

EXPLORING COLLATERAL CONSEQUENCES: *KOON v. UNITED STATES*, THIRD PARTY HARM, AND DEPARTURES FROM FEDERAL SENTENCING GUIDELINES

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INTRODUCTION

In June 1987, Anthony Olbres purchased a Rolls Royce Corniche convertible for \$158,000 and drove it to a local restaurant in Exeter, New Hampshire. A passing IRS employee saw the luxury car parked outside of the restaurant. His curiosity piqued, he wrote down the license plate number with the intention of identifying the car's owner and examining the owner's tax return. The IRS employee traced the luxury car to Mr. Olbres, who at the time ran a twelve person business, Design Consultants, which created exhibit booths for trade shows. In 1987, Mr. Olbres had a total income of \$837,480. The IRS employee's curiosity led to an audit of Mr. Olbres's tax return and eventually resulted in a criminal indictment. At trial, he was convicted of tax evasion.¹

At sentencing, the district court found that if Mr. Olbres were jailed, Design Consultants would become defunct and its employees would lose their jobs.² Nonetheless, the district court stated that the Sentencing Commission must have understood that small businesses would often fail if their principals were incarcerated and that job loss to third parties thus was not an "unusual situation"³—one of the grounds allowing district court judges to depart from the Guidelines. Believing that third party job loss could never serve as the basis for reducing a Guidelines sentence, the trial judge stated:

I also want the record to be clear that if the fact that your business were to fail could serve legally as a basis for departing under the Sentencing Guidelines, then I would depart, and I would depart

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¹ For a complete account of this case, see *United States v. Olbres*, 99 F.3d 28, 29 (1st Cir. 1996).

² See *id.* at 33.

³ *Id.* (quoting district court sentencing hearing).

in a manner sufficient to keep the business from failing and putting those people out of work. But as I say, I can't as I sit here find a principal [sic] basis for departing from the guidelines on those factual assumptions.⁴

Is the district court right or wrong? Do the Sentencing Guidelines permit judges to depart based on third party effects? And even if judges can depart, when should they?

* * *

Ever since Congress passed the Sentencing Reform Act of 1984⁵ (Act), judges have used their powers to correct the perceived unjust effects of the Federal Sentencing Guidelines (Guidelines).⁶ One device wielded by the bench is the departure.⁷ Written into the Guidelines themselves, the departure gives district court judges discretion to increase or decrease a prescribed sentence for factors enumerated in the Guidelines as well as for factors that, in the view of the sentencing judge, were not fully considered by the authors of the Guidelines.⁸ In practical terms, the departure is a built-in safety valve that allows judges to do justice in extraordinary cases.⁹

In the decade since the Act, departures have been invoked with varying degrees of enthusiasm by every circuit¹⁰ and seem likely to retain their popularity. District court judges across the political spectrum oppose statutorily mandated sentences.¹¹ Commentators and grassroots groups also prefer individualized sentencing to mandatory

⁴ *Id.* (quoting district court sentencing hearing).

⁵ Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586; 28 U.S.C. §§ 991-998 (1994)).

⁶ See, e.g., Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. Colo. L. Rev. 655, 655-56 (1993) (noting that complaints about Guidelines involve their "undue severity, rigidity, and prosecutorial rather than judicial power").

⁷ See *Koon v. United States*, 116 S. Ct. 2035, 2044 (1996) (holding that district courts can depart from applicable Guideline range in certain circumstances); see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 14 (1988) (noting intent of Guidelines to allow judges to depart in unusual cases).

⁸ See 18 U.S.C. § 3553(b) (1994).

⁹ See Breyer, *supra* note 7, at 14 (noting that departures exist to allow judges to adjust for differences among defendants and for unusual cases).

¹⁰ See, e.g., John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 Brook. L. Rev. 551, 551-53 (1993) (describing widespread use of departures).

¹¹ See Fred A. Bernstein, *Discretion Redux—Mandatory Minimums, Federal Judges and the "Safety Valve" Provision of the 1994 Crime Act*, 20 U. Dayton L. Rev. 765, 767 n.13 (1995) (noting federal judiciary's near unanimous opposition to statutorily mandated sentences).

sentencing.¹² And the Supreme Court, in its recent decision in *Koon v. United States*,¹³ affirmed the enduring role departures play in sentencing jurisprudence.¹⁴

To be sure, departures remain the exception not the rule. A recent study of Guidelines cases in six circuits found that less than ten percent of sentences involved departures.¹⁵ Nevertheless, the range of grounds for departure is nearly limitless.¹⁶ Only a handful of factors are banned from consideration by district courts when deciding whether to depart.¹⁷

Increasing scholarly and judicial attention has focused on departures based on the effects on third parties such as family members.¹⁸ Typically, such cases involve downward departures due to what this Note calls extraordinary family effects. Courts often invoke these departures when sentencing a defendant to the prison term called for by the Guidelines will cause extraordinary harm to family members (i.e., by depriving children of their sole caretaker and provider). In these rare instances, a court can use a downward departure to sentence a defendant to home confinement rather than prison. This enables courts to punish defendants but protect third parties. The fast-growing literature on the subject supports such departures¹⁹ as do the decisions of almost all circuits.²⁰

¹² See *id.* at 766-67 & 767 n.8 (highlighting family advocacy groups' and editorial writers' opposition to federal sentencing scheme).

¹³ 116 S. Ct. 2035 (1996).

¹⁴ See *id.* at 2046.

¹⁵ See Michael S. Gelacak et al., *Departures Under The Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 *Minn. L. Rev.* 299, 361 (1996) (stating that national average for downward departure was about six percent and national average for upward departure was less than two percent); see also Karin Bornstein, Note, *5K2.0 Departures for 5H Individual Characteristics: A Backdoor Out of the Federal Sentencing Guidelines*, 24 *Colum. Hum. Rts. L. Rev.* 135, 160 (1993) (stating that in 1990, 15.7% of all sentences involved departures).

¹⁶ See *Koon*, 116 S. Ct. at 2050.

¹⁷ These factors include the defendant's race, sex, national origin, creed, socioeconomic status, lack of guidance as a youth, drug or alcohol dependence, and economic hardship. See U.S. Sentencing Guidelines Manual § 5H1.10 (1995).

¹⁸ See, e.g., Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 *U. Pa. L. Rev.* 2151, 2189-91 (1995) (criticizing Guidelines as ignoring fairness to children); Karen R. Smith, *United States v. Johnson: The Second Circuit Overcomes the Sentencing Guidelines' Myopic View of "Not Ordinarily Relevant" Family Responsibilities of the Criminal Offender*, 59 *Brook. L. Rev.* 573, 573-76 (1993) (arguing that appellate courts should defer to district courts' departure findings); Walker, *supra* note 10, at 563 (noting courts' approval of downward departures based on extraordinary family effects). See generally Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 *Notre Dame L. Rev.* 1 (1991) (surveying newly emergent departure jurisprudence).

¹⁹ See sources cited *supra* note 18.

²⁰ See *infra* Part II.A.

In contrast, judges and scholars have paid less attention to departures based on the effects (what this Note calls extraordinary business effects) on third parties such as employees. Such departures typically are invoked for a defendant who owns a company that will go out of business if the defendant is imprisoned. Although the number of defendants who might merit such a departure is small, because very few defendants can assert credibly that their imprisonment will lead to the job loss of others, the number of workers who might benefit from the exercise of such judicial discretion is relatively high. In the six extraordinary business effects cases to reach the circuit courts of appeals, sending the defendant business owner to prison likely would have bankrupted the defendant's company and cost anywhere from twelve people to two hundred people their paychecks.²¹ In such extraordinary situations, district court judges invoke these departures to protect employees in much the same way that they invoke departures to protect family members.

Against this background, this Note will explore two questions. The first is whether the third party effects doctrine extends out of the home and into the workplace. Though the overwhelming majority of circuits approve departures due to extraordinary family effects, an inter-circuit conflict exists regarding the permissibility of departures due to extraordinary business effects.²² Such inconsistency is not justifiable. The Guidelines, this Note argues, clearly permit downward departures in both cases. In addition, this Note contends that the Guidelines also permit (but courts and commentators overlook) *upward* departures based on both extraordinary family and business effects.

The second question this Note addresses involves an unresolved issue in departure jurisprudence identified in *Koon*. Assuming departures are permissible, when are they justified?²³ At present, no explicit framework exists to help courts to resolve this dilemma. As a result, courts are "flying blind,"²⁴ justifying departures on a case-by-

²¹ In *United States v. Olbres*, 99 F.3d 28 (1st Cir. 1996), the district court found that 12 full-time employees would lose their jobs if the defendant were sentenced to prison. See *id.* at 33. In *United States v. Milikowsky*, 65 F.3d 4 (2d Cir. 1995), the district court held that up to two hundred employees would lose their jobs if the defendant were sentenced to prison. See *id.* at 8-9.

²² See *infra* Part II.B.

²³ This question is implicated in Justice Souter's concurrence in *Koon*. See *Koon v. United States*, 116 S. Ct. 2035, 2054 (1996) (Souter, J., concurring in part and dissenting in part) (stating that Congress and Commission envisioned that departures would be just only if differences "should" result in different sentences).

²⁴ *United States v. Brewer*, 899 F.2d 503, 513 (6th Cir. 1990) (Merritt, C.J., dissenting).

case basis and potentially reintroducing the very arbitrariness that the Guidelines were meant to counter.

Responding to this issue, this Note puts forth a framework to guide courts' departure decisions in cases involving extraordinary family and business effects. After briefly articulating this framework, which this Note calls collateral consequences, this Note discusses the benefits and drawbacks of this framework and applies it to the extraordinary family and business effects cases. This Note concludes that while the collateral consequence framework justifies upward and downward departures based on extraordinary family and business effects, it does so only in rare cases. Additionally, this Note suggests that the collateral consequences framework may apply to departures in a range of other cases as well.

Part I outlines the developments that led to and informed the Guidelines and reviews the scope of the Court's recent decision in *Koon*. Part II details the relevant and conflicting case law in extraordinary family and business effects cases. Part III argues that the Guidelines permit departures in both cases. Finally, Part IV examines when, even if permitted, courts should depart, and proposes a framework to guide courts' response to this question.

I

THE SENTENCING GUIDELINES AND THE ROLE OF DEPARTURES

To analyze departures in extraordinary family and business effects cases, it is necessary to understand the history and practice of federal sentencing decisions. This Part, therefore, briefly outlines the role of departures as set forth in the Guidelines and as articulated recently by the Supreme Court.

A. *Preserving Discretion in Extraordinary Cases*

Until the mid-1980s, sentencing judges had broad sentencing discretion.²⁵ Pre-Guidelines sentencing judges did not need to offer reasons to support their decisions,²⁶ and appellate review was virtually

²⁵ See *Koon*, 116 S. Ct. at 2043-45 (finding that before Act sentencing judges enjoyed broad discretion in determining whether and how long an offender should be incarcerated); Walker, *supra* note 10, at 553 (noting that prior to advent of Guidelines, district courts' sentencing decisions were "almost completely discretionary"); see also Selya & Kipp, *supra* note 18, at 1 (describing broad discretion of district courts before Guidelines).

²⁶ See Walker, *supra* note 10, at 553.

nonexistent.²⁷ This discretion led to a perception that federal judges were meting out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.²⁸

The Sentencing Reform Act cabins judicial discretion in a number of ways. First, the Act requires judges to impose sentences according to the Guidelines' grid in ordinary cases.²⁹ The grid assigns sentencing ranges at the nexus of a vertical column of forty-three offense levels and a horizontal axis of six criminal history categories. Second, the Act mandates that judges spell out their justifications for imposing certain sentences.³⁰ Third, the Act establishes a limited form of appellate review.³¹ As Judge Walker of the Second Circuit explained, "These requirements help to ensure that district courts are applying the Guidelines correctly and that an adequate record exists for the reviewing court."³²

The new rules have not robbed judges of all their discretion, however.³³ Subject to limits, judges still retain the power to depart from the Guidelines.³⁴ In extraordinary cases, judges can, at their discretion, depart upwards or downwards.³⁵

Preserving discretionary departure power was a *sine qua non* of the reform movement.³⁶ While considering the Act, the Senate Com-

²⁷ See *Koon*, 116 S. Ct. at 2045 (noting that federal criminal sentences were, for all practical purposes, not reviewable on appeal prior to Guidelines); Walker, *supra* note 10, at 553 (same).

²⁸ See *Koon*, 116 S. Ct. at 2043-44.

²⁹ See U.S. Sentencing Guidelines Manual § 1A2 (1995).

³⁰ See 18 U.S.C. § 3553(c) (1994).

³¹ See *id.* § 3742.

³² Walker, *supra* note 10, at 553.

³³ See *Koon*, 116 S. Ct. at 2053. The Court stated:

The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This too must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge. Discretion is reserved within the Sentencing Guidelines

Id.

³⁴ See 18 U.S.C. § 3553(b) (1994).

³⁵ See U.S. Sentencing Guidelines Manual § 1A4b (1995).

³⁶ In its analysis of the departure provision, the Senate Report states that "the provision provides the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines." S. Rep. No. 98-225, at 78 (1984),

mittee stated that "[t]he sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case."³⁷ The framers of the Act thus anticipated that departures would play a vital role in the new sentencing procedure.³⁸

That intent is further manifest in the language of the Act itself. In creating the Sentencing Commission (Commission), Congress decreed as its purpose "avoiding unwarranted sentencing disparities" while at the same time maintaining "sufficient flexibility to permit individualized sentences when warranted."³⁹ To achieve the former without sacrificing the latter, the Act directed courts to sentence within the applicable Guidelines range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."⁴⁰ Except for a handful of factors that judges must never consider, including the defendant's race, sex, creed, socioeconomic status, and national origin,⁴¹ the Guidelines place no limit on factors courts can consider when determining whether extraordinary circumstances exist.⁴²

The Commission adopted this departure policy for a few basic reasons. First, the Commission stated that it would be difficult to prescribe a single set of guidelines to encompass the "vast range of human conduct potentially relevant to a sentencing decision."⁴³ Second, the Commission stated that sentencing judges would not depart often, despite their legal freedom to depart from the Guidelines.⁴⁴ Finally, the Commission stated that because it was a permanent body and had the authority to rewrite the Guidelines, it could patrol district

reprinted in 1984 U.S.C.C.A.N. 3182, 3261. The Report also stated: "The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences." *Id.* at 52, reprinted in 1984 U.S.C.C.A.N. at 3235.

³⁷ *Id.* at 52, reprinted in 1984 U.S.C.C.A.N. at 3235.

³⁸ See Terence F. MacCarthy & Nancy B. Murnighan, *The Seventh Circuit and Departures from the Sentencing Guidelines: Sentencing By Numbers*, 67 *Chi.-Kent L. Rev.* 51, 53 (1991) (stating that departures would be "integral" part of new sentencing procedure).

³⁹ 28 U.S.C. § 991(b)(1)(B) (1994).

⁴⁰ 18 U.S.C. § 3553(b) (1994).

⁴¹ See U.S. Sentencing Guidelines Manual § 5H1.10 (1995).

⁴² See *id.* § 1A4(b) (noting that Guidelines do not intend to limit departure factors in unusual cases).

⁴³ *Id.*; see also *id.* § 5K2.0 (discussing grounds for departure and providing that if case involves factors not given adequate consideration by Commission, departure may be warranted in discretion of sentencing court).

⁴⁴ See *id.* § 1A4(b) (stating Commission's belief that courts will not depart often).

courts' discretion by adding or subtracting departure factors if necessary.⁴⁵

The Commission did not leave the district courts without guidance, however. The Commission listed certain factors that "encourage"⁴⁶ departures as well as those that "discourage"⁴⁷ departures. Factors that encourage departures include victim provocation⁴⁸ and disruption of a governmental function.⁴⁹ Factors that discourage departures include the defendant's family ties and responsibilities,⁵⁰ his or her educational and vocational skills,⁵¹ and his or her civil, charitable, military, or public service record.⁵²

That certain factors are discouraged does not mean that they are never relevant to sentencing decisions. According to then-Chief Judge (now Justice) Breyer, one of the Guidelines' drafters, the Commission intended courts to depart, even on the basis of a discouraged factor, if they found an unusual case.⁵³ Upholding this view, the Supreme Court said in *Koon* that discouraged factors may be relevant in extraordinary cases.⁵⁴

Even when extraordinary circumstances exist such that a departure based on a discouraged factor would be permitted, however, the district court retains the discretion not to depart, a decision which is not generally subject to appellate review. In contrast, a district court's decision to depart triggers a limited form of appeal. Pursuant to the Act, the government can now appeal downward departures and defendants can now appeal upward departures.⁵⁵

B. *The Supreme Court's Koon Decision*

The general rules for sentencing under the Guidelines were considered recently by the Supreme Court in *Koon v. United States*.⁵⁶ The case involved the sentencing of police officers Stacey Koon and Laurence Powell, who were convicted of violating Rodney King's constitutional rights and were sentenced to thirty months imprisonment.

⁴⁵ See *id.*

⁴⁶ See *id.* § 5K (listing encouraged departure factors).

⁴⁷ See *id.* § 5H (listing discouraged departure factors).

⁴⁸ See *id.* § 5K2.10.

⁴⁹ See *id.* § 5K2.7.

⁵⁰ See *id.* § 5H1.6.

⁵¹ See *id.* § 5H1.2.

⁵² See *id.* § 5H1.11.

⁵³ See MacCarthy & Murnighan, *supra* note 38, at 59-60 (describing then-Chief Judge Breyer's interpretation of Guidelines).

⁵⁴ See *Koon v. United States*, 116 S. Ct. 2035, 2045 (1996).

⁵⁵ See 18 U.S.C. § 3742 (1994).

⁵⁶ 116 S. Ct. 2035 (1996).

The Supreme Court granted certiorari in the case and reviewed the lower court's interpretation of the Guidelines.

In his thorough analysis, Justice Kennedy put the Court's seal of approval on the Guidelines' main structure, which mandates the use of the grid to sentence in ordinary cases and permits the exercise of discretion to depart in extraordinary cases. While this part of the decision set forth the correct sentencing road map for lower courts to follow, it was not revolutionary.

Perhaps more noteworthy, therefore, were three other aspects of *Koon*. First, the Court unanimously embraced the treatment of departure factors set forth by then-Chief Judge Breyer. According to Chief Judge Breyer, a judge should ask initially whether features of the case make it unusual and whether the Commission has forbidden departures based on such features.⁵⁷ If features are both unusual and not forbidden by the Commission, then trial judges generally are permitted to use their discretion to depart.

A second noteworthy aspect of *Koon* involved the Court's exploration of the proper standard of appellate review of district courts' departure decisions. The Court rejected a *de novo* standard, stating that appellate courts must give substantial deference to the district court's application of the Guidelines to the facts of each case: "[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence."⁵⁸

Deference to the district court makes sense given the nature of key sentencing questions. For example, to determine whether the facts in a case are extraordinary enough to fall out of the heartland, the district court relies on its "day-to-day experience in criminal sentencing"⁵⁹ as well as case-by-case comparisons with the facts of other Guidelines cases.⁶⁰ Because they see so many more Guidelines cases than appellate courts do—in 1994, for example, 93.9% of Guidelines cases were not appealed⁶¹—"[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations."⁶² As one appellate judge stated: "We do not see or hear the witnesses or the defendant. We are removed from the emotional appeal in the case We do not see real people in their struggle to live,

⁵⁷ See *id.* at 2045.

⁵⁸ *Id.* at 2046 (quoting *Williams v. United States*, 503 U.S. 193 (1992) (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983))).

⁵⁹ *Id.* at 2047.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² *Id.*

only abstract people—'plaintiffs' and 'defendants,' 'appellants' and 'appellees,' 'petitioners' and 'respondents.'"⁶³ Considerations like these compelled the Supreme Court in *Koon* to adopt an abuse of discretion standard of review.⁶⁴

Critics may argue that an abuse of discretion standard is a green light for lower courts to ignore the Guidelines and depart at will. But such a claim, while plausible in theory, is hard to accept. In practice, departures have been extremely uncommon.⁶⁵ Additionally, when judges do depart, appellate courts possess the power to review whether the district court abused its discretion by departing based on an impermissible factor.⁶⁶ Furthermore, if courts begin to depart too frequently, the Guidelines can be amended, as they have been more than five hundred times since 1987.⁶⁷

Finally, the most potentially far reaching part of *Koon* was tucked away in a separate opinion written by Justice Souter and joined by Justice Ginsburg. Until *Koon*, it appeared that sentencing decisions involved only one key question: do the Guidelines permit a departure? If yes, the judge could depart; if no, the judge could not depart. In *Koon*, the two Justices raised an interesting and largely ignored point: even if the Guidelines permit judges to depart, when *should* judges depart?⁶⁸ The Justices discuss but never resolve this question.

The remainder of this Note attempts to answer the question raised by Justices Souter and Ginsburg. Parts II and III survey and analyze the conflicting case law in order to answer the threshold question of whether the Guidelines permit courts to depart in cases involving extraordinary family and business effects. These parts conclude that the Guidelines permit such departures. Part IV then examines when courts should depart, if at all, and proposes a framework to guide courts in their departure decisions.

II DEPARTURES BASED ON THIRD PARTY EFFECTS: CASE LAW

This Part sketches a brief portrait of the case law in extraordinary family and business effects cases. Part II.A. highlights the near-con-

⁶³ *United States v. Brewer*, 899 F.2d 503, 514 (6th Cir. 1990) (Merritt, C.J., dissenting).

⁶⁴ See *Koon*, 116 S. Ct. at 2047-48.

⁶⁵ See *supra* note 15. Of course, departures may become more common under the Court's more deferential standard of review.

⁶⁶ See *Koon*, 116 S. Ct. at 2047 (describing system of appellate review).

⁶⁷ See Elizabeth B. Ford, Guidelines 101: Learning The Basics: Federal Sentencing, *Tenn. B.J.*, Nov.-Dec. 1996, at 25, 25 (noting frequency and effective dates of amendments).

⁶⁸ See *Koon*, 116 S. Ct. at 2054 (Souter, J., concurring in part and dissenting in part).

sensus view that the Guidelines permit district courts to depart in extraordinary family effects cases. In contrast, as outlined in Part II.B., a circuit split exists regarding a district court's discretion to depart in extraordinary business effects cases.

A. *Extraordinary Family Effects Cases*

Immediately after the Guidelines took effect, some circuits held that district courts lacked the power to depart in extraordinary family effects cases. For example, in 1989, the Eighth Circuit held that the defendant's unusual family circumstances did not warrant a downward departure.⁶⁹ The Eighth Circuit concluded that the Guidelines barred consideration of even extraordinary circumstances when the sentence called for some sort of confinement.⁷⁰

Less than one year later, however, the Eighth Circuit abandoned its rigid interpretation. In *United States v. Shortt*,⁷¹ the court adopted a broader reading of section 5H1.1 and accepted departures based on extraordinary family effects.⁷² The defendant in *Shortt* urged the district court to depart, claiming that a prison sentence would harm his family because his wife had a history of drug and alcohol abuse; he was the sole source of income for his family; and he helped his disabled father farm in rural Missouri.⁷³ The district court departed downward on the ground that committing the defendant to prison would be detrimental to the defendant's family.⁷⁴ On appeal, the circuit court vacated the departure, because the defendant's brothers could help their father farm, and because the defendant's wife had admitted at trial that she had overcome her drug and alcohol problems.⁷⁵ Even though the circuit court found that the facts in *Shortt's* case did not fall outside the heartland, it made clear that under a different, "extraordinary" set of family effects, "[i]t may be legally possible for . . . these kinds of circumstances to justify a departure."⁷⁶

⁶⁹ See *United States v. Sutherland*, 890 F.2d 1042, 1043 (8th Cir. 1989).

⁷⁰ See *id.*

⁷¹ 919 F.2d 1325 (8th Cir. 1990).

⁷² See *id.* at 1328 (noting that extraordinary family effects may warrant departure); see also Donald C. Wayne, Case Comment, *Chaotic Sentencing: Downward Departures Based on Extraordinary Family Circumstances*, 71 Wash. U. L.Q. 443, 447-48 (1993) (reviewing *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992) and analyzing change in Eighth Circuit's jurisprudence).

⁷³ See *Shortt*, 919 F.2d at 1326.

⁷⁴ See *id.* at 1328 (giving family factors as one of two possible reasons for court's departure).

⁷⁵ See *id.*

⁷⁶ *Id.*

One by one, other circuits that initially seemed to disapprove of departures based on extraordinary family effects followed the Eighth Circuit's switch.⁷⁷ As of this writing, almost every circuit agrees that the Guidelines permit district courts to depart in extraordinary family effects cases.⁷⁸ Only the Seventh Circuit rejects such an interpretation of the Guidelines.⁷⁹

B. *Extraordinary Business Effects Cases*

Circuit courts split in their treatment of extraordinary business effects cases. The First and Second Circuits read the Guidelines to permit departures based on extraordinary business effects. The Third, Sixth, and Eleventh Circuits read the Guidelines to bar such departures. As of this writing, no other circuit has passed on this issue.

1. *Two Circuits Permit Departures*

In *United States v. Olbres*,⁸⁰ the New Hampshire district court recognized that if Mr. Olbres were jailed, his company would become defunct and its employees would lose their jobs.⁸¹ Nonetheless, the court ruled that job loss to third parties was not an "unusual situation"⁸² warranting a departure under the Guidelines, reasoning that the Commission must have considered the fact that small businesses would often fail if their principals were incarcerated and rejected it as a ground for departure.

The First Circuit rejected the district court's ruling and rationale. In vacating the sentence, the First Circuit questioned the district court's claim that the Commission's decision to discourage departures based on the defendant's "vocational skills" categorically prohibited consideration of job loss to third parties.⁸³ The First Circuit reasoned that the district court's approach also ran afoul of *Koon*, which held

⁷⁷ See Smith, *supra* note 18, at 641-42.

⁷⁸ See *United States v. Harrington*, 82 F.3d 83, 90 (5th Cir. 1996) (holding that Guidelines permit departures due to extraordinary family effects); *United States v. Rivera*, 994 F.2d 942, 953 (1st Cir. 1993) (same); *United States v. Gaskill*, 991 F.2d 82, 85 (3d Cir. 1993) (same); *United States v. Johnson* 964 F.2d 124, 128 (2d Cir. 1992) (same); *United States v. Cacho*, 951 F.2d 308, 311 (11th Cir. 1992) (same); *United States v. Pena*, 930 F.2d 1486, 1494-95 (10th Cir. 1991) (same); *United States v. Mondello*, 927 F.2d 1463, 1470 (9th Cir. 1991) (same); *Shortt*, 919 F.2d at 1328 (same); *United States v. Goff*, 907 F.2d 1441, 1446 (4th Cir. 1990) (same); *United States v. Brewer*, 899 F.2d 503, 508 (6th Cir. 1990) (same).

⁷⁹ See *United States v. Thomas*, 930 F.2d 526, 528 (7th Cir. 1991) (interpreting Guidelines as barring extraordinary family effects as ground for departure cases involving confinement).

⁸⁰ 99 F.3d 28 (1st Cir. 1996).

⁸¹ See *id.* at 33.

⁸² *Id.* (quoting district court sentencing hearing).

⁸³ See *id.* at 33-35.

that generally "courts should not categorically reject a factor as a basis for departure from a Guidelines sentence."⁸⁴

The Second Circuit also has recognized that, in extraordinary cases, the need to avoid injury to third parties is a factor that may justify a downward departure.⁸⁵ In *United States v. Johnson*,⁸⁶ the Second Circuit affirmed a departure based on extraordinary family effects, stating, "The rationale for a downward departure here is not that Johnson's family circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing."⁸⁷ In *United States v. Milikowsky*,⁸⁸ the court applied a similar rationale, upholding a trial court's downward departure to protect employees who would lose their jobs if the defendant was imprisoned.⁸⁹

The undisputed record in *Milikowsky* showed that the defendant was the only individual with the knowledge, skill, experience, and relationships to run his two firms and that imprisonment might well have led to the "immediate bankruptcy" of his firms and the loss of employment for 150 to 200 people.⁹⁰ Stating that business ownership alone, or even ownership of a small business, does not make downward departure appropriate, the Second Circuit nevertheless held that a "departure may be warranted where, as here, imprisonment would impose extraordinary hardship on employees."⁹¹

2. *Three Circuits Do Not Permit Departures*

Three circuits—the Third, Sixth, and Eleventh—have taken the position that district courts can never consider business effects. These circuits offer three reasons for refusing to depart to protect employees. The first justification flows from the Guidelines' prohibition on considering "socioeconomic factors" as bases for departure. The second rests on an interpretation of Policy Statement 5H1.2, which discourages departures based on the defendant's vocational skills. Finally, all contend that third party job loss is never extraordinary.

a. The Socioeconomic Bar. The Eleventh Circuit adopted a bright line rule regarding departures based on third party job loss in

⁸⁴ *Id.* at 34.

⁸⁵ See *United States v. Milikowsky*, 65 F.3d 4, 9 (2d Cir. 1995).

⁸⁶ 964 F.2d 124 (2d Cir. 1992).

⁸⁷ *Id.* at 129.

⁸⁸ 65 F.3d 4 (2d Cir. 1995).

⁸⁹ See *id.* at 9.

⁹⁰ See *id.* at 8.

⁹¹ *Id.* at 9.

United States v. Mogel.⁹² There, the district court found that the defendant had “‘a business that could go under if [she were] not there to take care of it.’”⁹³ In an attempt to protect the employees’ jobs, the district court departed downward and sentenced the defendant to six months of confinement in a halfway house.⁹⁴

Overturning the lower court, the Eleventh Circuit held that a judge can never consider what it called “business ownership” as a ground for departure.⁹⁵ Specifically, the court held, “Ownership of a business, however, much like ownership of a home or of a car, represents an indicator of socioeconomic status, and, as such, is irrelevant for sentencing purposes.”⁹⁶

Similarly, the Sixth Circuit equates business ownership with socioeconomic status, thereby triggering the “never-consider” rule. In *United States v. Rutana*,⁹⁷ in sentencing the defendant to five years probation, 1000 hours of community service, and a \$90,000 fine, the district court noted that the defendant employed twenty-six people and expressed concern about “‘put[ting] them out of work.’”⁹⁸ On appeal, the Sixth Circuit found that the departure decision “relied upon Rutana’s ownership of another business which . . . might fail if Rutana were to be incarcerated.”⁹⁹ After stating that socioeconomic status is never relevant, and concluding without explanation that third party job loss necessarily triggers the socioeconomic bar, the Sixth Circuit vacated the lower court’s departure and remanded for resentencing.¹⁰⁰

b. Vocational Skills Are Not Ordinarily Relevant. Unlike the Sixth and Eleventh Circuits, the Third Circuit does not bar departures based on third party job loss by equating business ownership with socioeconomic status. Instead, the Third Circuit voids such departures under policy statement 5H1.2, which states that a defendant’s “vocational skills” are not ordinarily relevant in sentencing decisions. For example, in *United States v. Sharapan*,¹⁰¹ the district court used a downward departure to sentence the defendant to house arrest rather

⁹² 956 F.2d 1555 (11th Cir. 1992).

⁹³ *Id.* at 1557 (quoting district court sentencing hearing) (citing one of three grounds identified by district court as justifying downward departure).

⁹⁴ *See id.*

⁹⁵ *See id.* at 1564.

⁹⁶ *Id.*

⁹⁷ 932 F.2d 1155 (6th Cir. 1991).

⁹⁸ *See id.* at 1158 (quoting district court sentencing hearing).

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 1158, 1160.

¹⁰¹ 13 F.3d 781 (3d Cir. 1994).

than prison.¹⁰² Expressing concern about “putting Ralph’s 30 employees out of work and about the broader effects on the community,” the judge explained that “he thought it made ‘more sense’ to require the appellee ‘to work in his business’ and pay restitution to his victims.”¹⁰³

Overturing the lower court’s departure, the Third Circuit classified the defendant’s ability to keep the business running as a type of “vocational skill,” and therefore generally irrelevant. The court further argued that no extraordinary circumstances existed to warrant a departure because the consequences of imprisoning the defendant lacked “sufficient economic importance to society.”¹⁰⁴

c. Job Loss Is Never Extraordinary. All three circuits rely on an additional argument—that third party job loss is never an extraordinary circumstance.¹⁰⁵ In *Rutana*, for example, the Sixth Circuit stated that there was “nothing special” about sentences that “may potentially impose hardship upon [defendants’] employees and families.”¹⁰⁶

The Third Circuit agrees. Vacating a district court’s decision to depart because the defendant’s incarceration would have caused his business to fail, the Third Circuit in *United States v. Reilly*¹⁰⁷ held that

there was nothing extraordinary in the fact that the incarceration of a company’s principal might “cause harm to the business and its employees,” and . . . even assuming that the business would fail as a result of the defendant’s incarceration, there was “no basis for concluding that this failure would cause any extraordinary harm to society as a whole.”¹⁰⁸

Together, these three circuits’ cases stand for the proposition that business failure and third party job loss, regardless of the magnitude or severity of the consequences, can never serve as bases for a departure.

¹⁰² See *id.* at 783.

¹⁰³ *Id.* (quoting district court sentencing hearing).

¹⁰⁴ *Id.* at 785.

¹⁰⁵ See *United States v. Mogel*, 956 F.2d 1555, 1564 (11th Cir. 1992) (failing to find defendant’s employment record sufficient for departure); *United States v. Rutana*, 932 F.2d 1155, 1158 (stating that potential hardship on employees was not legally sufficient basis for departure).

¹⁰⁶ *Rutana*, 932 F.2d at 1158.

¹⁰⁷ 33 F.3d 1396 (3d. Cir. 1994).

¹⁰⁸ *Id.* at 1424 (quoting *Sharapan*, 13 F.3d at 785).

III DEPARTURES BASED ON EXTRAORDINARY THIRD PARTY EFFECTS: THE GUIDELINES

Part II examined the disparate treatment by the circuits of departures based on extraordinary family effects and extraordinary business effects. This Part argues that such a distinction is not justifiable. Part III.A. argues that the Guidelines affirmatively permit courts to depart in both situations and that the Third, Sixth, and Eleventh Circuits wrongly bar departures based on extraordinary business effects. Part III.B. explores the implications of permitting departures in extraordinary business effects cases.

A. *The Guidelines Permit Such Departures*

As discussed above, the Guidelines explicitly permit departures due to extraordinary factors.¹⁰⁹ Unless a factor is one of the few prohibited, any factor may warrant a departure in extraordinary cases.¹¹⁰ Expanding upon the latter point, Justice Kennedy in *Koon* held that judges can base departures on nonproscribed factors whenever “the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.”¹¹¹ According to the framework set out by then-Chief Judge Breyer and unanimously embraced by the Court in *Koon*, the threshold textual question is whether departures based on extraordinary family and business effects cases are explicitly forbidden. If such departures are not forbidden, but merely discouraged, encouraged, or never mentioned by the Guidelines, then the Guidelines permit such departures in extraordinary cases.

Consider the family effects departure. Section 5H1.6 of the Guidelines asserts that departures based on family effects are discouraged but not forbidden. Accordingly, while ordinary family effects do not permit departures, extraordinary effects do.¹¹² Only the Seventh Circuit does not follow this reading of the Guidelines.¹¹³

¹⁰⁹ See *supra* Part I.A.

¹¹⁰ See *supra* text accompanying notes 41-54.

¹¹¹ *Koon v. United States*, 116 S. Ct. 2035, 2045 (1996).

¹¹² See *id.*

¹¹³ See *supra* note 79 and accompanying text. Interestingly, the Seventh Circuit does not follow its narrow reading consistently. In departures involving family responsibilities, the Seventh Circuit has “taken the extreme position that, for the most part, the guidelines leave the district courts no room [to depart].” *MacCarthy & Murnighan, supra* note 38, at 66. The court has reached this conclusion “by reading the Commission’s policy statements regarding offender characteristics more narrowly than perhaps any other court in the country.” *Id.* However, in certain cases involving upward departures, the Seventh Circuit em-

Like the family effects departures, the Guidelines do not forbid departures based on effects on employees. Unlike the family effects departures, however, the Guidelines simply do not mention departures based on business effects. The omission alone proves nothing, as the Guidelines are silent regarding many possible grounds for departure.¹¹⁴ Moreover, the Guidelines' silence does not mean that judges are without guidance. *Koon* instructs judges to handle factors not expressly dealt with by the Commission by determining "whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline."¹¹⁵

It is clear, therefore, that the Guidelines forbid neither type of departure. Rather, the Guidelines permit departures based on extraordinary family and business effects simply because they sanction departures in extraordinary cases when the factor is not forbidden.¹¹⁶ While the Third, Sixth, and Eleventh Circuits uphold departures based on extraordinary family effects, these circuits fail to see that the Guidelines require that they treat business effects cases in the same manner. By banning departures based on third party job loss, these circuits ignore the Guidelines and usurp the role given to the Commission to decide which factors are forbidden. As *Koon* states, courts generally should not reject a factor categorically as a basis for departure from a Guidelines sentence because such rigid interpretations "would nullify the Commission's treatment of particular departure factors and its determination that, with few exceptions, departure factors should not be ruled out on a categorical basis."¹¹⁷

The Sixth and Eleventh Circuits also argue that departures based on extraordinary business effects trigger the Guidelines' bar on consideration of socioeconomic factors.¹¹⁸ This reasoning is flawed because it glosses over a subtle but vital interpretative point: the bar

braces a "singularly expansive reading to the policy statement." *Id.* "The result is a disturbingly uneven application of departures in this circuit." *Id.*

¹¹⁴ See *Koon*, 116 S. Ct. at 2050 (stating that Guidelines essentially place "no limit" on number of factors that may warrant departure).

¹¹⁵ *Id.* at 2051. Specifically, *Koon* instructs judges to handle factors not expressly dealt with by the Commission as follows:

[A] federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no . . . the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.

Id.

¹¹⁶ This holds true except for the few factors forbidden by the Guidelines.

¹¹⁷ *Koon*, 116 S. Ct. at 2051.

¹¹⁸ See *supra* Part II.B.2.a.

applies to the defendant's socioeconomic status but the departure occurs because of the effects on *third parties*. What is at stake in extraordinary business and family effects cases, therefore, and what these circuits fail to address adequately or consistently, is the relevance of harm to third parties—employees and family members, respectively—in the departure decision. Defendants' business ownership is only introduced to signal the magnitude of potential third party effects.

Even assuming, however, that at the time of their rulings these circuits were correct to vacate departures based on extraordinary business effects, on the ground that they ran afoul of the bar on socioeconomic factors, the Supreme Court now has likely rejected such an approach. In *Koon*, the Court held that the relationship between a defendant's career and his or her socioeconomic status "is not so close as to justify categorical exclusion of the effect of conviction on a career."¹¹⁹ That is, a judge can depart in extraordinary cases to save the job of a guilty defendant, even though a defendant's job may relate, at least indirectly, to the defendant's socioeconomic status. It follows that departures based on job loss of innocent third parties as a result of the imprisonment of a defendant cannot be categorically excluded from consideration either. In fact, it should be easier to justify departures that help innocent employees than it is to justify departures that help guilty defendants.

B. Implications

Permitting departures based on extraordinary business effects raises a number of important issues. The first is who benefits. Requiring extraordinary circumstances to permit a departure severely narrows the universe of defendants who can credibly seek downward departures based on the ship-goes-down-without-me defense. Not even all business owners will be eligible, as owners of large companies will be hard pressed to argue that their absence will bankrupt their firms.

One drawback of permitting any such departures, however, is the obvious disparity that this rule creates between defendant owners and all other defendants. Defendants who are not business owners, but who are convicted of the same offense as defendant business owners, will likely be unable to claim that their imprisonment will lead to third party job loss.¹²⁰ As a result, such defendants will not merit a depart-

¹¹⁹ *Koon*, 116 S. Ct. at 2052.

¹²⁰ Although it may be possible for a key employee's imprisonment to lead to third party job loss, the more likely scenario involves a business owner.

ture based on extraordinary business effects. It seems viscerally unfair to allow a business owner to avoid a sentence facing a lesser-ranking employee who is guilty of the same offense, simply because of their relative job status. Indeed, one of the goals of the Guidelines was to limit the disparities pervasive in the pre-Guidelines era.

It is equally true, however, that the Commission avoided adopting an absolute no-departure rule. Rather, the Commission chose to balance the competing goals of narrowing disparities and preserving discretion by allowing departures in extraordinary cases. In this regard, allowing occasional departures based on extraordinary effects on third parties fits squarely within the Guidelines' structure.

Moreover, the disparity in sentences for the same crime committed by defendant business owners and nonowners will often (though not always) be slight. This is because defendant owners facing prison time often commit white-collar crimes for which short sentences are common.¹²¹ The departures, therefore, can be circumscribed and remain effective. Indeed, courts that have granted departures to prevent adverse effects on employees have limited the departures to as little as one level.¹²²

In contrast, much larger disparities are tolerated in extraordinary family effects cases. Defendants with extraordinary family responsibilities have received up to thirteen level departures from sentences facing defendants without such responsibilities.¹²³ Take the following real life example: two single women, one with four children, the other childless, were convicted of the same crime.¹²⁴ The judge departed from the Guidelines and gave the mother five years probation because of the extraordinary harm incarceration would cause to the children. The woman with no children received a five-year jail sentence. Given that such wide disparities are accepted in extraordinary family effects cases, the more modest disparities in extraordinary business effects cases seem equally, if not more, appropriate.

¹²¹ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 414 (1989) (Scalia, J., dissenting) (noting that Guidelines prescribe base sentences for antitrust violations of as little as two to eight months); *United States v. Brewer*, 899 F.2d 503, 507-08 (6th Cir. 1990) (same). Critics may contend that penalties against white-collar defendants are still too light, but that issue is outside the scope of this Note.

¹²² See, e.g., *United States v. Milikowsky*, 65 F.3d 4 (2d Cir. 1995) (affirming one level departure based on extraordinary business effects of sentence). But see *United States v. Rutana*, 932 F.2d 1155 (6th Cir. 1991) (overturning twelve level departure originally granted because of extraordinary business effects of sentence).

¹²³ See, e.g., *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992) (upholding thirteen level departure based on defendant's extraordinary family responsibilities).

¹²⁴ See Bornstein, *supra* note 15, at 135 (describing *United States v. Johnson*, 762 F. Supp. 535 (S.D.N.Y. 1991), *aff'd*, 964 F.2d 124 (2d Cir. 1992)).

Allowing departures based on extraordinary business effects also raises concern about general laxity in white-collar crime sentencing. This issue is particularly significant because the Guidelines were designed, in part, to remedy the lenience traditionally reserved for defendants who commit white-collar crimes.¹²⁵ As one of the authors of the Guidelines and a member of the Commission, then-Chief Judge Breyer, explained:

The Commission found in its data significant discrepancies between pre-Guideline punishment of certain white-collar crimes, such as fraud, and other similar common law crimes, such as theft. The Commission's statistics indicated that where white-collar fraud was involved, courts granted probation to offenders more frequently than in situations involving analogous common law crimes; furthermore, prison terms were less severe for white-collar criminals who did not receive probation.¹²⁶

The Commission believed that the best way to mitigate the inequities of these discrepancies and deter future criminal activity would be to require confinement for most white-collar crimes.¹²⁷ Introducing a way for white-collar criminals to reduce their already short sentences, therefore, seems to run counter to the Guidelines' get-tough approach.

However, the Guidelines do not require a court to impose a sentence including actual prison time in *every* white-collar crime case. Nothing in the Guidelines suggests that in an extraordinary case, where the facts militate against imprisonment, a sentencing judge is forbidden from considering alternatives such as home or community confinement or weekend prison or probation. Had the Commission intended to mandate prison sentences in every white-collar case, it likely would have stated outright that a judge has no authority to depart, even in atypical cases.¹²⁸ To the contrary, the Commission seemed to recognize that not every defendant guilty of a white-collar crime would be confined, much less imprisoned. The district court in *Milikowsky*, for example, explicitly dealt with this issue when crafting its sentence:

¹²⁵ See *Brewer*, 899 F.2d at 507-08.

¹²⁶ Breyer, *supra* note 7, at 20 (footnotes omitted).

¹²⁷ See *Brewer*, 899 F.2d at 508 (describing Commission's intent regarding sentencing of defendants who committed white-collar crimes). "The Commission's view is that the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm." *Id.* at 507.

¹²⁸ The Commission knew how to and did draw bright lines when it wanted to. See *supra* note 41 and accompanying text (listing factors that Guidelines expressly prohibit judges from considering).

"I don't want anyone to believe, however, that the Court in this sentence believes that a conviction for an antitrust violation is a minimal situation. Certainly, the Congress has determined that antitrust violations are serious. They have a serious impact on the business life of this country, and the guidelines also suggest that the Court should look very carefully at persons convicted of these offenses. I am, however, convinced that . . . the sentence the Court is imposing today is an appropriate one."¹²⁹

Noting that Milikowsky's circumstances differed from those of other high-level business people it had sentenced, the district court stated that "this is a situation where I am convinced that the loss of his daily guidance would extraordinarily impact on persons who are employed by him."¹³⁰

Additionally, there is a concern that permitting downward departures will significantly reduce business owners' disincentives to commit crime (in the belief that, even if caught, they will receive no prison time because of a downward departure based on extraordinary business effects). This outcome is unlikely for at least two reasons. First, downward departures in general are rare, occurring in only about six percent of sentences.¹³¹ It is unlikely, therefore, that enough departures will occur for business owners to change their behavior in response. Moreover, there is always the possibility that the defendant's situation will merit an extraordinary business effect departure but that the defendant will be sentenced by a judge who decides not to depart. As well, and equally important, the chance always exists that a defendant will receive an upward departure based on extraordinary business effects.¹³²

Another issue is whether extraordinary business effects departures only apply to defendants who commit white-collar crimes. The answer is no: the Guidelines generally apply no matter what kind of crime a defendant commits. Burglars or tax evaders who happen to run small businesses may be eligible for downward departures based on extraordinary business effects. Likewise, small business owners who assault and paralyze single parents may be eligible for upward departures based on extraordinary family effects.

¹²⁹ Appellant's Reply Brief at 22, *United States v. Milikowsky*, 65 F.3d 4 (2d Cir. 1995) (No. 94-1450) (quoting joint appendix at 1796).

¹³⁰ *Milikowsky*, 65 F.3d at 6 (quoting district court sentencing hearing).

¹³¹ See *supra* note 15.

¹³² The prospect of an upward departure may or may not provide a disincentive to commit a crime. That depends upon whether the defendant is able to tailor the crime to minimize its likely third party effects. However, any decrease in third party effects because of tailoring would be beneficial.

* * *

Whether defendants merit departures in the above situations, however, is a matter that the departure jurisprudence does not yet address adequately. As discussed in Part IV, the Guidelines clearly advise courts when they are or are not *permitted* to depart. However, the Guidelines generally leave courts to themselves to decide the next and final step in a sentencing decision: whether they *should* depart.

IV

EVEN IF COURTS CAN DEPART, WHEN SHOULD THEY?: USING COLLATERAL CONSEQUENCES TO JUSTIFY DEPARTURES

Parts I through III established that the Guidelines permit departures based on extraordinary family and business effects. This Part probes when courts should depart in such cases. Part IV.A. reveals the lack of guidance the courts now receive when trying to assess whether a departure is justified by extraordinary third party effects. Part IV.B. proposes a departure framework—which this Note calls collateral consequences—to help courts decide when they should depart. Part IV.C. applies the framework to cases involving extraordinary family and business effects. Part IV.D. examines the implications of using such a framework.

A. *The Guidelines and the Departure Jurisprudence Gap: The Need for a Framework*

In 1990, Chief Judge Merritt of the Sixth Circuit noted the lack of a unified principle that would help courts decide when to depart:

For the past 200 years in the United States, there has been no appellate review of the length of sentences imposed by district judges so long as the sentence imposed fell within the statutorily authorized range. For this reason, appellate courts have not developed a coherent set of sentencing principles or policies on which to rely in reviewing sentences. Neither Congress, in the new sentencing legislation, the Sentencing Commission, nor the scholarly community has supplied any such set of principles to aid appellate courts. So far as I can determine, no such principles exist. We are flying blind in this area with no instruments for navigation.¹³³

More recently, in *Koon*, Justice Souter, joined by Justice Ginsburg, echoed Chief Judge Merritt's view that the federal courts

¹³³ *United States v. Brewer*, 899 F.2d 503, 513 (6th Cir. 1990) (Merritt, C.J., dissenting).

have little concrete guidance for making departures decisions.¹³⁴ Specifically, Justice Souter suggested that extraordinary facts, by themselves, are not enough to justify a departure: “Congress and the Commission envisioned that departures would require some unusual factual circumstance, but would be justified only if the factual difference ‘should’ result in a different sentence.”¹³⁵

Thus, according to Justice Souter, the second step of the sentencing decision requires that the judge determine when extraordinary facts justify a departure. Currently, when the Guidelines permit departures, judges are required only to *consider*, rather than adhere to, the Guidelines’ goals when deciding whether to depart.¹³⁶ Therefore, no framework exists—judges are “flying blind” in Chief Judge Merritt’s words—and the lack of a framework has led to a lack of uniformity in the departure jurisprudence. Without a broad framework, sentencing judges have offered a variety of justifications for granting departures, raising the possibility that they are reintroducing, via the backdoor, the very arbitrariness that the Guidelines were designed to curb.

Accepting Justice Souter’s diagnosis—that a justification is needed to guide departure decisions—leads to the question: what is his prescription? This is less clear. He writes in *Koon*, “Departures . . . must be consistent with rational normative order.”¹³⁷ Later in the opinion, he speaks of a “requisite moral calculus.”¹³⁸ In the end, his opinion appears to flag the issue but stops short of setting out a framework with which courts can approach departure decisions.

Addressing the issue raised by Justice Souter, this Part offers a framework that courts can use to guide their departure decisions in extraordinary family and business effects cases. The framework, called collateral consequences, applies a broad perspective to current legal trends and highlights the justifications implicit in many recent family and business effects. The collateral consequences framework allows judges to take notice of and weigh the third party effects of both the crime and the punishment.

Such a framework aligns with the broader trend of giving a voice to those previously ignored by the legal process. In corporate law, for example, more than twenty-five states have recently passed so-called

¹³⁴ See *Koon v. United States*, 116 S. Ct. 2035, 2054-56 (1996) (Souter, J., concurring in part and dissenting in part).

¹³⁵ *Id.* at 2054 (Souter, J., concurring in part and dissenting in part).

¹³⁶ See *id.* at 2051.

¹³⁷ *Id.* at 2054 (Souter, J., concurring in part and dissenting in part).

¹³⁸ *Id.* at 2055 (Souter, J., concurring in part and dissenting in part).

constituency statutes.¹³⁹ These statutes allow corporate boards to base decisions on the best interests not only of shareholders but also of creditors, employees, local communities, and other groups who will be affected by corporate decisions. The ramifications of such a rule can be enormous. In the recent battle for Conrail, for example, the Third Circuit allowed a corporate board to favor a tender offer valued at \$1 billion less than a competing offer on the ground that the lower-priced offer better served third parties, including employees.¹⁴⁰ To similar effect, the so-called Victims' Rights Amendment, a proposal permitting victims to testify at sentencing,¹⁴¹ is another indicator that courts might increasingly take judicial notice of the third party effects of defendants' crimes and punishments.¹⁴²

The collateral consequences framework takes the interests of third parties directly into account. Moreover, as the examples below illustrate, a collateral consequences framework is neither inherently tough nor inherently soft on crime. It allows for both upward and downward departures, punishment or compassion, depending on the circumstances.

The framework, like the Guidelines,¹⁴³ does not attempt to reconcile the competing theories of punishment.¹⁴⁴ Instead, and also like

¹³⁹ Some such statutes give board members sweeping powers to discharge their duties in "the best interests of the corporation," which include the interests of third parties. See, e.g., Va. Code Ann. § 13.1-690 (Michie 1993). Other statutes are more limited and are modeled after the American Law Institute Corporate Governance Project's formulation of a board of directors' fiduciary duties when responding to an unsolicited tender offer: "[t]he board may . . . have regard for interests or groups (other than shareholders) with respect to which the corporation has a legitimate concern if to do so would not significantly disfavor the long-term interests of shareholders." American Law Institute, *Principles of Corporate Governance: Analysis and Recommendation* § 6.02(b)(2) (1994).

¹⁴⁰ See Anna Wilde Mathews & Stephen Lipin, *CSX Wins Another Ruling in Fight for Conrail*, Wall St. J., Nov. 21, 1996, at A3.

¹⁴¹ See President William Clinton's Message to Congress on the State of the Union, in N.Y. Times, Feb. 5, 1997, at A20.

¹⁴² State judges have taken similar actions. In New York, for example, a judge pressured a company to reopen its factory to preserve jobs. See Steven Greenhouse, *Judge's Efforts Gain a Reprieve for Farberware Factory in the Bronx*, N.Y. Times, Sept. 14, 1996, at 21.

¹⁴³ See U.S. Sentencing Guidelines Manual § 1A (1995) (stating that "a philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment.")

¹⁴⁴ For further discussion of the difficulty in reconciling the competing theories of punishment, see H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, reprinted in H.L.A. Hart, *Punishment and Responsibility* 1, 3 (Oxford Univ. Press 1968) (arguing that no single theory can adequately provide a justification of punishment); John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3, 5-6 (1955) (suggesting that utilitarian arguments are appropriate for answering questions about general practice, while retributive arguments explain application of particular rules to specific cases). For a more recent attempt at synthesis, see generally John M. Darley & Paul H. Robinson, *The Utility of Desert*, 91 *Nw. U.*

the Guidelines,¹⁴⁵ the framework seeks to promote uniformity, proportionality, and honesty: uniformity, by encouraging judges to give similar sentences in cases that present similar circumstances; proportionality, by encouraging judges to depart, if at all, only in extraordinary situations; and honesty, by encouraging judges to compare openly the third party effects of the defendant's actions with the third party effects of the proposed sentence.

In this regard, the framework may not satisfy strict adherents of one penal theory or the other. But the framework will appeal to those who seek to further the Guidelines' evolutionary march toward providing judges with a more effective and disciplined way of deciding whether they should or should not depart.

B. Collateral Consequences Framework

The following section sets out the collateral consequences framework. As a threshold matter, courts must decide whether the Guidelines permit departure in a given situation. If so permitted, the courts should then ask the following questions:

- (1) What are the effects of the defendant's actions?
- (2) What are the effects of the prescribed sentence?
- (3) How do these effects compare?¹⁴⁶

Courts should consider departing upward when the effects of the defendant's actions are extraordinary and the effects of the defendant's sentence are ordinary. Similarly, courts should consider departing downward when the effects of the defendant's actions are ordinary and the effects of the defendant's sentence are extraordinary.

L. Rev. 453, 457 (1997) (proposing that both major theories of punishment, just desert/retribution and utilitarian/deterrence, can be merged successfully to explain the justifications of punishment in our criminal system).

¹⁴⁵ See U.S. Sentencing Guidelines Manual § 1A (1995) (describing Guidelines' goals of uniformity, proportionality, and honesty).

¹⁴⁶ The rationale for the framework is its ability to promote a uniform, proportional, and honest departure sentencing scheme. It relies in part upon a prospective analysis to achieve this objective. But a prospective analysis would err if it failed to capture significant and relevant (albeit sunk) third party effects—effects that the Guidelines explicitly use to ground departures. For example, the Guidelines permit departures when the defendant's actions lead to certain third party effects such as death, extraordinary property damage or extreme physical or psychological injury. See U.S. Sentencing Guidelines Manual § 5K2 (1995). Accounting for such third party effects, even when sunk, is consistent with, if not vital to, an effective liability scheme, according to Professors A. Mitchell Polinsky and Steven Shavell, who state that liability regimes should be based on the level of third party harm. See generally A. Mitchell Polinsky & Steven Shavell, *Should Liability be Based on the Harm to the Victim or the Gain to the Injurer?*, 10 J. L. Econ. & Org. 427 (1994) (arguing that unless liability regime accounts for third party harm, individuals who contemplate engaging in criminal acts will not take such harms into consideration).

In contrast, if the effects of both the defendant's action and sentence are extraordinary, then courts generally should not depart. This seems appropriate. If the third party effects of the defendant's action are extraordinary (i.e., the defendant killed two people, one of whom was a single parent raising three children), the defendant should not receive a downward departure, even if the third party effects of his sentence are extraordinary (i.e., because the defendant himself is a single parent raising three children).¹⁴⁷ Finally, departures are never warranted when the effects of both the defendant's actions and sentence are ordinary.

The exact level of third party effects that would justify a departure likely would vary, especially initially, as judges begin using the framework. A rule of thumb might be that the greater the cost spread between the effects of the defendant's actions and sentence, the greater the chance of a departure. Over time, however, judges likely would find a rough range that would or would not justify departures. To be sure, whatever range is settled upon ultimately would be arbitrary to some extent. But, overall, weighed against the manner in which departures can be granted today, the collateral consequences framework for departures in extraordinary family and business effects cases would constitute a step forward.

C. Applying the Framework to Extraordinary Family and Business Effects Cases

Using the above framework, this section contains hypothetical and actual cases designed to illustrate when courts should depart in family and business effects cases.

1. Downward Departures Based on Collateral Consequences

Consider, for example, a hypothetical case in which the defendant is a single mother who supports three children, one with multiple sclerosis, and a homebound elderly parent. The defendant is also a first-time offender who pleads guilty to conspiracy. Suppose, also, that the Guidelines call for a sentence of eighteen months in prison.

Applying the collateral consequence framework to this hypothetical, a district court likely would find that the third party effects of the defendant's actions are ordinary, but the third party effects of the sentence are not, because the sentence would punish three children and one elderly parent to a much greater extent than is warranted. Since the Guidelines' recommended sentence would leave the children and

¹⁴⁷ In this scenario, a court might prefer to depart both upward and downward—an approach that effectively could lead to no departure.

elderly parent without a provider and caretaker, a judge might normatively argue that sentencing the defendant to prison is not more important than preventing the extreme harm that will come to the children and elderly parent from the loss of the defendant's emotional, physical, and economic support.

Alternatively, a judge could balance the literal costs of the defendant's crime against the costs to the state of caring for her family while she serves a prison sentence. In this case, suppose that it cost the state \$100,000 to care for the family in the defendant's absence. A judge might conclude that it is in society's best interest not to expend its resources in such a manner when alternative forms of punishment could allow the defendant to care for her dependents while paying for her crime.¹⁴⁸

In fact, preventing harm to third parties and reducing costs to society already seem to be the driving forces behind departures in actual extraordinary family effects cases. When children rely solely on the defendant parent for their welfare, courts state that the potential harm to the family justifies a departure.¹⁴⁹ Similarly, courts explicitly have justified departing downward where a defendant or a defendant's dependent was elderly or infirm.¹⁵⁰ Indeed, in some sections, the Guidelines specifically authorize departures when they are "efficient . . . and less costly."¹⁵¹

The collateral consequences framework also applies to downward departures based on extraordinary business effects. Suppose a defendant is, like Mr. Olbres, the sole owner of a twelve-person firm who is convicted of tax fraud. Suppose, also, that the facts establish that the defendant's crime cost society an "ordinary" amount in tax fraud cases. In contrast, suppose the court finds that the eighteen-month sentence called for by the Guidelines will have extraordinary third party effects, because the defendant would default on personal loan guarantees and the business would fail, leaving twelve people without work. Normatively, the judge might argue that preventing harm to the employees outweighs the need to sentence the defendant to prison. Alternatively, the judge could accept evidence as to the total present value of the third party effects of imprisoning the defendant

¹⁴⁸ To be sure, fixing the third party costs of the defendant's crime and punishment with absolute certainty will prove difficult. But even approximations can help judges measure how extraordinary the third party effects likely are.

¹⁴⁹ See *supra* Part II.A.

¹⁵⁰ See, e.g., Federal Judge Ends Helmsley Probation, N.Y. L.J., July 16, 1996, at 6 (reporting nine-month reduction of prison sentence so that defendant could care for ill husband).

¹⁵¹ See U.S. Sentencing Guidelines Manual §§ 5H1.1, 5H1.4 (1995).

which, in this case, suppose, would be \$200,000. Using the collateral consequences framework, the court might then decide that a downward departure is proper and sentence the defendant to weekend prison or home confinement, as well as restitution, community service, and/or probation. Such a modification would allow the court to punish the defendant without punishing his employees.

More complex scenarios are foreseeable, however. What if the defendant was convicted of price fixing and the employees benefited, via higher wages, from the defendant's crime? Taking into account the benefits previously and unjustly bestowed upon the employees, the collateral consequences balance would tip away from needing to protect the employees.

Furthermore, it is possible that a judge might find that letting the defendant's business fail would make room for another business, perhaps one run by one of the employees, or perhaps by a would-be competitor previously barred from the market via the price fixing. If this new business will lead to new jobs (regardless of whether they are held by the defendant's former employees or others), then perhaps the effects of imprisoning the defendant are less than extraordinary. Other possibilities exist as well. Perhaps no new business will be created, but instead consumers will stop buying what was sold by the defendant's business and start purchasing more of a different product, leading to more jobs elsewhere. In any of these described scenarios, absent a strong showing that the third party effects of the defendant's crime were ordinary and the likely third party effects of his sentence extraordinary, a downward departure would not be justified.

2. *Upward Departures Based on Collateral Consequences*

Although courts and commentators tend to focus on downward departures, upward departures are both permissible and, at times, warranted. Indeed, one of the key themes of the Guidelines is that district courts possess the discretion both to decrease and to *increase* a sentence in extraordinary cases. The collateral consequences framework therefore also must apply to upward departures based on extraordinary family and business effects cases. However, whereas downward departures turn on the extraordinary third party effects of the sentence, upward departures result from the extraordinary third party effects of the defendant's crime.

Consider the hypothetical where a defendant is convicted of drunk driving, reckless endangerment, and assault for running a red light and crashing into another car. The accident paralyzed the other driver, a single mother who supports three children, one of whom suffers from multiple sclerosis, as well as an elderly parent.

Suppose that under the Guidelines, the defendant would receive a five-year sentence because he is a first-time offender. Assuming that the court interprets the Guidelines to permit upward departures based on extraordinary family effects, the court then must utilize the collateral consequences framework to help decide whether to depart. Again, the judge could point to the unusually detrimental effects on third parties that resulted from the defendant's crime. And assuming that the evidence at sentencing established that the children, parent, and grandparent would need significant governmental support, about \$100,000 per year, the judge could argue that the third party effects are extraordinary. In contrast, the effects of the defendant's prescribed sentence on third parties would be ordinary—he would leave his children with only one caregiver and a significantly reduced income—no more and no less than the average third party effects imposed by a five-year sentence. Applying the collateral consequences framework, the effects of the defendant's actions appear to be extraordinary; thus, a judge well might conclude that the facts justify an upward departure.

Consider another hypothetical involving extraordinary business effects. The defendant is a junk bond dealer who persuaded a bank to buy worthless corporate debt, causing the bank to close and to throw hundreds of people out of work. Suppose, also, that the Guidelines call for a five-year sentence.

Applying the collateral consequences framework, a judge might find that the third party effects of this defendant's actions are extraordinary—most frauds do not lead to this much collateral damage—and that the third party effects of the sentence are ordinary—the defendant is single and is a mid-level employee in a one thousand person firm. The collateral consequences framework may therefore justify an upward departure.

Some courts already have used, implicitly, this idea of collateral consequences to justify upward departures. In *United States v. Merritt*,¹⁵² the defendant had a contract with the United States Agency for International Development to ship food to Sudan during a severe food shortage.¹⁵³ Instead of shipping that food, the defendant shipped a cheap milk replacement, which was supposed to be used as animal feed and was unfit for human consumption.¹⁵⁴ Furthermore, the defendant forged documents to the court that stated, falsely, that of the \$936,000 he had received as payment, all but \$7500 had been

¹⁵² 988 F.2d 1298 (2d Cir. 1993). For further discussion, see Walker, *supra* note 10, at 559-61.

¹⁵³ See *Merritt*, 988 F.2d at 1300.

¹⁵⁴ See *id.* (recounting defendant's fraud).

disbursed to other persons.¹⁵⁵ The Second Circuit noted that Merritt's crime was "so heinous and [went] so far beyond the 'heartland' of fraud"¹⁵⁶ that the sentencing judge would have been justified to depart upward even further than he did. Similarly, in *United States v. Bryser*,¹⁵⁷ the Second Circuit held that an upward departure was warranted because the defendant had refused to return \$3.7 million that he had stolen from an armored truck.¹⁵⁸

The sentencing of the junk-bond king, Michael Milken, offers a more high profile example. There, the court held that it could take into account the "legitimate public concern"¹⁵⁹ that the financial markets, in which so many people invest their savings, be free of secret manipulation:

When a man of your power in the financial world at the head of the most important department of one of the most important investment banking houses in this country repeatedly conspires to violate and violates securities and tax laws in order to achieve more power and wealth for himself and his wealthy clients and commits financial crimes that are particularly hard to detect, a significant prison term is required¹⁶⁰

D. Implications

To the extent that the collateral consequences framework helps guide courts' decisions to depart based on extraordinary third party effects, its implications for the law are substantial. First, if every district court sentences openly with reference to the same framework, appellate courts, the Sentencing Commission, and commentators will then be better able to assess the appropriateness of certain types of departures. Second, a more explicit use of any framework likely will increase the uniformity and proportionality of intercircuit and intracircuit sentences, thus increasing the chances that defendants in similar circumstances will receive similar sentences—one of the primary goals of the Guidelines. Third, in deciding whether a departure is warranted, the collateral consequences framework encourages judges to make a needed comparison between the third party effects of the defendant's crime and the third party effects of the defendant's punishment.

¹⁵⁵ See *id.* at 1303.

¹⁵⁶ *Id.* at 1312 n.11.

¹⁵⁷ 954 F.2d 79 (2d Cir. 1992).

¹⁵⁸ See *id.* at 89-90.

¹⁵⁹ *United States v. Milken*, No. (S)89Cr.41(KMW), 1990 WL 264699, at *4 (S.D.N.Y. Nov. 21, 1990).

¹⁶⁰ *Id.* at *5.

The implications for the law may not be limited to these departures either. This Note confines discussion of the benefits of the collateral consequences framework to departures involving extraordinary family and business effects. But one goal in focusing on a small segment of departures is to demonstrate the potential usefulness of this framework for weighing elements of other types of departures. Although the breadth of the collateral consequences framework remains untested, the framework might apply equally well to other areas of departure jurisprudence and merits further attention.

The collateral consequences framework presents certain potential dangers as well. First, there is the question of exactly how courts will determine whether the third party effects are extraordinary or ordinary. This task, however, is not as daunting as it first appears. The Guidelines already explicitly require judges to decide whether the factors of a given case are extraordinary. Moreover, judges make difficult cost-benefit analyses in other contexts (tort and antitrust, for example), and courts can, and routinely do, hear expert testimony regarding environmental, economic, and other forms of collateral consequences. There is no reason to think judges are less competent to take judicial notice of, and assess testimony regarding, the relevant third party effects in departure situations.

A second ramification is that most defendants likely will seek to present evidence of the collateral effects of their sentences, and most prosecutors will seek to present evidence of the collateral effects of the defendants' crimes. While this process may be time consuming, the increased awareness is useful. If more defense and government counsel present such evidence, there is greater likelihood that courts will, over time, develop a better understanding of when third party effects are or are not extraordinary and, as a result, impose similar sentences for similar situations.

CONCLUSION

The Sentencing Guidelines seek to promote a delicate balance. One goal of the Guidelines is to reduce unjustified sentencing disparities. The other aim is to preserve some discretion for sentencing courts.

The exact scope of that discretion is not yet clear. Accordingly, this Note explored two questions—ignored by commentators but of growing concern to judges—about the limits of discretion. The first is whether the Guidelines permit sentencing courts to depart based on extraordinary third party effects. A circuit split exists, and this Note

concludes that the Guidelines permit both upward and downward departures based on extraordinary third party effects.

The second question this Note addressed involves an unresolved issue in departure jurisprudence identified in *Koon v. United States*. Assuming courts can depart, when should they? At present, no explicit framework exists to help courts resolve this dilemma. As a result, courts are "flying blind," justifying departures on a case-by-case basis and potentially reintroducing the very arbitrariness that the Guidelines were designed to counter.

Responding to this issue, this Note put forth a "collateral consequences" framework to guide courts' departure decisions in cases involving extraordinary third party effects. The framework will assist courts seeking to promote the Guidelines' evolutionary march toward a more effective, uniform, proportional, and honest sentencing scheme. By applying the framework to departures based on extraordinary family and business effects, this Note concludes that departures may be justified in rare cases. Further, this Note suggests that the collateral consequences framework might apply with equal force to departure decisions based on other factors.