-be offenders. Doing so requires judges to attempt to predict offenders' future dangerousness (i.e., their risk of future violence). They may consider such things as the offender's past criminal history, educational history, family and work situation, substance abuse history, and conduct since the arrest (Steffensmeier et al., 1998; Ulmer, 1997). Assessing offenders in this way allows judges to differentiate among offenders who might otherwise appear very similar based solely on the crime for which they were convicted. The focal concerns perspective also links assessments of dangerousness and blameworthiness to stereotypes and attributions based on race, gender, and social status (see Albonetti, 1991; Ulmer, 1997).

Finally, the focal concerns perspective suggests that sentencing decisions will be affected by decision makers' concerns about the practical consequences or social costs of their decisions. This reflects the fact that judges are part of a courtroom workgroup (Eisenstein & Jacob, 1977) or courthouse community (Eisenstein, Flemming, & Nardulli, 1988) with common goals and shared expectations about how cases should be handled. Other factors that constrain their decisions include concerns about the "social costs" of punishment; examples include the fairness of incarcerating nonviolent drug offenders for long periods of time, the costs inherent in incarcerating offenders who are responsible for the care of young children, and the overcrowding of jails and prisons that results from locking up large numbers of non-serious offenders.

At its foundation, the focal concerns perspective suggests that judges (and other members of the courtroom workgroup) attempt to tailor outcomes to the facts and circumstances of each case. To do this, judges need detailed information about the crime and the offender. Although convictions that result from a jury trial may produce the necessary information, these cases are not typical. Most convictions—especially those in the federal courts⁶—result from guilty pleas, not trials, and in these cases, the information that judges have about offenders and their crimes may be limited. Because they do not have all of the information needed to fashion sentences to fit crimes and offenders, judges may resort to stereotypes of blameworthiness, dangerousness, and threat that are linked to offender characteristics (for a more detailed discussion, see Bridges & Steen, 1998; Hawkins, 1981; Steffensmeier et al., 1998).

Research on Departures

Research on departures primarily has focused on *when* and *for whom* judges and prosecutors use departures—in particular, whether the use of departures varies by race or gender of the defendant and whether there is variation between districts in the use of departures and reasons for departures. However, almost all of this research examines the prosecutor's decision to file a motion for a downward departure for providing substantial assistance rather than the judge's decision to depart from the presumptive sentence. Research on substantial assistance departures provides evidence that race, ethnicity, and gender affect both the likelihood of a substantial assistance departure and the magnitude of the sentence discount (Albonetti 1998; Doerner & Demuth, 2014; Johnson, 2003; Spohn & Fornango, 2009; Ulmer et al., 2011a). There also is evidence that the use of substantial assistance departures varies across districts (Johnson, Ulmer, & Kramer, 2008; Ulmer et al., 2011b), and one study found small, but statistically significant, differences across prosecutors in three district courts (Spohn & Fornango, 2009).

Although the research summarized above addresses prosecutorial discretion in the use of substantial assistance departures, the findings from this body of literature also may be applicable to judges' departure decisions. Like prosecutors, judges may use departures to mitigate the sentences of "salvageable" and "sympathetic" defendants (see, for example, Nagel & Schulhofer, 1992), to enhance the sentences of defendants deemed dangerous and blameworthy, or tailor the sentence to fit the circumstances of the crime (Johnson et al., 2008; Ulmer et al., 2011).

The purpose of this study is to build on and extend prior research by examining the reasons judges provide for departing from the federal sentencing guidelines. These reasons, which judges are required to provide whenever they sentence an offender outside the applicable guidelines range, provide important insights into the focal concerns that guide judges as they attempt to tailor sentences to fit offenders and their crimes. This focus on departures is appropriate, both because departures represent the primary avenue for the exercise of judicial discretion in jurisdictions that use sentencing guidelines and because the decision to depart is highly discretionary in the post-*Booker* era. Examining the reasons that judges provide to justify these discretionary decisions can help elucidate the decision rules they apply at sentencing.

Method

Data

We use federal sentencing data for fiscal year 2013 obtained from the United States Sentencing Commission's (USSC) Standardized Research files, which is a publicly available dataset. These data are a rich source of information relating to sentencing outcomes and draw information from several court documents, including the judgment and commitment order, presentence reports, statement of reasons, and plea agreements, among others. Of particular interest for this study, this dataset includes the reasons given by judges for departures from the sentencing guidelines.⁷

In 2013, there were 78,628 offenders convicted and sentenced in federal courts across the United States and almost half (48.83%) received some form of departure, meaning that they were sentenced outside of the recommended guideline range. Although departures can be initiated by the prosecutor or the judge, in this paper, we limit our analysis to offenders who received judicial, rather than prosecutorial, departures. There were 16,421 sentenced offenders who received a judicial sentencing departure; this represents 42.76% of all departures. These departures can be either downward (i.e., below the guideline range) or upward (i.e., above the guideline range). For each sentenced offender, judges can provide multiple reasons for departing from the guideline range. In 2013, judges gave an average of 3.67 departure reasons per offender ($SD = 2.52$; range = 1-16), resulting in a total of 60,267 reasons for departures included in our review. Table 1 provides descriptive statistics for these sentencing departures.

For each case involving a departure, judges were required to provide the reasons for departing from the sentencing guidelines. Although judges can depart from the guidelines based on their discretion, the U.S. Sentencing Guidelines Manual does provide provisions for when a departure may be warranted (USSG, Nov. 2013). During sentencing, judges may use these policy provisions to justify their departure decisions and/or may provide reasons for departures that are not specified by the guidelines manual. The specific reasons for departures are noted in the Statement of Reasons that accompanies the final Judgment and Commitment order, which details the court's sentencing decision.⁸ This information is then provided to the USSC, which generates a numerical coding scheme for most of these departure reasons. Reasons that are unable to be coded are included as "other," and the original text of the departure reason is provided.⁹ In order to create our coding strategy (as outlined below), we collected additional information from the sentencing guidelines manual, federal

statutes, and case law regarding the justifications for judicial departures that were provided within the

USSC sentencing data.

Table 1: Judicial Departures for FY 2013

Departures	Downward	Upward	Both
Number of Departures	14,740	1,681	16,421
Total Number of Reasons	55,043	5,224	60,267
Average Number of Reasons^a	3.73	3.11	2.59
Standard Deviation	2.52	2.19	2.30
Range	1-16	1-12	1-16

Notes: 48.83% of cases in 2013 received a sentencing departure or variance, 27.96% were government sponsored departures and are not included in these analyses.

^a The average number of coded reasons given for each departed case. Judges can specify multiple reasons per case for departing from a guideline sentence.

Coding Procedures and Analytic Strategy

Given the unique nature of the data—consisting of the USSC dataset of numerically coded and textual departure reasons, guideline manual policies, federal statutes, and case law—a two-stage review process was used to systematically code departure reasons. First, we noted and reviewed the statutes, the sections of the sentencing guidelines manual, and the court cases referenced within the data. For example, some judges cited court cases, such as “*US v. Gigante*,”¹⁰ “*US v. Maier* 2nd Cir. 1992,”¹¹ and “*US v. Koczuk*,”¹² among many others, in their reasons for departing. Other judges cited specific sections of the sentencing guidelines or a U.S. statute. We examined these court decisions, policy statements, and statutes to determine the guidance that each provided for departures.¹³ Once this information was collected and catalogued, we proceeded with the qualitative assessment of departure reasons.

During this stage of our review, we used an inductive analysis strategy to identify major themes present in the justifications given by judges for both upward and downward departures. Following a grounded theory approach (Alexander, Denzin, & Lincoln, 2005; Charmaz, 2006; Corbin & Strauss, 2014; Padgett, 2008), we used an open coding strategy to classify the terms into conceptual groupings. The goal of this inductive approach was to identify common patterns in judicial reasons for departures without being bound by specific theoretical frameworks. We first identified common words and passages by closely reviewing the departure policies, statutes, cases, and other information collected, which involved repeated readings by both authors and numerous comparisons. After careful review of these identified concepts, six

themes emerged. This process resulted in a coding sheet that was then used in the second stage of our review process. An example of the coding sheet is provided in Appendix A.

After our initial review of the departure reasons, we progressed to the second stage of our analysis, which involved quantifying the number of times judges used each departure reason. This was an important step as not all reasons for departures were used with the same frequency.¹⁴ By quantifying the number of times judges rely on specific types of departure reasons—for example those that represent defendant or victim considerations—we can better understand how and why judges are using departures. We coded all reasons for each offender who received a judicial departure, resulting in the coding of 60,267 individual departure reasons for the 16,421 offenders. We first coded for the presence of the key terms or concepts for each departure reason; however, we used the offender as our unit of analysis rather than each individual departure reason for the purpose of parsimony and ease of interpretation. In other words, as judges used multiple reasons for departures for some offenders, we coded for the presence of key terms in *any* of those departure reasons, but we only counted the presence of that term once for that offender.¹⁵

There are some limitations to our approach that must be acknowledged. First, although the data include each of the reasons that judges gave for every offender who was sentenced outside the guideline range, the information that judges provide is limited. We assume that the information judges provide on the statement of reasons is an accurate accounting of their justifications for departing. We have no reason to believe that judges are not truthful in their stated reasons for departures (and, in fact, the candid nature

of some departure reasons suggests forthrightness); nevertheless, we acknowledge that unstated reasons for departures may exist. Second, as reasons for departures are only given for cases involving offenders who received departures, we do not know why judges decided that they would not depart from the sentencing guidelines. This, however, is not the purpose of the present paper and does not diminish the wealth of information that can be obtained by reviewing those cases that received a judicial sentencing departure.

Findings

The first stage of our review uncovered the key concepts that were reflected in the justifications for judicial departures. As shown in Table 2 and as discussed in the sections that follow, we grouped these concepts into six broad themes: 1) philosophy of punishment, 2) defendant focused, 3) victim

focused, 4) offense specific, 5) guideline corrections or issues, and 6) system contexts.¹⁶ We then quantified the use of reasons for downward and upward departures that reflected these concepts and themes. Although we initially identified victim specific concepts as a unique theme based on review of policy and statutes, this was by far the least common reason ascribed by judges for departing, appearing in fewer than four percent of all cases (3.81% of upward departures and .45% of downward departures). Chi-Square tests were performed to determine whether there were significant differences in the reasons given for upward and downward departures. In the sections that follow, we discuss these themes and provide examples of the types of reasons that fall within each theme. Although we present them separately, we want to emphasize that many of these themes are interconnected and that judges may rely on more than one to justify a particular departure.

Table 2: Main Themes by Departure Type

Reason Theme	Downward		Upward		χ^2
	Count	Percent	Count	Percent	
Philosophy of Punishment	8,345	56.61	827	49.20	33.67***
Defendant Focused	11,586	78.60	794	47.23	800.29***
Victim Focused	66	.45	64	3.81	216.83***
Offense Focused	10,656	72.29	857	50.98	327.04***
Guideline Corrections/Issues	7,311	49.60	757	45.03	12.59***
System Contexts	2,184	14.82	399	23.74	90.55***
Other/Not specified	1,720	11.67	135	8.03	12.46***
Total Number of Cases	14,740		1,681		

*** $p < .001$

Reasons Based on Philosophies of Punishment

In about half of all upward (49.20%) and downward (56.61%) departures, judges justified the decision to depart using a specific philosophy of punishment. As shown in Table 3, the departure reasons that fell into this category reflected one of the

philosophical purposes of sentencing, including *retribution*, *deterrence*, *restoration*, and *rehabilitation*. With the exception of *deterrence*, there were statistically significant differences between upward and downward departures in how often these reasons were cited.

Table 3: Philosophy of Punishment Reasons for Departures

Philosophy Category	Downward		Upward		χ^2
	Count	Percent	Count	Percent	
Deterrence	5,062	34.34	1,681	35.81	1.44
Rehabilitation	3,264	22.14	117	6.96	212.76***
Restoration	859	5.83	31	1.84	46.71***
Justice/Reasonableness	6,503	44.12	695	41.34	43.83*
Protect Public	4,071	27.62	584	34.74	37.69***

Note: Some judicial reasons for departure may be included in multiple categories.

* $p < .05$; *** $p < .001$

For both downward and upward departures, *justice/reasonableness* was the most common type of punishment philosophy used, accounting for 44.12% of downward departures and 41.34% of upward departures ($\chi^2 = 5.17$, $p < .05$). This reason for departure is reminiscent of retribution, in that the justification for the departure is that the punishment should fit the crime, but judges also frequently referenced the need to “achieve a reasonable sentence” for the offense and stated that the departure was in the “interest of justice.” To justify downward departures, judges frequently provided reasons such as “adequate punishment to meet the purposes of sentencing” and “lost job/punishment enough.” “Sufficient punishment” was a common reason for both upward and downward departures, as was to “provide just punishment for the offense.”

Deterrence, incapacitation, rehabilitation, and restoration were additional reasons for departures that fit within the context of philosophy of punishment. Often, judges would cite these reasons directly (e.g., “Afford adequate deterrence to criminal conduct (18 3553(a)(2)(B),” “Incapacitation,” and “Rehabilitation”). For examples of rehabilitation, some judges cited “training/treatment opportunities” and to “provide the def [defendant] with needed educational or vocational training, medical care, or other correctional treatment in most effective manner (18 3553(a)(2)(D))” as reasons for downward departures.

Protection of the community was also a common reason given for both upward (34.74%) and downward (27.62%) sentencing departures. A judge may use this as a rationale for a downward departure if he or she believes that the defendant does not pose a risk to the public. For example, the judge may sentence a defendant below the guideline range because the “offense conduct posed no risk to security or foreign policy interest of the US.” For upward departures, a judge may believe the defendant to be an exceptional risk to society (34.74%) and therefore may justify the departure as

designed to “protect the public from further crimes of the defendant (18 3553(a)(2)(D)),” or because “his conduct undermined the safety and security of the Fed Detention Center,” or because the “court believes that defendant is a sexual predator and a danger to the community.”

Defendant-Focused Reasons

Circumstances related to the defendant was another recurrent theme in judicial reasons for departures. In fact, this was by far the most prevalent, appearing in over 78% of downward departures and 47% of upward departures. The key concepts and terms that are incorporated within this theme are presented in Table 4. Above all, judges were concerned with the *attitude and character of the defendant*. For example, when imposing a downward departure, judges provided reasons such as the “history or character of the defendant...,” “acceptance of responsibility,” and “remorse.” Some judges were more specific, bringing up the defendant’s “newfound religious outlook,” or indicating that the defendant “acknowledges offense impact on victims.” By contrast, a perception that the defendant lacked these positive attitudes and had “taken no responsibility for actions” was often used as a justification for an upward departure.

Beyond the defendant’s attitude or character, judges also justified downward departures based on the defendant’s circumstances, such as *drug or alcohol abuse* (4.00%), *kids and family ties* (13.19%), *employment or education* (8.49%), or other *life circumstances* (7.67%). These reasons were almost never given to explain upward departures. Downward departures justified on the basis of kids and family ties were often related to the collateral consequences to the family as a result of the defendant’s sentence. For example, some judges relied on section 5H1.6(B)(i) of the guidelines manual, which states that a departure may be warranted if “the defendant’s service of a sentence within the applicable guideline range will cause substantial, direct, and specific loss

of essential caretaking, or essential financial support, to the defendant's family."

Another aspect of defendant-focused reasons for departures is the defendant's behavior or conduct, which was present in both upward (8.03%) and downward departures (13.18%). For downward departures, judges provided general reasons such as "aberrant behavior"¹⁷ and "defendant's conduct." Judges were also more explicit about the specific nature of the defendant behavior that justified a departure, such as "absent defendant's voluntary return to US it is unlikely any further action would have been taken," "Court considered defendant

turning in a handcuff key that he found in detention facility which could have potentially created a dangerous situation in the hands of another inmate," and "defendant's journey through the jungles to surrender." These reasons for downward departures illustrate how the defendant's behavior both during and after the crime can influence judicial decisions. Similar types of defendant-focused reasons were given for upward departures—judges cited such things as "extreme conduct," "untruthful testimony," "def[endant] guided people through desert for 11 days and ran out of water and food," and defendant "attempted to bribe arresting agents."

Table 4: Defendant Focused Reasons for Departures

Reason Category	Downward		Upward		χ^2
	Count	Percent	Count	Percent	
Age/Health	1,596	10.83	1	.06	199.29***
Mental Health	828	5.62	2	.12	95.07***
Drug/Alcohol Abuse	590	4.00	4	.24	61.34***
Employment/Education	1,251	8.49	12	.71	128.42***
Kids/Family	1,944	13.19	2	.12	246.73***
Community ties	438	2.97	1	.06	49.18***
Life Circumstances	1,130	7.67	15	.89	106.74***
Attitudes/Character	10,015	67.94	731	43.49	399.12***
Behavior	1,943	13.18	135	8.03	36.22***

Note: Some judicial reasons for departure may be included in multiple categories.

*** $p < .001$

Victim-Focused Reasons

Although we initially found victim-focused reasons for departures present within guideline policies and statutes, these were given infrequently by judges to justify either downward or upward departures. As shown in Table 5, when determining whether to depart from the guideline sentence, judges rarely considered issues related to the victim, even when it came to *victim harm or injury*. In those cases in which judges did use victim-focused reasons for departures, they cited such things as "lesser harm,"¹⁸ "No victims/no harm," and "Victim's conduct." The use of the victim's conduct as a reason for downward departure is articulated in section 5K2.10 of the sentencing guideline manual, which states that "if the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense."

Victim-related reasons for upward departures often reflected the amount of harm or injury sustained by the victim. These include if the offense resulted in the "death"¹⁹ of the victim, "physical injury,"²⁰ or "extreme psychological injury."²¹ Victim harm, however, did not have to relate to physical or psychological injury. For example, one judge stated that the "defendant stole lifes [sic] savings and devastated victims" and another stated that the number of victims involved was a key consideration for an upward departure, noting that the "instant offense caused 170 employees to be laid off." Furthermore, characteristics of the victim, such as the "diminished mental capacity of one of the victims" and the fact that the "abuse occurred on more than one occasion" were also cited as reasons for upward departures. The age of the victim was noted in some cases as a reason to justify an upward departure, including one judge who stated that the "def smuggled 14 yr old girl for his carnal purposes."

Table 5: Victim Focused Reasons for Departures

Reason Category	Downward		Upward		χ^2
	Count	Percent	Count	Percent	
Injury/Harm	41	.28	53	3.15	219.09***
Character/Conduct	28	.19	14	.83	24.45***

Note: Some judicial reasons for departure may be included in multiple categories.

p <.001

Offense-Focused Reasons

Second only to defendant-focused reasons for downward departures, judges relied on aspects of the instant offense when determining whether a departure below (72.29%) or above (50.98%) the guidelines was warranted. These reasons for departures are presented in Table 6. The *severity or seriousness of the offense* is the predominant offense-focused reason given to justify both upward and downward departures. Overwhelmingly, this was due to the application of more general reasons for departures based on 18 U.S.C. 3553(a), such as to “reflect the seriousness of the offense,” and the “nature and circumstances of offense.” Other reasons related to the seriousness of the offense had to do with the specific nature of the offense. For instance, judges referenced drug purity and quantity as a reason for either a downward departure (e.g., “low drug purity”) or an upward departure (e.g., “unusually high drug amount/purity”). For child pornography offenses, reasons such as “number of images,” “no inappropriate conduct with children...,” and “has had inappropriate contact with or exploited minors” were reasons used to justify upward and downward departures. Additional downward departure reasons that relate to the seriousness of the offense involved comparisons to what could have happened, such as “the defendant did not produce child pornography,” “the court found that the defendant used less serious means to counterfeit currency,” and “no inappropriate conduct with children/not a pedophile.”

The violent nature of the offense and use of a weapon are also related to the seriousness of the offense and are captured within this category. *Violence and weapon use*, however, may also tap into a separate determination by judges when considering a sentencing departure. We found that violence and weapon use were not prominent reasons for departures. Although this is not particularly surprising for downward departures, we anticipated that violence and use of a weapon would play a more

important role in judicial explanations for upward departures. However, these factors were specifically mentioned in only three percent of cases involving upward departures. When violence or weapon use was mentioned as a reason for a downward departure, it was most often due to the lack of violence or mitigating factors regarding firearms. One example of this can be drawn from one judge’s written explanation, which stated that there was “no loss of life or gratuitous torture or violence.” The lack of presence of departure reasons for violence or weapon use may be related to the level of detail that is involved in the calculation of offense levels for sentencing determinations. Based on our results, it would appear that judges may accept how violence and weapon use are currently included within guideline offense calculations.

The defendant’s *role in the offense* was also a departure reason provided by judges, typically for downward departures. These reasons reflect the judge’s consideration of whether the defendant was “influenced/used by others” or had a “mule/role in the offense,” among other similar concerns. One judge stated that the “def did not control amount of ammo” and another noted the “limited duration of involvement” of the defendant. Although this was a less common reason given for upward departures, “abuse of trust/skill/position” was one potential aggravating factor related to the defendant’s role in the offense. The *motive and intent* of the defendant was another consideration for departures. For example, some judges noted the “lack of culpability/accountability of defendant,” or that the “defendant did not set out to defraud victim,” and had “no motive for personal gain.” In one case, the judge imposed a sentence that involved a downward departure based on the fact that there were extenuating circumstances as motive for the offense; this judge stated that “deft absconded believing their child was being abused.”

Table 6: Offense Specific Reasons for Departures

Reason Category	Downward		Upward		χ^2
	Count	Percent	Count	Percent	
Violence/Weapon	308	2.09	56	3.33	10.74***

Role in Offense	964	6.54	27	1.61	64.77***
Motive/Intent	477	3.24	37	2.20	5.33*
Seriousness of Offense	10,406	70.60	831	49.43	312.80***

Note: Some judicial reasons for departure may be included in multiple categories.

* $p < .05$; *** $p < .001$

Reasons Related to Guideline

Corrections and Other Guideline Issues

Judges gave reasons specifically addressing guideline issues in just under half of the cases that received either a downward (49.60%) or an upward departure (45.03%). Presented in Table 7, the reason most often cited related to *criminal history correction* to account for nuances of criminal history that are not captured with the criminal history score calculations. This reason was present in both upward and downward departures, and there was not a statistically significant difference between the two groups. Most of these reasons were condensed under an aggregated reason called “criminal history issues,” and we were therefore unable to discern the exact nature of the “issue” the judge had with the calculated criminal history score.²² “Safety valve” departures also represent corrections for criminal history issues, specifically for drug offenders (see §5C1.2 of USSG).

Judges also cited issues relating to *disparity and policy disagreements* as a reason for downward departures (21.87%, compared to only 8% for upward

departures). Judges provided reasons such as to “avoid unwarranted sentencing disparities among defendants,” “crack/powder disparity,” as well as frequent mention of the disparities that exist between other drug sentences, such as “pseudoephedrine to meth disparity” and “oxycodone ratio not rational and disproportionate to the ratio for equivalent substances.” One judge was particularly explicit in his reason for downward departure by stating, “Career offender qualifying events such as street drug dealing have a disproportionate impact on African American offenders.” We also noted that judges were using policy disagreements as reasons for downward departures. This was most common for drug offenses, as noted above, and for child pornography offenses. Judges sometimes explicitly stated that the departure was based on a policy disagreement, such as “policy disagreement with the guidelines,” and “policy disagreement with the meth actual guidelines US v Hayes.”²³ Others cited specific cases that authorized judges to use policy disagreements as a reason for departures such as “US v Crosby 2nd Cir 2005”²⁴ and “US v Garcia Jacquez.”

Table 7: Guideline Specific Reasons for Departures

Reason Category	Downward		Upward		
	Count	Percent	Count	Percent	χ^2
Disparity/Disagreement	3,223	21.87	127	7.56	190.30***
General Guideline Correction	1,612	10.94	269	16.00	38.18***
Criminal History Correction	3,999	27.13	460	27.36	.04

Note: Some judicial reasons for departure may be included in multiple categories.

*** $p < .001$

Reasons Related to System Contexts

The final theme found in judicial reasons for departures, presented in Table 8, is a reference to either court or correctional contexts. Reasons that were classified as *court contexts* included those that were to maintain good working relationships with court actors by departing in a case due to “party motion/agreement/consent” or “based on defense attorney” and were more common for upward departures. The few that related to downward departures were typically related to court efficiency. For example, “waiver of pretrial motions,” “waiver of appeal,” “early resolution of case,” and “expedited resolution of case” were cited as reasons for

downward departures. Although not as common, some judges compared federal court and state court processes in determining whether to depart. A judge in one case stated that the departure “tracks sentence that would have been imposed if sentenced in state courts,” and others stated that “state authorities are pursuing charges for the same conduct” and that “one month variance due to unusual nature of state and federal involvement in this case.”

Correctional contexts were often related to the defendant’s ability to do time or to the costs of incarceration and were more often used for downward departures. A number of judges cited the *defendant’s physical condition* as a reason for downward departure. According to the cited statute

(§5H1.4), “an extraordinary physical impairment may be a reason to depart downward; e.g. in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.” Additional reasons related to the defendant’s ability to do time include considerations that he or she may be “prey to other inmates/susceptibility to abuse in prison” and “conditions of confinement.”

Overall, the findings from our review of departure reasons demonstrate that judges rely on a

multitude of reasons to justify the use of sentencing departures. As these are complex decisions, judges may rely on more than one reason when making their decisions; however, we were able to classify the majority of these reasons into six general themes. Of these, defendant-focused and offense-focused justifications were used most often to justify downward departures and offense-focused and philosophy of punishment reasons were most often used as explanations for upward departures.

Table 8: System Context Reasons for Departures

Reason Category	Downward		Upward		χ^2
	Count	Percent	Count	Percent	
Court/Community	931	6.32	382	22.72	552.24***
Corrections	1,325	8.99	17	1.01	127.97***

Note: Some judicial reasons for departure may be included in multiple categories.

*** $p < .001$

Discussion and Conclusions

Within the first few pages of the U.S. Sentencing Guidelines Manual, the Commission states that “by monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so...the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted” (USSG, 2013, §1A.4b). Reviewing the explanations provided by judges for sentencing departures offers many insights into these decisions. These stated reasons for departures can lead to a better understanding of the decision rules used by judges and shed light on how judges work within—and beyond—the sentencing guidelines. The goal of this study was to use these judicial reasons for departures to evaluate judicial sentencing decisions from an alternative perspective to see whether these stated reasons for departures can be used to provide insights as to how judges are using departures and for what reasons. Through this effort, we uncovered several findings that contribute to the refinement of theory and policy.

First, the results of this study lead to significant conclusions regarding judges’ use and perceptions of sentencing guidelines. The commonalities observed in the reasons for departures hint at key aspects of the guidelines that effectively address judicial concerns at sentencing and also identify areas where the guidelines fall short and may be in need of revision. For instance, the lack of judicial departures for reasons of victim considerations may suggest that these concerns are adequately addressed by the

guidelines themselves and that, overall, judges do not see a need for adjustments at sentencing to account for them. There are notable findings that may indicate a need for further investigation for the improvement of guideline policy as well. For example, although the sentencing guidelines are meant to accurately capture prior criminal history and severity of the offense, these both represent common reasons for judicial departures. The meaning of this particular finding is conditioned on the actual goals of the sentencing guidelines themselves. If the purpose of sentencing guidelines is to offer a guideline range appropriate for the majority of offenders, this finding would suggest that judges do not find this to be the case and would indicate the need for reform to make appropriate adjustments to guiding policy.

Additionally, and perhaps most significantly, the finding that over 20% of downward departures are for issues of disparity and disagreement with disparate sentencing policies warrants further consideration. The use of departures to correct for inherent disparity within sentencing guidelines has received some limited attention from scholars (see Hartley et al., 2007b; Kaiser & Spohn, 2014). These policy disagreement departures are most likely to affect certain types of offenders and offenses (e.g., drug crimes, child pornography, armed career criminals) more than others, and future studies should continue to examine the nuances of this phenomenon. The fact that judges used both upward and downward departures to correct for perceived errors in defendants’ criminal history scores is interesting, especially in light of the prominent role that criminal history plays in determining the presumptive guideline sentence. That judges frequently use departures to adjust criminal history scores suggests

that the Sentencing Commission may want to revise the procedures used to calculate these scores.

Beyond policy considerations, our findings also lead to a number of conclusions regarding sentencing theory and the focal concerns that guide judges in their departure decisions. Overall, our findings are generally consistent with the focal concerns perspective. Judges often explicitly cited concerns of offender's blameworthiness and culpability as well as the need to protect the community from dangerous offenders likely to recidivate. These factors clearly influence judges' sentencing/departure decisions. By contrast, we found less support for the assertion that judges consider practical constraints—such as prison crowding or courtroom efficiency; however, concerns about correcting for disparity and policy disagreements may be a practical consideration of sentencing to which judges are more highly attuned. This finding is consistent with recent research which indicates that judges may be cognizant of disparities in sentencing outcomes (see Clair & Winter, 2016; Kaiser & Spohn, 2014) and may use their discretionary power to limit these inherent disparities.

Also of theoretical interest is the degree to which the various punishment philosophies were used to justify sentencing departures. Further research should delve deeper into how these philosophies are used. We were not able to examine the departure decisions of individual judges, and therefore, we cannot say whether certain judges justified their departure decisions using a consistent philosophy of punishment whereas others took a more pragmatic and eclectic approach that involved the use of different philosophical perspectives depending upon the nature of the crime or the characteristics of the offender. The presence of several different philosophical perspectives among the rationales for departures suggests that judges bring different philosophies of punishment and beliefs about the goals of sentencing to the bench. The ways in which these philosophical differences may shape their sentencing decisions is a potential topic for future research.

It is important to note that our findings are with respect to the formally articulated reasons for departures as noted in sentencing documents and may not necessarily reflect the judges' true feelings or opinions. Additionally, these findings only speak to the reasons for departures in federal cases and may not reflect decision-making processes of judges within the state court systems. Finally, although over half of federal departures are prosecutor initiated, such as substantial assistance departures, we are not able to as closely examine prosecutor reasons for departures given that there is no requirement for prosecutors to justify their reasons for offering

substantial assistance or other types of prosecutor-based departures.

The goal of this paper was to systematically review the reasons judges give for departing from sentencing guidelines and, in so doing, to shed light on the decision rules and focal concerns that guide the sentencing process. The sentencing research conducted to date—most of which involves estimating models of sentence outcomes using variables purported to measure the factors that judges take into consideration in determining the appropriate sentence (but see Clair and Winter, 2016, for an exception)—cannot say with any degree of certainty that these are, in fact, the concerns that motivate judges' decisions. Like Clair and Winter (2016), we believe that the judicial decision making process is complex and that "researchers should focus analytic attention on the situationally specific social processes of decision-making" (p. 355). We suggest that examining and cataloguing judges' stated reasons for departing provides a deeper and more nuanced understanding of the factors they consider as they attempt to tailor sentences to fit offenders and their crimes.

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Court Cases Cited

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Appendix A

Departure Coding

These themes and key concepts were identified by reviewing the USSC codebook for sentencing departures and textual “other” reasons for departures provided within the data, the U.S. Sentencing Guideline Manual policy statements on appropriate use of departures, U.S. case laws referenced within departure decisions, and U.S. federal sentencing statutes that pertain to departures. After these themes and concepts were identified, this coding sheet was used to quantify the number of times judges cited reasons for departures that correspond these concepts for each sentencing offender.

Theme 1: Philosophy of Punishment

- Deterrence (1 = present; 0 = not present)
- Rehabilitation (1 = present; 0 = not present)
- Restoration (1 = present; 0 = not present)
- Justice/Reasonableness (1 = present; 0 = not present)
- Protect Public (1 = present; 0 = not present)

Theme 2: Defendant Focused

- Age/Physical Health (1 = present; 0 = not present)
- Mental Health (1 = present; 0 = not present)
- Defendant Past Drug/Alcohol Use or Abuse (1 = present; 0 = not present)
- Defendant Employment/Training/Education (1 = present; 0 = not present)
- Defendant Kids/Family Ties (1 = present; 0 = not present)
- Defendant Community Ties (1 = present; 0 = not present)
- Defendant’s Past/Life Circumstances (1 = present; 0 = not present)
- Collateral Consequences of Punishment (1 = present; 0 = not present)
- Defendant’s Attitude or Personal Characteristics (1 = present; 0 = not present)
- Defendant’s Behaviors/Actions (1 = present; 0 = not present)

Theme 3: Victim Focused Reasons

- Victim Injury/Harm (1 = present; 0 = not present)
- Victim Age/Characteristics (1 = present; 0 = not present)
- Victim's Conduct/Behavior (1 = present; 0 = not present)

Theme 4: Offense Focused

- Violence or Weapon Used (1 = present; 0 = not present)
- Defendant's Role in the Offense (1 = present; 0 = not present)
- Defendant's Intent/Motive (1 = present; 0 = not present)
- Severity of Offense (1 = present; 0 = not present)

Theme 5: Guidelines Focused

- Disparity/ Guideline Disagreement (1 = present; 0 = not present)
- Criminal History Issues/Correction (1 = present; 0 = not present)
- Guideline Corrections (1 = present; 0 = not present)

Theme 6: System Contexts

- Court Contexts (1 = present; 0 = not present)
- Correctional Contexts (1 = present; 0 = not present)

Endnotes

¹ This includes the defendant's race, sex, national origin, creed, religion, and socio-economic status (§5H1.10) and whether the offender had a lack of guidance as a youth or similar circumstances indicating a disadvantaged upbringing (§5H1.12).

² These factors include the defendant's educational and vocation skills, drug or alcohol dependence or abuse, employment record, and family ties and responsibilities (§5H1.1-5H1.6).

³ There were several changes prior to 2005. In *Koon v. United States* (518 U.S. 81, 1996), the Supreme Court attempted to restore some measure of judicial discretion by establishing an "abuse of discretion" doctrine of appellate review. In an effort to curb judicial departures, Congress subsequently responded with the enactment of the Feeney Amendment to the PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today; Pub. L. No. 108-21, 117 Stat. 650) of 2003, which reinstated a "de novo" standard for appellate review (18 U.S.C. § 3742 (e)), thus restricting judicial discretion. Therefore, it could be argued that, from 1996 to 2002, judges' discretion was enhanced and, then, restricted again by the PROTECT Act of 2003.

⁴ Although departures and variances are different, both terms refer to sentences imposed outside of the guideline range. This paper will use the term "departure" to generally refer to all sentences that are imposed outside of the guideline range, including departures and variances.

⁵ In 2013, 78,628 offenders were convicted and sentenced in federal courts, and almost most (48.83%) received a sentence outside the guideline range. Of those, 43% received a judicial—as opposed to a prosecutorial—departure.

⁶ In 2016, 97.3% of all cases in the U.S. District Courts resulted in a guilty plea (United States Sentencing Commission, 2017). Because only three percent of federal cases resulted from trial convictions, it was not possible to provide meaningful comparisons in departure reasons between sentences from trial and plea agreements for this particular study. Additionally, the Guideline Manual, which we used to create our initial coding scheme, does not differentiate policy guidelines for departures between cases that resulted in guilty plea and trials. For these reasons, we do not examine departures between guilty pleas and trial convictions, although this may be an area for future research.

⁷ Prosecutorial departures tend to fall into two categories: (1) fast track and (2) substantial assistant departures. Unfortunately, departures based on substantial assistance or fast track do not have the same level of detail in to the reasons for departures as those that are given by the judge. Also, there is far less guidance given within the U.S. Sentencing Guidelines on the use of these types of departures. Because of these reasons, we purposefully excluded prosecutorial departures from our analysis. Further, the results from our study do not make any implications to prosecutorial reasons for departures.

⁸ An example of the Judgment in a Criminal Case form (AO 245B) can be found at <http://www.uscourts.gov/forms/criminal-judgment-forms/judgment-criminal-case>, last accessed April 9, 2016.

⁹ The reason codes for departures are provided within the USSC Variable Codebook for Individual Offenders. The USSC variable codebook can be found at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/datafiles/USSC_Public_Release_Codebook_FY99_FY13.pdf, last accessed March 25, 2015. The reasons for departures can be found in the Code Attachment pages A10-A16.

¹⁰ Case that found that downward departure due to advanced age and health problems of defendant were appropriate (*U.S. v Gigante*, 989 F. Supp. 436 (E.D.N.Y. 1998)).

¹¹ Case that affirmed the use of downward departure for "efforts toward rehabilitation followed an uneven course, not a surprising result for someone with a fourteen year history of addiction" (*U.S. v. Maier*, 975 F.2d 944, 945, 2d Cir.1992).

¹² Case in which the appellate court ruled that the district court departed downward for an erroneous reason (*U.S. v. Koczuk*, 166 F. Supp. 2d 757 (EDNY 2001)).

¹³ There were few occasions in which we were unable to determine the reason for departure or the specific code description was missing from the codebook. In these instances, clarification was sought by contacting the USSC directly.

¹⁴ There may be guideline policies, statutes, and cases which provide guidance for the use of departures that were not used at all by judges in their departure decisions in 2013. These were therefore not included in our review.

¹⁵ For the majority of cases, presence of key terms and concepts were identified by the explicit inclusion of that term or phrase. For example, if the reason for departure stated “injury to victim” that would be coded using the key term “victim injury.” Other instances required more subjective judgment on the presence of key terms, such as “waiver of pretrial motions.” While this does not use a specific key term, such as “court contexts,” it is clear to see this reason for departure is related to issues of court efficiency, which fits within our definition of court contexts. Instances in which reasons for departures captured two or more key concepts were also noted and would be coded in both places. For example, “willingness to continue mental health treatment” could be coded as “rehabilitation” philosophy of punishment as well as “defendant mental health” reasons for departures. Coding decisions where subjective determinations of the presence of key terms and concepts were reviewed and discussed between authors to maintain consistency.

¹⁶ There were roughly 11 percent of judicial reasons for departures that we were unable to identify key terms or phrases and therefore unable to include in our thematic review. Most of these reasons were too vague to code confidently. These were included within the “other/not specified” category.

¹⁷ USSG §5K2.20 Aberrant Behavior (Policy Statement)

¹⁸ USSG §5K2.11 Lesser Harms (Policy Statement)

¹⁹ USSG §5K2.1 Death (Policy Statement)

²⁰ USSG §5K2.2 Physical injury (Policy Statement)

²¹ USSG §5K2.3 Extreme psychological injury (Policy Statement)

²² We contacted the USSC directly to gain clarity on what this aggregated reason for departure represents. According to the USSC (personal communication, C. Kitchens, February 9, 2015), this aggregates reasons that are based on §4A1.3 of the guidelines manual, which states reasons such as “pattern of conduct,” “pending cases,” and “related cases,” among others. This category also includes reasons such as “criminal history category over-represents the defendant’s involvement,” “age of priors,” and “no prior record/first offender,” as just a few examples.

²³ Case in which judge states that “The methamphetamine Guidelines are fundamentally flawed because they fail to consider additional factors beyond quantity” (*United States v. Hayes*, __ F. Supp. 2d __, 2013 WL 2468038 38, N.D. Iowa June 7, 2013).

²⁴ Case in which the second circuit outlined post-*Booker* sentencing procedures and standards of review that has been applied to policy disagreement departure cases (*United States v. Crosby*, 397 F.3d 103, 2d Cir. 2005)