ELDERLY STATUS, EXTRAORDINARY PHYSICAL IMPAIRMENTS AND INTERCIRCUIT VARIATION UNDER THE FEDERAL SENTENCING GUIDELINES†

John D. Burrow, Ph.D., J.D.

Barbara A. Koons-Witt, Ph.D.

The population of incarcerated elderly in this country is on the rise. This increase coincides with the greater emphasis on uniform sentencing provided in the Federal

---

John D. Burrow is an Assistant Professor in the Department of Criminology and Criminal Justice at the University of South Carolina. He received his Ph.D. from the School of Criminal Justice at Michigan State University in 1998. Dr. Burrow received his law degree from the University of Wisconsin, Madison in 2001. Dr. Burrow's research interests include the death penalty, juveniles, race, violence, and sentencing practices.

Barbara A. Koons-Witt is an Assistant Professor in the Department of Criminology and Criminal Justice at the University of South Carolina. She received her Ph.D. from the School of Criminal Justice at Michigan State University in 2000. Dr. Koons-Witt's research interests include age, gender and sentencing practices, correctional policies for women offenders, and women and violent offending. Her work has been published in *Criminology*, *Journal of Criminal Justice*, and *Justice Quarterly*.

---

† *An earlier version of this article was presented at the 2002 Law and Society Association Annual Meeting in Vancouver, British Columbia, Canada. Data for the current study was obtained from the U.S. Sentencing Commission. U.S. SENTENCING COMM'N, INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, MONITORING OF FEDERAL CRIMINAL SENTENCES, 1999 (2001) [hereinafter MONITORING OF FEDERAL CRIMINAL SENTENCES].*

Sentencing Guidelines. Under the Guidelines, offenders are sentenced to longer periods of incarceration than under the discretionary sentencing regime, and are subject to prison time for offenses previously punished through alternative sentencing. Consequently, elderly offenders, who are uniquely subject to the need for medical care, are spending a longer amount of time in the custody of prison systems. With consultation to empirical data, Professors Burrow and Koons-Witt explore whether the consideration of elderly status as a sentencing departure under the Guidelines contributes to variation in sentencing across the circuits. The authors recognize that the good of the elderly offenders and society is served when the age and physical impairments of elderly offenders are considered as mitigating factors at sentencing. They further propose adopting uniform standards in the consideration of these conditions as sentencing departures.

I. Introduction

During the last twenty years, much has been made of the increasing number of offenders coming into the criminal justice system.[1] Between 1990 and 2000, the total number of individuals incarcerated in federal and state corrections facilities increased by seventy-nine percent.[2] According to a report from the Bureau of Justice Statistics on prisoners in 2000, estimates suggest that approximately 3.3% of the state and federal incarcerated population in the United States is age fifty-five years or older, and this figure is expected to rise over the next several decades.[3] Even more, one California study estimated that by the year 2020, twenty percent of that state's correctional population will be comprised of offenders fifty years of age or older.[4] This rising number is forcing many states to turn their attention to understanding the implications for incarcerating this group of offenders and the special needs that elderly offenders require.[5]

1. *See* Alfred Blumstein, *Incarceration Trends,* 7 U. CHI. L. SCH. ROUNDTABLE 95 (2000); Patrick A. Langan, *America's Soaring Prison Population,* 251 SCIENCE 1568 (1991); Darrell Steffensmeier & Miles D. Harer, *Bulging Prisons, an Aging U.S. Population, and the Nation's Violent Crime Rate,* FED. PROBATION, June 1993, at 3.

2. Allen J. Beck & Paige M. Harrison, *Prisoners in 2000*, BUREAU OF JUST. STATISTICS BULL. (U.S. Dep't of Justice, Wash., D.C.), Aug. 2001, at 1, http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf.

3. *See id.* at 11.

4. Philip G. Zimbardo, *Transforming California's Prisons into Expensive Old Age Homes for Felons: Enormous Hidden Costs and Consequences for California's Taxpayers*, REPORT (Ctr. on Juvenile & Criminal Justice, S.F., Cal.), Nov. 1994, at 3.

5. CRIMINAL JUSTICE POLICY COUNCIL, ELDERLY OFFENDERS IN TEXAS PRISONS (1999), http://www.cjpc.state.tx.us/reports/othadlt/ElderlyOffenders.PDF [hereinafter ELDERLY OFFENDERS IN TEXAS PRISONS]; FLA. HOUSE OF REPRESENTATIVES

Many observers argue that the increasing incarcerated population, including elderly prisoners, has been the direct result of the shift in the punishment philosophy of sentencing systems at the state and federal levels.[6] Since the mid-1970s, when Maine became the first state to abolish its parole system, many states along with the federal sentencing system shifted from an indeterminate sentencing philosophy to a determinate sentencing philosophy.[7] With this shift, there was an increased emphasis on more certain and lengthier punitive sentencing practices.[8] The specific aims of the changes were to limit the discretion of judges and courts and base sentencing decisions on aspects of the criminal offense and the criminal history of the offender.[9] Though imperfect, the Federal Sentencing Guidelines (the Guidelines) were premised on the belief that honesty, proportionality, and uniformity must be restored to sentencing.[10] This goal was partly achieved by limiting the conditions under which judges could sentence offenders outside of the boundaries prescribed by the Guidelines.[11] That is, few circumstances warrant departure from the Guidelines.[12]

One of the consequences attributed to a change to guidelines-based sentencing was that more offenders were spending longer periods of time incarcerated.[13] Additionally, the change to guidelines-based sentencing made it possible to incarcerate offenders who would have normally served time in community-based alternatives.[14] Some concern

CRIMINAL JUSTICE & CORR. COUNCIL COMM. ON CORR., AN EXAMINATION OF ELDER INMATES SERVICES: AN AGING CRISIS (1999), http://www.leg.state.fl.us/Publications/1999/House/reports/corrctns.pdf [hereinafter AN EXAMINATION OF ELDER INMATES SERVICES: AN AGING CRISIS]; GA. DEP'T OF CORR., GEORGIA'S AGING INMATE POPULATION: AN ANALYSIS OF HISTORIC TRENDS AND PROJECTION OF THE FUTURE POPULATION (2002), http://www.dcor.state.ga.us/pdf/agingpop.pdf [hereinafter GEORGIA'S AGING INMATE POPULATION]; *see also* OHIO DEP'T OF REHAB. & CORR., OLDER OFFENDERS: THE OHIO INITIATIVE (1997) [hereinafter OLDER OFFENDERS: THE OHIO INITIATIVE].

6. *See* Nadine Curran, *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225 (2000).

7. NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 24 (1990).

8. *Id*. at 24, 46.

9. *See id*. at 25–27.

10. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A3 (2001).

11. *See* MORRIS & TONRY, *supra* note 7, at 61.

12. 18 U.S.C. § 3553(b) (2001). The Sentencing Guidelines permit factors such as age and physical condition to be considered within very narrow circumstances. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1, .4 (2001).

13. *See* MORRIS & TONRY, *supra* note 7, at 38–40.

14. *See id*.

was expressed that existing facilities were not sufficient to address the needs of this increasingly aging and elderly criminal population.[15] At the same time, there were misgivings about the utility of the continued incarceration of elderly offenders.[16] That is, many doubted that any penal or societal interests were served by the continued incarceration of these offenders.[17]

The problems posed by the incarceration of elderly offenders, and their concomitant lengthier sentences, are compounded by the medical problems and physical health needs that this population of offenders bring with them.[18] For example, there are estimates that suggest that approximately thirty-seven percent of all federal prisoners age forty-five and older report the existence of medical problems, excluding injury.[19] Moreover, approximately eighteen percent of these inmates report medical problems that require surgery.[20] This number is significantly higher in Georgia, where estimates suggest that as much as forty percent of the offenders over the age of fifty have medical problems that could be classified as either major or very major.[21]

Generally, there is concern that neither state, nor federal correctional facilities can keep pace with the costs associated with servicing

15. *See* William E. Adams, *The Incarceration of Older Criminals: Balancing Safety, Cost, and Humanitarian Concerns*, 19 NOVA L. REV. 465, 474–75 (1995); Ronald H. Aday, *Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates*, FED. PROBATION, June 1994, at 47, 47–49; Thomas Ellsworth & Karin A. Helle, *Older Offenders on Probation,* FED. PROBATION, Dec. 1994, at 43, 44; Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding,* 4 ELDER L. J. 173, 176–77 (1996).

16. *Compare* Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse than the Disease?*, 3 WIDENER J. PUB. L. 799, 805 (1994) (arguing that legislatures should adopt programs for compassionate release of terminally ill prisoners), *with* Cristina J. Pertierra, *Do the Crime, Do the Time: Should Elderly Criminals Receive Proportionate Sentences?*, 19 NOVA L. REV. 793 (1995) (arguing that elderly status should not give rise to favored treatment by the courts).

17. *See* Russell, *supra* note 16, at 805 (arguing that it is politically expedient to use compassionate release for terminally ill offenders because the dual needs for punishment and public safety are significantly diminished); *see also* Molly Fairchild James, Note, *The Sentencing of Elderly Criminals*, 29 AM. CRIM. L. REV. 1025, 1041, 1043 (1992); Julian H. Wright, Jr., *Life Without Parole: An Alternative to Death or Not Much of a Life at All?,* 43 VAND. L. REV. 529, 563–64 (1990).

18. *See* Wright, *supra* note 17, at 563.

19. Laura M. Maruschak & Allen J. Beck, *Medical Problems of Inmates, 1997*, BUREAU OF JUST. STATS. SPECIAL REP. (U.S. Dep't of Justice, Wash., D.C.), Jan. 2001, at 8, http://www.ojp.usdoj.gov/bjs/pub/pdf/mpi97.pdf.

20. *Id*. More recent data collected on the clinical status of these offenders in 2000 show that these medical problems include respiratory, diabetes, heart, and HIV/AIDS. *Id*.

21. *See* GEORGIA'S AGING INMATE POPULATION, *supra* note 5, at 18.

this population of offenders. For example, in Georgia, though elderly inmates comprise about six percent of the total inmate population, they consume approximately twelve percent of the state's correctional medical budget.[22] Similarly, budget estimates for this population in Texas suggest that the costs for servicing the medical needs of elderly offenders are more than three times that of younger offenders.[23]

This research will explore the issue of elderly offenders and how their age influences sentencing practices under the Federal Sentencing Guidelines. The research will consider the extent to which the lack of precise definitions in sections 5H1.1 and 5H1.4 of the Guidelines results in variation in sentencing across the various judicial circuits. Prior research has suggested that the variation in sentencing among the federal circuits is largely due to geographic location.[24] This article will expand on that premise and suggest that the lack of precise definitions for "not ordinarily relevant" factors such as elderly status compounds the problem of intercircuit variation. Identifying how and why sentencing variation for this group of offenders occurs is important because the Federal Sentencing Guidelines were purportedly enacted to remedy the problem of nonuniformity in sentences. Unless a reasonably consistent and rational definition for elderly status, as well as other "not ordinarily relevant" factors, can be developed, then the elusive goals sought by the Guidelines will not be achieved. This research offers a glimpse into the issues that judges confront when elderly offenders are brought before them and why it is important to seriously consider the consequences that result from the lack of precision in determining who is considered an elderly offender.

With this goal in mind, the remainder of this article will be organized in the following manner: Part II will examine the purpose of the Federal Sentencing Guidelines. Particular focus will be given to how terms such as "elderly," "infirm," and "extraordinary physical impairments" are defined. This section will also examine case law derived from various federal circuits. Of most importance here is how the *Carey*[25] and *Ghannam*[26] standards limit the discretion of federal judges to

22. *See id*. at 1.
23. *See* ELDERLY OFFENDERS IN TEXAS PRISONS, *supra* note 5, at 9.
24. Paula Kautt, *Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses,* 19 JUST. Q. 633, 633–34 (2002).
25. United States v. Carey, 895 F.2d 318 (7th Cir. 1990).
26. United States v. Ghannam, 899 F.2d 327 (4th Cir. 1990).

grant departures when they are confronted with issues of elderly offenders and extraordinary physical impairments. Most importantly, the discussion of these cases will suggest that the law is somewhat unsettled and ambiguous in terms of defining when elderly status and extraordinary physical impairments merit departures under the Guidelines.

Part III will provide a discussion of the organizational context of sentencing decisions. Organizational context focuses on the rationale behind guidelines-based sentencing.[27] This rationale is to a large extent derived from social science notions of substantive and formal legal rationality wherein legal rules and justifications are juxtaposed against the flexible goals inherent in sentencing.[28] The importance of understanding the organizational context lies in its ability to explain how judges who are confronted with similar issues or cases can arrive at different conclusions.[29] Part IV will present findings from an analysis of sentencing practices across four different judicial circuits. Importantly, the analyses will examine whether there are differences across these judicial circuits in granting departures to elderly offenders. Part V will offer a discussion of the legal and policy implications of the current study, including a proposal outlining how federal courts and the Guidelines should address these issues.

The proposal does not assume that offenders who fall into these categories should get a "free pass" simply by virtue of the physical characteristics that they possess because to do so would bestow on them a "suspect classification," which would make it impossible for any judge to impose a sentence or a term of confinement.[30] Rather, this proposal will provide a basis for arguing that the federal system should pay more attention to the crisis that states are now beginning to recognize relative to the problems and concerns that are attached to this special population of offenders. Age along with certain extraordinary physical impairments are clearly mitigating factors that should be considered at the time of sentencing. Last, the proposal will suggest that judges should exercise greater consistency in their determinations of which offenders should be granted departures because of their elderly

27. *See* Jo Dixon, *The Organizational Context of Criminal Sentencing*, 100 AM. J. SOC. 1157, 1157 (1995).
28. *Id*.
29. *Id*. at 1158.
30. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3 (4th ed. 1991).

status. This proposal rests largely on the belief that much ambiguity and uncertainty surrounds the decision making of judges when they are confronted with atypical offenders such as those who are elderly. In an era where age and physical impairment are "not ordinarily relevant," judges should adopt some uniform standard for making departure decisions for this small but growing segment of offenders who are sentenced under the Federal Sentencing Guidelines.[31]

II. The Federal Sentencing Guidelines

A. History and Purpose

The Federal Sentencing Guidelines grew out of the Sentencing Reform Act of 1984.[32] However, it was not until 1987 that the Guidelines were actually enacted by Congress.[33] During the course of its legislative history, the Sentencing Reform Act underwent numerous changes and modifications.[34] The policy statement of the Federal Sentencing Guidelines indicates that three primary objectives were pursued through their enactment: (1) honesty in sentencing; (2) uniformity in sentencing; and (3) proportionality in sentencing.[35] At their core, the Federal Sentencing Guidelines focused on constraining the discretion of judges.[36] Not only were judges discouraged from departing from the Guidelines, but there was also the explicit requirement that all judges state on the record the specific reasons for imposing a sentence outside of the recommended guidelines.[37] As an additional measure, both the defendant and the

31. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (2001).

32. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (suggesting that the Federal Sentencing Guidelines actually have their genesis back to 1975 where Senator Kennedy introduced a bill in the U.S. Senate aimed at reforming the sentencing structure in the United States). Though there were several iterations of this bill and many drafts, support for its basic precepts increased when Senator Strom Thurmond lent his support (and name) to the reform effort. *Id*. at 225.

33. *Id*. at 247.

34. See the Stith and Koh article for an excellent discussion of the legislative history of the Sentencing Reform Act. *Id*. at 223–327. Among the modifications made included the proposal that a permanent, full-time Sentencing Commission be created. *Id*. at 237. In addition, sentencing ranges became fixed so that there could never be variation between the minimum and maximum by more than twenty-five percent. *Id*. at 237 n.85.

35. U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A3 (2001); *see also* 28 U.S.C. § 991 (b)(1)(B) (2001).

36. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A3 (2001).

37. Paul Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity,* 90 J. CRIM. L. & CRIMINOLOGY 239, 255 (1999).

government could petition for review of the sentence if the judge departed (or refused to depart) from the recommended sentencing guidelines.[38] However, courts have held that review is discretionary unless the judge committed plain error.[39] For example, in *United States v. Crumbliss*,[40] the Fourth Circuit Court of Appeals ruled that though the issue was a close one, namely whether the defendant's diabetes and its attendant complications qualified as an extraordinary physical impairment, it could not find that the district court's decision was legally erroneous.[41] Importantly, the court wrote that it will not overturn a district court's decision unless there has been an abuse of discretion.[42]

The Federal Sentencing Guidelines were established during a time when a dramatic shift was occurring at both the state and federal levels of the justice system.[43] Indeterminate sentencing, the idea that defendants should be examined and sentenced on a case-by-case basis, was the dominant perspective throughout much of the twentieth century.[44] During the early decades progressive reformers established many of the components of the indeterminate justice model.[45] Both probation and parole were initiated, thereby introducing a new flexibility into the sentencing process.[46] The rehabilitative principles of the indeterminate sentencing system gave broad discretionary powers and oversight to judges at the sentencing stage.[47] Beginning approximately in the mid-1970s, a dramatic shift in punishment philosophy occurred in the criminal justice system.[48] Several factors became the catalyst for the shift that was occurring.[49] The infamous 1974 Martinson Report that "Nothing Works" in correctional rehabilitation programs led many to question (if

38. *Id*. at 255–56.
39. United States v. Crumbliss, 58 Fed. Appx. 577, 581 (4th Cir. 2003).
40. *Id*. at 582. Though the opinion in this case was not published, it still serves the purpose of illustrating the point that the appellate courts will allow the district courts to exercise some discretion so long as they remain within the boundaries of the law.
41. *See id*. at 581.
42. *See id*.
43. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 44 (1980).
44. VERNON B. FOX & JEANNE B. STINCHCOMB, INTRODUCTION TO CORRECTIONS 32–33 (4th ed. 1994).
45. ROTHMAN, *supra* note 43, at 73.
46. *Id*.
47. Charles A. Moore & Terance D. Miethe, *Regulated and Unregulated Sentencing Decisions: An Analysis of First-Year Practices Under Minnesota's Felony Sentencing Guidelines,* 20 LAW & SOC'Y REV. 253, 253–54 (1986).
48. FOX & STINCHCOMB, *supra* note 44, at 33.
49. *Id*. at 50.

they were not already) the efficacy of rehabilitation as a rational objective of the criminal justice system.[50] In addition, the civil unrest and perpetual crime problem experienced by American citizens reinforced the cries for a tougher approach in dealing with criminal offenders.[51] At the same time, some organizations such as the American Friends Service Committee came out and openly criticized criminal justice officials for decisions that appeared to be inconsistent, unjust, and racially biased.[52]

Thus, attacks on the philosophy and principles of indeterminate sentencing came from both liberals and conservatives, albeit for different justifications.[53] Liberals contended that uninhibited discretion opened the door for bias, specifically based on race.[54] Conservatives, on the other hand, believed that crime was out of control and judges were too soft on offenders.[55] A multitude of factors played a part in moving the legal systems at the state and federal levels from one that embraced the utilitarian benefits of rehabilitation to the idea that punishment should be more consistent, proportionate, and punitive in nature.[56]

The goals of the legal system changed from an emphasis on crime causation and rehabilitation to retributive and deterrent efforts, which resulted in making sentences more swift, certain, and severe.[57] Early sentencing reformers believed that the best method to limit discretion

50. *Id*.
51. *Id*.
52. MORRIS & TONRY, *supra* note 7, at 21–22.
53. SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990, at 113 (1993).
54. *Id*. at 114.
55. Some federal judges are quite aware of the important role that they play when it comes to sentencing defendants. *See generally* United States v. Johnson, 318 F.3d 821, 831–32 (8th Cir. 2003). Inherent within this role is the need to use discretion which the Guidelines sought to channel and, in many cases, constrain. *See* WALKER, *supra* note 53, at 113. However, it is believed that the nature of sentencing requires discretion to be exercised. Judge Bright, for example, wrote that:

> [T]he district court judges retain a critical role in making findings, assessing credibility, and relying on those findings to impose the sentence. Those duties are important and even awesome. I say to the district court judge in this matter, and to other federal district court judges who impose sentences: do not surrender those duties and important functions, notwithstanding disagreements with your appellate colleagues . . . . These functions belong to the district court, need to be in the district court, and should remain there.

Johnson, 318 F.3d at 831–32.
56. *See* Joan Petersilia, *Debating Crime and Imprisonment in California,* 17 EVALUATION & PROGRAM PLAN. 165 (1994).
57. *Id*. at 165.

was to implement sentencing guidelines.[58] The use of guidelines did not abolish discretion altogether, but instead suggested presumptive sentences and permitted some room for flexibility during the sentencing phase.[59] Discretion was structured through written regulations and formal policies.[60]

Though the primary purpose behind the Federal Sentencing Guidelines was punishment, there seemed to be the recognition that punishment should be tempered with some level of flexibility.[61] That is, the Guidelines recognized that not all offenders and crimes are alike and, thus, provided for a departure scheme wherein atypical cases could merit punishment outside of the boundaries prescribed by the Guidelines.[62]

The Federal Sentencing Guidelines include provisions that prohibit the use of factors such as race, gender, and ethnicity.[63] Additional factors that judges are discouraged from considering include age (section 5H1.1), physical impairment (section 5H1.4), family responsibility and community ties (section 5H1.6), and employment record (section 5H1.5).[64] It is important to note that these so-called extralegal factors

58. *Id*.
59. *See generally* WALKER, *supra* note 53.
60. *See generally id*.
61. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A3 (2001).
62. *See* Koon v. United States, 518 U.S. 81, 92 (1996) (recognizing that the Federal Sentencing Guidelines did not completely divest the district courts of discretion in their sentencing decisions). Rather, district courts could deviate from the guidelines if they found that there was some aggravating or mitigating circumstance that was not adequately taken into consideration by the Sentencing Commission. *Id*. Accordingly, if the district court found that the defendant was atypical, that is, the defendant's conduct or some heightened characteristic is not normal with respect to the usual or "heartland" of cases then, a departure may be warranted. *Id*. at 93.
63. U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2001).
64. Specifically, section 5H1.1 indicates that

> Age (including youth) is not ordinarily important in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient and less costly than incarceration. Physical condition, which may be related to age, is addressed at § 5H1.4.

Id.

The Sentencing Commission addressed the issue of infirmity and physical health in the policy statement governing section 5H1.4. *Id*. This policy statement reads in part

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable

were considered "not ordinarily relevant" to sentencing.[65] Accordingly, under certain conditions it may be permissible to use these factors as a basis for departure, as long as the judge provides an explicit rationale on the record for the reason for doing so.[66] What is most troublesome is the actual interpretation and application of the language "not ordinarily relevant." Many judges have expressed the frustration that they have been given little guidance in terms of how to apply this provision.[67] For example, in *United States v. Johnson*,[68] Judge Bright expressed concern that the district courts, even the circuit courts of appeals themselves, are not provided with the clarification that they need to render informed decisions about what constitutes extraordinary physical impairments under section 5H1.4 of the Federal Sentencing Guidelines.[69] As a result of the lack of direction, the federal courts remain free to choose from a continuum of medical problems relative to the capability of the Bureau of Prisons to monitor and treat the offenders.[70]

During the 1990s, many federal courts were grappling with this issue in light of the fact that there was no agreement among the numerous judges about how to define "elderly," "infirmity," or "extraordinary physical impairment."[71] Many judges used these terms differently in light of their own experiences and background.[72] As a consequence,

---

guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Id.

65. *See id*. ch. 5, pt. H, introductory cmt.

66. *See* 18 U.S.C. § 3553 (b)–(c) (1994); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2001); Hofer, *supra* note 37, at 240.

67. *See infra* notes 71, 73 and accompanying text.

68. United States v. Johnson, 318 F.3d 821 (8th Cir. 2003).

69. *Johnson*, 318 F.3d at 827 (Bright, J., dissenting). Judge Bright, in his dissenting opinion, quoted some of the language used by the district court judge, who was responsible for sentencing the defendant, in which he expressed the hope that there would be an appeal so that the district courts would get the guidance they needed in applying the law. *Id*. at 828–29 nn.4, 6. Rather than supplying the needed clarification, the circuit court instead issued an opinion overruling the decision to grant a departure under the Guidelines because in its view the district court erred in applying the law. *See id*. at 829.

70. *See generally id.* at 831 n.8 (quoting the district court's statement that federal courts "don't have to find some incredibly obscure condition that the Bureau of Prisons has never heard of or doesn't believe they can treat in order to have discretion to grant the downward departure").

71. *See, e.g*., United States v. Tocco, 200 F.3d 401, 434–35 (6th Cir. 2000); United States v. Collins, 122 F.3d 1297, 1306–07 (10th Cir. 1997).

72. *Compare Collins*, 122 F.3d at 1297, where the defendant was sixty-four years old, *with Tocco*, 200 F.3d at 401, where the defendant was seventy-two years old. The federal judge in *Tocco* noted that the defendant's age alone should not be the basis for a downward sentence departure. *See Tocco*, 200 F.3d at 434. Moreover, the court ob-

the uniformity that was sought by the Federal Sentencing Guidelines often resulted in disparate treatment for similarly situated offenders where some judges were inclined to read the exceptions to the Guidelines very narrowly compared to others who tended to take a somewhat expansive view.[73] The general problem was that the courts had not precisely defined who or what is "elderly."[74]

Even more problematic is the section 5H1.4 provision of the Guidelines, which contains no definition of "extraordinary physical impairment."[75] This lack of a rigorous definition has caused great con-

served in passing that there were eight federal judges on the Court of Appeals for the Sixth Circuit who were Tocco's age, or older, still in service and continued to serve in important capacities. *See id*. Unlike the position taken by the Sixth Circuit, the *Collins* court continued to adhere to the principle that age is a relevant consideration for departure when "the career offender category [is] appropriately applied to an individual defendant." *Collins*, 122 F.3d at 1306.

73. Terence F. MacCarthy & Nancy Murnighan, *The Seventh Circuit and Departures from the Sentencing Guidelines: Sentencing by Numbers,* 67 CHI.-KENT L. REV. 51, 66–67, 72–73 (1991). This disparate reading of the statute has also been addressed by Thomas Long who noted that most federal courts rarely find age to be singularly determinative of a defendant's sentence. Thomas A. Long, *The Federal Sentencing Guidelines and Elderly Offenders: Walking a Tightrope Between Uniformity and Discretion (and Slipping)*, 2 ELDER L. J. 69, 74 (1994). This belief has been borne out in several court decisions. For example, in *United States v. Marin-Castaneda*, Judge Lewis refused to reverse a judgment against the defendant whose appeal was based on the notion that, by virtue of his age of sixty-seven, he was entitled to a downward sentencing departure. 134 F.3d 551, 556 (3d Cir. 1998). Judge Lewis strictly interpreted section 5H1.1 and reasoned that it "foreclos[ed] departures based on age in all but the most extraordinary of circumstances." *Id*. Judge Lewis further held that "[a]bsent some extraordinary infirmity, we cannot conclude that the bare fact that Marin-Castaneda was 67 years old would have justified a downward departure by the district courts." *Id*. at 557. Similarly, in *United States v. Ferruccio*, a lower court's decision not to depart from the Guidelines was upheld even though the defendant was seventy-nine years old. Nos. 95-4281/96-3612, 1997 U.S. App. LEXIS 5951, at *12 (6th Cir. Mar. 25, 1997). *But see* United States v. Moy, No. 90 CR 760, 1995 U.S. Dist. LEXIS 6732, at *75–83 (N.D. Ill. May 15, 1995) (departing downward because the defendant, aged seventy-eight, was very frail).

74. There are cases that suggest what ages do not meet the definitional requirements of elderly status. *See, e.g.*, United States v. Anders, 956 F.2d 907, 912 (9th Cir. 1992) (holding that the age of forty-six did not qualify as elderly and infirm); United States v. Harpst, 949 F.2d 860, 864 (6th Cir. 1991) (holding that defendant not considered elderly and infirm within the meaning of the Guidelines although he was fifty-four years old and had heart trouble); United States v. Bowman, No. 92-2534, 1993 U.S. App. LEXIS 7517, at *5 (7th Cir. Apr. 1, 1993) (holding that defendant's age of fifty years does not meet the statutory guidelines of elderly and infirm such that a downward departure is warranted); United States v. Price, Nos. 90-30148, 90-30149, 1991 U.S. App. LEXIS 5444, at *13 (9th Cir. Mar. 28, 1991) (holding that fifty-nine-year-old defendant who is not in ill health does not meet the requirements of section 5H1.1).

75. The Supreme Court was mindful of the fact that the Sentencing Commission could not compile an exhaustive list of all the circumstances wherein a departure from the Guidelines should be granted. United States v. Koon, 518 U.S. 81, 93–94

sternation for judges.[76] The empirical research on this subject is sparse,[77] and few have attempted to provide a cogent definition of "extraordinary physical impairment."[78] One could suggest that the multitude of illnesses and dysfunctions that beset the human body, whether one is incarcerated or not, makes it impossible to definitely state what is extraordinary. For example, while some judges may consider paraplegia an extraordinary impairment,[79] other judges are not inclined to go so far.[80] In addition, federal judges have been very hesitant to define "obesity"[81] or "chronic pulmonary obstruction"[82] as conditions sufficient to justify downward sentencing departures. Given the absence of a definition within the statutes and a reluctance of federal judges to define it themselves, determining what qualifies as an "extraordinary physical impairment" will remain a vexing issue as evidenced by judges who struggle with the issues of HIV and AIDS.[83] Nowhere is this observation more clear than in *United States v. Rabins*[84] where in his dissent, Judge Wilson concluded that most judges simply do not understand the issues.[85] Almost a decade later, some judges still suggest that

(1996). Even more, the Court recognized the fact that it was unnecessary to do so in view that the Guidelines are not fixed but subject to revision and refinement over time, which would take into account the appropriate circumstances where departures should be granted. *Id*.

76. *See* United States v. Sherman, 53 F.3d 782 (7th Cir. 1995). Judge Coffey seemed to express frustration with the fact that the Sentencing Guidelines did not define "extraordinary physical impairment." *See id*. at 788. However, he declined any attempt to define it himself but remanded the case back to the circuit court with instructions that it look to other courts for guidance as to what constituted an "extraordinary physical impairment." *Id*.

77. Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis,* 81 MINN. L. REV. 299, 302 (1996).

78. *See* Jordan B. Hansell, Note, *Is HIV "Extraordinary"?*, 96 MICH. L. REV. 1095, 1098–1107 (1998). A four-part test is proposed as a means to guide courts in making determinations relative to what constitutes an "extraordinary physical impairment." *Id*.; *see also* Reid J. Schar, Comment, *Downward Sentencing Departures for HIV-Infected Defendants: An Analysis of Current Law and a Framework for the Future,* 91 NW. U. L. REV. 1147, 1161–67 (1997); Stacey M. Studnicki, *Individualized Sentencing: Federal Sentencing Departures Based upon Physical Condition,* 1994 DETROIT C. L. REV. 1215 (1994).

79. United States v. Mattox, 417 F. Supp. 343, 345 (S.D.N.Y. 1976).

80. United States v. Goff, 6 F.3d 363, 364 (6th Cir. 1993).

81. *Sherman*, 53 F.3d at 786–88.

82. United States v. Little, 736 F. Supp. 71, 72 (D.N.J. 1990).

83. United States v. Woody, 55 F.3d 1257, 1259 (7th Cir. 1995); United States v. Thomas, 49 F.3d 253, 254 (6th Cir. 1995); State v. Iglesias, 517 N.W.2d 175, 178 (Wis. 1994).

84. 63 F.3d 721 (8th Cir. 1995).

85. *See id*. at 738–41. Judge Wilson concluded that the majority did not decide against Rabins based on the merits as they suggested, but rather the decision was based on the uncertainty as to whether section 5H1.4 permitted a downward departure unless he was in the final stages of AIDS. *See id*. at 736. In the end, Judge Wil-

the issues related to departures for extraordinary physical impairments are still not fully understood.[86]

Despite the apparent concerns of some federal judges, there are others who believe that health considerations should never enter into the calculus of sentencing.[87] That is, a defendant's health is irrelevant for the purposes of sentencing because it may diminish the severity of the crime.[88] Judge Posner adopted such a position in *United States v. Prevatte*[89] where he wrote:

> I do not think that the judge should also consider the defendant's health. Apart from the complexities and uncertainties involved in computing life expectancies on the basis of the health of a specific person, a sentence reflects a judgment about the gravity of the defendant's conduct. A person is not less an arsonist for only having six months to live, and a five-month sentence for arson might be thought to depreciate the gravity of his crime.[90]

Still, there have been some attempts to provide a framework for federal judges to use when they were confronted with requests for departures based on elderly status or extraordinary physical impairment.[91] Some of these frameworks, though they take a literalist view of the Guidelines, provide a starting point for a discussion of the unease experienced by some of the judges who must decide these issues.[92]

B. The *Carey* Standard

One framework that was developed to analyze departures from the Federal Sentencing Guidelines was announced in *United States v. Carey*.[93] James Carey, who was sixty-two years old when he was in-

son believed that the Third Circuit had the correct approach and admonished the courts to think carefully when sentencing offenders with this virus (disease). *See id*. at 743.

86. Judge Bright wrote that some judges merely reinterpret the medical diagnoses rather than providing the guidance courts need to make these sentencing decisions. United States v. Johnson, 318 F.3d 821, 827 (8th Cir. 2003). Judge Bright went on to say that "leaving this matter unresolved in a published opinion is a great disservice to sentencing courts. At a minimum, the majority should [clarify the law]—a proper function of federal appellate courts." *Id*. at 831.

87. United States v. Prevatte, 66 F.3d 840, 848 (7th Cir. 1998).

88. *See id.*

89. *Id.*

90. *See id*.

91. *See, e.g.,* United States v. Carey, 895 F.2d 318 (7th Cir. 1990).

92. *See id*.; United States v. Baron, 914 F. Supp. 660 (D. Mass. 1995); United States v. McKelvey, No. 92-2310, 1993 U.S. App. LEXIS 22884, at *1 (7th Cir. Sept. 1, 1993); United States v. Maltese, No. 90 CR 87-19, 1993 U.S. Dist. LEXIS 8403, at *1 (N.D. Ill. June 18, 1993).

93. *Carey*, 895 F.2d at 318.

dicted, was president of a trucking company in Indiana.[94] For a fifteen-month period, Carey engaged in a pattern of conduct that included fraud upon two banks.[95] He later entered into a plea agreement on condition that not only would the government make an appropriate sentence recommendation, but also that he would be able to make an argument for any sentence that he deemed appropriate.[96] In advance of sentencing, pretrial services prepared a presentence report (PSR) that noted the medical condition of Carey—pituitary tumors and possible chest cancer.[97] Though these would have been adequate considerations for a departure, the district court made no reference to them, yet it departed downward from the Guidelines and imposed a sentence of one-month imprisonment and two-years supervised release.[98] The government promptly appealed to the court of appeals after which time the district court issued a memorandum that listed the age and physical condition of Carey as reasons for its departure.[99]

Judge Flaum, writing for the court of appeals, began his analysis by examining the permissible factors that could be considered by a judge should he or she decide to sentence an offender outside of the Guidelines.[100] Judge Flaum first noted that sentences must be imposed within the parameters of the Guidelines "unless the court finds an aggravating or mitigating circumstance of a kind or degree not adequately considered by the Commission in formulating the Guidelines."[101] He went on to say that the Guidelines do not permit the consideration of factors such as age and physical condition except in extraordinary cases.[102] Any such departure based on these factors must conform with section 5H1.1 and section 5H1.4.[103] Given these proscriptions, the district court's departure from the Guidelines was not reasonable in light of the fact that it failed to make particularized findings as to whether Carey was elderly, infirm, and suffered from an extraordinary physical infirmity.[104]

94. *See id*. at 320.
95. *See id*.
96. *Id*. at 320–21.
97. *See id*. at 321.
98. *See id*.
99. *See id*.
100. *See id*. at 322.
101. *See id*.
102. *See id*.
103. *See id*. at 324.
104. *See id*. The research literature indicates that judges in state courts that use guideline-based sentencing require that substantial and compelling reasons be given

While it seemed as if Judge Flaum subscribed to a literal interpretation of the Guidelines, he did not suggest that an offender's age and health status could never be proper considerations for a sentencing departure.[105] In fact, in writing the court's opinion, Judge Flaum noted that he too was concerned about the undue harshness of the Guidelines in cases similar to the one at bar.[106] Moreover, he noted that the court had a neutral stance toward what would be an appropriate sentence.[107] However, Judge Flaum reiterated that there was simply an insufficient record on which to justify a departure without further findings by the district court.[108]

This same approach has been taken in other cases in which the courts of appeals have reviewed lower courts' departures from the Federal Sentencing Guidelines based on age and physical condition.[109] In *United States v. Harrison*,[110] for example, the Eighth Circuit addressed the issue of whether an offender's advanced age was sufficient to justify a downward departure from the Guidelines.[111] Mary Lee Harrison, who was sixty-four years old, was charged with embezzling more than $92,000 from a credit union over a three-year period.[112] After pleading guilty to the offense, a PSR was prepared for the sentencing hearing, which made note of Harrison's age and her living conditions.[113] Harrison's attorney argued for a downward departure based on the age of his client, but the court stated that it was without authority to grant the request.[114] Harrison appealed this decision and argued that the sentencing court based its decision on the erroneous belief that it was without authority to depart from the Guidelines.[115]

in writing for deviating outside of the range prescribed by the guidelines. Rodney L. Engen et al., *Discretion and Disparity Under Sentencing Guidelines: The Role of Departures and Structured Sentencing Alternatives,* 41 CRIMINOLOGY 99, 105 (2003). In this regard, judges are able to tailor their sentencing decisions based on exceptional cases. *Id*.

105. *See Carey*, 895 F.2d at 324.
106. *Id.* at 326.
107. *Id*.
108. *Id*.
109. *See* United States v. Seligsohn, 981 F.2d 1418 (3d Cir. 1992); United States v. Harrison, 970 F.2d 444 (8th Cir. 1992).
110. *Harrison*, 970 F.2d at 444.
111. *Id*.
112. *Id*. at 445.
113. *Id*.
114. *Id*.
115. *Id*.

Judge Bowman, writing for the court of appeals, found that the sentencing court lacked the authority to impose a sentence that departed from the Guidelines.[116] A court may depart downward only if it finds a mitigating circumstance of a kind, or to a degree, not adequately considered by the Guidelines.[117] Age, in and of itself, was not a sufficient basis for departure.[118] There was no showing that Harrison was elderly or infirm within the meaning of the Guidelines and neither was there a showing that her health was extraordinarily impaired such that the court should weigh other alternatives.[119] Harrison's admission that she was in good health was sufficient to remove the case from the departure considerations permitted by the Guidelines.[120]

Similarly, in *United States v. Seligsohn*,[121] the U.S. Court of Appeals for the Third Circuit considered whether an offender who was sixty-two years of age fell within the meaning of section 5H1.1 of the Federal Sentencing Guidelines.[122] Melvin Seligsohn, the defendant, was charged with mail fraud, consumer fraud, bribery, and tax evasion.[123] In reaching a plea agreement with the government, Seligsohn pled guilty to eighteen counts contained in the sixty-seven count indict-

116. *Id*. at 446–47.
117. *Id*. at 446.
118. *Id*. at 447; *see also* United States v. Doe, 921 F.2d 340, 347 (1st Cir. 1990) (holding that the defendant, a man of fifty-four years, was not eligible for a downward departure from the Sentencing Guidelines given that he did not meet the criteria of being elderly and infirm). But see *United States v. Lara*, 905 F.2d 599, 605 (2d Cir. 1990) and *United States v. Gonzalez*, 945 F.2d 525, 526–27 (2d Cir. 1991), where the courts noted age coupled with physical stature warranted a downward departure because the physical stature of the defendants rendered them susceptible to victimization and the potential for victimization increased if defendants were given lengthy prison sentences.
119. *See Harrison*, 970 F.2d at 447. The First Circuit Court of Appeals has also found that health or physical condition alone unless "present in unusual kind or degree" is insufficient to warrant a departure from the Sentencing Guidelines. *See* United States v. LeBlanc, 24 F.3d 340, 348 (1st Cir. 1994) (holding that a forty-seven-year-old male defendant who had suffered two heart attacks, did not satisfy the requirements for a reduced sentence under the Sentencing Guidelines because his heart condition was not an extraordinary physical impairment such that his life would be shortened because of incarceration). However, other courts have taken contrary positions on this issue of health and physical condition. For instance, the defendant's health was believed to be so "fragile" that incarceration in a prison for any length of time could prove to be fatal and thus amount to a life sentence. *See* United States v. Mossesson, No. 89 Cr. 40 (WK), 1989 U.S. Dist. LEXIS 13837, at *2 (S.D.N.Y. Nov. 22, 1989).
120. *See Harrison*, 970 F.2d at 447.
121. 981 F.2d 1418 (3d Cir. 1992).
122. *See id.*
123. *See id*. at 1420.

ment.[124] In appealing from the sentence imposed on Seligsohn, the government argued that the district court impermissibly departed from the Guidelines.[125]

Judge Weis, writing for the court, reiterated the rationale behind section 5H1.1 and other provisions of the Federal Sentencing Guidelines.[126] In addition, he noted that departures from this Guideline provision were permissible only if certain criteria were met.[127] From the record before the court, Judge Weis concluded that there was an insufficient basis for making such a departure because there were no findings as to whether Seligsohn was elderly or infirm.[128]

In addition, the *Carey* standard was followed in *United States v. Tolson*.[129] Truman Tolson, who was sixty years old, pled guilty to conspiracy to distribute marijuana.[130] The basis for Tolson's appeal was that his health and age were of such a nature that a departure from the Federal Sentencing Guidelines was warranted.[131] He had numerous medical problems including onychomycosis, peripheral neuropathy, arthritis, and emphysema.[132]

Judge Miller applied the standards that were established in *Carey*.[133] First, he held that the principles of section 5H1.1 and section 5H1.4 must be strictly applied.[134] As such, a departure from the Guidelines is permissible only where a defendant presents an extraordinary medical condition or is elderly.[135] Second, he found that the sentencing court did not make any particularized findings relative to whether Tol-

124. *See id*.
125. *See id*. at 1428.
126. *See id*.
127. *See id*.
128. *See id*. *But see* United States v. DeCologero, 821 F.2d 39, 43 (1st Cir. 1987) (holding that the defendant was not entitled to a downward departure because the district court went the "proverbial extra mile" in reviewing his medical history and making detailed findings of fact concerning his paraplegia and whether incarceration would worsen his condition).
129. 760 F. Supp. 1322 (N.D. Ind. 1991).
130. *Id*. at 1323.
131. *Id*. at 1330.
132. *Id*.
133. *Id*. at 1331.
134. *Id.*
135. *Id*. This language was strictly interpreted by Judge Garza when he found that a defendant's age (fifty-five years) and health problems (cancer in remission, fused ankle bone, and high blood pressure) were not sufficiently severe to be classified as an extraordinary medical condition within the meaning of the statutes. United States v. Guajardo, 950 F.2d 203, 203 (5th Cir. 1991).

son was elderly or physically infirm such that he was disabled.[136] Lastly, Judge Miller found that even

> [a]ssuming a sixty-year old man to be elderly, the court cannot find [Tolson] to be infirm; his physical problems, while extensive, do not appear to disable him in any sense. Without intending to belittle his medical problems, his physical condition cannot be described as an extraordinary physical impairment.[137]

The cases mentioned thus far seem to be based on the presumption that advanced age and infirmities are mutually exclusive, even though infirmity or disease may be inextricably tied to the aging process.[138] Thus, sympathy, which may be manifested through leniency or downward departures, can be evoked only if the defendant is of advanced age and his or her physical infirmities exert a hardship on the defendant that would not be endured by healthier offenders.[139] Second, there is the presumption that age alone is an insufficient consideration for leniency even if the defendant is of advanced years.[140] Here, the courts' emphasis seems to be centered on accountability and retribution. Elderly offenders, then, must be held accountable irrespective of the fact that the effect of any punishment imposed on them may be greatly disproportionate to the crime committed.[141]

136. *Tolson*, 760 F. Supp. at 1331; *see also* United States v. Winters, 105 F.3d 200, 208–09 (5th Cir. 1997) (reversing a departure because the trial judge did not make specific or particularized findings that the defendant's medical condition (chronic inflammation of multiple organs) was exceptional); United States v. Jones, 18 F.3d 1145, 1147 (4th Cir. 1994) (holding that despite the defendant's age (sixty-one years) and the existence of significant medical problems, such medical problems did not meet the conditions contemplated by the Sentencing Guidelines); United States v. Mulligan, No. 92-406, 1995 U.S. Dist. LEXIS 7568, at *2 (E.D. Pa. May 30, 1995) (denying a sixty-four-year-old defendant with heart problems a downward sentence departure).

137. *Tolson*, 760 F. Supp. at 1331.

138. *See, e.g., Jones*, 18 F.3d at 1149–50; *Tolson*, 760 F. Supp at 1331.

139. *See* United States v. Tucker, 986 F.2d 278, 279–80 (8th Cir. 1993) (adopting what can be best described as a totality of circumstances test where the convergence of age and health transforms the defendant to such a degree that his situation could not be contemplated by the Sentencing Commission). It is only where these two condition are manifested with sufficient magnitude that a departure from the guidelines will be granted. *See id*.; *see also* United States v. Whitmore, 35 Fed. Appx. 307, 321 (9th Cir. 2002) (holding that age in combination with disabilities warranted a departure).

140. *Whitmore*, 35 Fed. Appx. at 322.

141. Hannah T. S. Long, *The "Inequality" of Incarceration*, 31 COLUM. J. L. & SOC. PROBS. 321, 343 (1998). Long observes that the effect of incarceration is felt differently by offenders who are elderly and terminally ill. *See id*. A similar observation was made by another commentator who noted that elderly offenders are at greater risk of contracting life-threatening diseases in prison that are costly to treat and may shorten their life expectancy. Linda Sollish Sikka, *Health Care in New York State Prisons,* 13 IN PUB. INTEREST 33, 56 (1993).

Given the state of law in these cases, the argument is not being advanced that elderly offenders be given a "free pass" simply because they are old and infirm.[142] Such an argument would rest on the presumption that elderly offenders are childlike and in need of the solicitous care and protection of the state.[143] Not only is the logic of such an argument questionable,[144] but it may also be offensive and demeaning to many older citizens who continue to lead fruitful and productive lives.[145] Thus, the federal courts seem to have adopted a policy of "age neutrality,"[146] which comports with the belief that criminal cases involving the elderly should be judged on an individualized basis wherein age per se is not relevant except in extraordinary cases.[147]

Even though some federal courts have expressed a reluctance to depart from the Federal Sentencing Guidelines, others seem less hesi-

142. *See* United States v. Booher, 962 F. Supp. 629, 634 (D.N.J. 1997) (stating that recognition of a defendant's age and heart problems would carve a hole in the Guidelines thereby creating a benefit to some offenders based on their status).

143. *See generally* Fred Cohen, *Old Age as a Criminal Defense,* 21 CRIM. L. BULL. 5 (1985).

144. *See id*. at 10 (observing that the "functional variability" among the elderly cautions against the creation of such a legal presumption).

145. *See id*. at 25 (noting that a "[l]egal doctrine built on a generalized picture of the over-65 age group as sick, dependent, needy, and not competent would not comport with the facts and would needlessly contribute to this negative stereotyping").

146. *See id*. at 15. Age neutrality is built on the notion that age is not a defense to criminal responsibility. *Id*.

147. *See id*. at 35. Cohen correctly points out that any legal doctrine that ascribes incapacity to all elderly offenders needlessly robs them of their autonomy. *Id*. A better approach, he writes, is to:

> [focus] on the specific functional impairment that may be associated with a physical or mental condition suffered by the elderly accused. Such an approach, where successful, does lead to full exculpation and avoids the virtually automatic commitment that follows an acquittal by reason of insanity. Where such an approach cannot be taken, the consequence is that criminal responsibility with age will possibly serve as a mitigating factor at sentencing.

Id. In reality, some courts have adopted this approach to the extent that they do not treat elderly status or infirmity as a "get out of jail free" card. *See* State v. Spioch, 706 So. 2d 32, 36 (Fla. Dist. Ct. App. 1998). Rather, federal judges are vested with discretion to vary from the Guidelines if the "constellation of problems" make incarceration unsuitable. *See id*. at 35–36; *see also* United States v. Angiulo, 852 F. Supp. 54, 62 (D. Mass. 1994). In *Angiulo*, Judge Young held that his court follows

> a general approach of age-neutrality in sentencing, focusing instead on the individually justified, proportionate 'fit' . . . between the crime committed and the sentence to be imposed on the particular individual defendant. Age plays little or no role in adjusting this fit unless the age of the offender plays some unique role in ascertaining the proper sentence.

Angiulo, 852 F. Supp. at 62.

tant.[148] Though it may seem that no guiding philosophy exists beyond what is contained within section 5H1.1 and section 5H1.4 of the Guidelines, it does appear that some federal courts have attempted to craft legal constructs to serve as a basis for their decisions regarding elderly status, infirmity, and extraordinary physical impairments.[149]

C. The *Ghannam* Principle

Aside from the cases where federal courts attempted to develop frameworks within which to analyze whether elderly status could provide a basis for departures from the Guidelines, similar principles of law have been used to address the issue of extraordinary physical impairments.[150] One of the first cases to serve as a benchmark for downward departures based on extraordinary physical impairment was *United States v. Ghannam*.[151] Mohammad Fariz Ghannam, who suffered from cancer, was indicted for conspiracy to distribute and possess cocaine.[152] After entering into a plea arrangement with the government, a PSR was prepared which detailed Ghannam's medical condition and the fact that he also suffered from depression as a result of his fight with cancer.[153] The report also indicated that Ghannam's medical condition compromised his decision-making ability.[154] Though the sentencing court reduced Ghannam's sentence based in part upon considerations of his health and physical condition, he appealed on grounds that the district court's refusal to consider diminished capacity as a basis for departure was erroneous.[155]

Judge Butzner first noted that the district court's refusal to consider diminished capacity as a basis for departure was of no consequence.[156] That is, the district court was well within its discretion in not considering diminished capacity as an adequate basis for departure.[157]

148. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unaccepted Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1686–87 (1992).
149. *See, e.g.,* United States v. Harrison, 970 F.2d 444 (8th Cir. 1992); United States v. Seligsohn, 781 F.2d 1428 (3d Cir. 1992); United States v. Carey, 895 F.2d 318 (7th Cir. 1990).
150. *See generally* Studnicki, *supra* note 78.
151. 899 F.2d 327 (4th Cir. 1990).
152. *Id*. at 328.
153. *Id*.
154. *Id*.
155. *Id*.
156. *Id*.
157. *See id*.

Such a refusal was not reviewable by an appellate court.[158] Judge Butzner also addressed the contention that section 5H1.4 was inappropriately applied.[159] Here, Ghannam contended that a proper reading of section 5H1.4 would have required an elimination of his sentence rather than merely reducing it.[160] However, Justice Butzner reasoned:

> Section 5H1.4's observation that extraordinary impairment might justify an alternative to imprisonment does not preclude the possibility that impairment might also warrant a shorter sentence. The greater departure, no imprisonment, includes the lesser departure, shorter imprisonment.[161]

Interestingly, Judge Butzner made no reference at all to Ghannam's age.[162] This would suggest that federal judges may be free to consider physical impairment alone or elderly status.[163] Judge Butzner's reading of section 5H1.4 would indicate that age and extraordinary physical impairment are indeed mutually exclusive and one can be considered without reference to the other.

Such a reading of the statute would be quite a departure from the standard used in *Carey*.[164] A compelling argument for departure from the Guidelines was also made in *United States v. Maltese*.[165] Frank Maltese, a sixty-two-year-old man who suffered from the effects of liver cancer, pled guilty to an illegal gambling conspiracy charge in October 1991.[166] Pursuant to this plea agreement, the probation department recommended a sentence of twenty-one to twenty-seven months.[167] Mal-

158. *Id*.
159. *Id*. at 329.
160. *Id*.
161. *Id*.
162. *See id.*
163. Other federal court decisions have read the statute to suggest that physical impairment or health status is sufficient alone to warrant a downward departure from the Guidelines. For example, in *United States v. Greenwood*, 928 F.2d 645, 646 (4th Cir. 1991), Judge Widener upheld a downward departure because of the defendant's severe physical handicap (both legs were lost below the knee). In *United States v. Long*, 977 F.2d 1264, 1278 (8th Cir. 1992), a downward departure was upheld on behalf of the defendant after evidence was presented that a term of incarceration would be the equivalent of a death sentence for one who suffered from his physical impairments. In *United States v. Mosesson*, No. 89 CR 40 (WK), 1989 U.S. Dist. LEXIS 13837, at *1 (S.D.N.Y. Nov. 22, 1989), a downward departure was upheld because the "defendant's health appeared to be so fragile that institutional incarceration might well prove fatal." In *United States v. Rioux*, 97 F.3d 648, 663 (2d Cir. 1996), a downward departure was upheld because the defendant suffered a kidney ailment that left him with one diseased kidney and a bone disease.
164. *See* 895 F.2d 318 (7th Cir. 1990).
165. No. 90 Cr 87-19, 1993 WL 222350 (N.D. Ill. June 22, 1993).
166. *Id.* at *1, *10.
167. *Id*. at *1.

tese appealed this sentence on several grounds.[168] Maltese also argued that his health and age warranted a downward departure from the Guidelines.[169] Maltese contended that he met the provisions established within the Federal Sentencing Guidelines section 5H1.1 and section 5H1.4, and, thus, the district court was required to reduce his sentence.[170]

Judge Williams, in arriving at her decision, conducted the two-prong inquiry first elucidated in *Carey*.[171] First, Judge Williams examined the physical and medical condition of Maltese.[172] Greater weight was given to the doctors' reports submitted by Maltese as opposed to those provided by the government.[173] Next, Judge Williams examined the language of section 5H1.1 and section 5H1.4 that served as the basis for sentence departures.[174] She found that although these provisions apply to extraordinary cases, Maltese's medical condition was of such a profound nature that he satisfied the requisite criteria.[175] Accordingly, the sentence departure was appropriate.[176]

Some federal courts have found it necessary to depart from the Federal Sentencing Guidelines on several other occasions where grave health conditions were present in conjunction with elderly age.[177] In

168. Maltese argued for a reduced sentence because he had a minimal role in the offense and had accepted responsibility for his offense. *Id*. at *1, *3, *7.

169. *Id*. at *9.

170. *Id*.

171. *Id*. at *10.

172. *Id*. at *9. Judge Williams noted that not only did Maltese still suffer from the lingering effects of liver cancer, but also referred to the doctors' reports that concluded that his prognosis was very poor given that the majority of patients with liver cancer do not live for more than one year despite undergoing chemotherapy. *Id*. Judge Williams also noted that Maltese had the additional malady of stomatitis that was associated with his chemotherapy. *Id*.

173. Maltese's doctors argued that his treatment was ongoing and costly. *Id*. at *10. Not only would he require overnight hospital visits so that additional medical procedures could be conducted, but he also needed substantial recuperation time. *Id*. These medical findings, though contrary to the findings of doctors from the Bureau of Prisons, were sufficiently persuasive to satisfy the first prong of the *Carey* inquiry. *Id*. at *9, *10.

174. *Id*. at *10.

175. *Id*. Federal courts seem to give clear recognition to the profound nature and impact of cancer and other degenerative diseases. *See, e.g.*, United States v. Velasquez, 762 F. Supp. 39, 40 (E.D.N.Y. 1991) (giving downward departure to a defendant who was diagnosed with testicular cancer and a metastatic germ cell tumor); *see also* United States v. Roth, No. 94 Cr. 726 (RWS), 1995 U.S. Dist. LEXIS 996, at *2 (S.D.N.Y. Jan. 30, 1995) (granting a downward departure to a defendant who was sixty-three years old and suffered from amyotrophic lateral sclerosis).

176. *Maltese*, 1993 WL 222350, at *10.

177. There have been instances at the state level in which age seemed to be the predominate factor in granting a departure. *See, e.g.,* State v. Davis, 493 N.W.2d 467,

United States v. Baron,[178] Judge Gertner carved out an exception to the Guidelines for a seventy-six-year-old man who suffered from a number of ailments including pituitary tumors.[179] Similarly, departures have been carved out where defendants suffered from chronic heart conditions[180] or other debilitating heart diseases.[181]

A careful reading of these cases suggests that downward departures in criminal sentences are usually granted where age, infirmity, and extraordinary physical impairment converge.[182] Judge Gertner makes this point quite explicit in his opinion when he indicated that age and infirmity are inextricably linked and must be considered together for purposes of granting departures.[183] He also noted that there is an inverse relationship between age and infirmity.[184] That is, if an offender is elderly but in relatively good health, his age alone is not determinative of whether a departure will be granted.[185] Conversely, though an

469–70 (Mich. Ct. App. 1992) (upholding a departure for defendant who was sixty-six years old and possessed no medical problems). The caveat is that the Michigan Court of Appeals found that other conditions were present that merited a departure. *Id*. at 470. Further, the judge noted that a lengthy term of incarceration would not further the purposes of deterrence or punishment. *Id*.

178. 914 F. Supp. 660 (D. Mass. 1995).

179. *Id*. at 662–63, 665. The defendant also needed hormone replacement and was suspected of having prostate cancer. *Id.* at 663.

180. United States v. Moy, No. 90 CR 760, 1995 U.S. Dist. LEXIS 6732 (N.D. Ill. May 15, 1995). The defendant was an elderly man of seventy-eight years who suffered from angina and had recently undergone coronary angioplasty. *Id*. at *10.

181. United States v. Libutti, No. 92-611(JBS), 1994 U.S. Dist. LEXIS 19916 (D.N.J. Dec. 23, 1994). Judge Simandle found that the defendant's age (sixty-two years old) coupled with his ischemic heart disease was sufficiently grave to warrant a departure downward from the Sentencing Guidelines. *Id*. at *25.

182. *See Baron*, 914 F. Supp. at 664.

183. *Id*. at 665.

184. *Id*. at 662.

185. In *United States v. Angiulo*, a federal judge was fully cognizant of the defendants' ages but believed that their history of criminal behavior was so severe that lengthy incarceration was the only way to vindicate public policy and ensure societal tranquility. 852 F. Supp. 54, 62 (D. Mass. 1994). This same rationale was followed in *United States v. Gigante*, where the court held that the defendant, though sixty-nine years old, must be punished "for what he was and what he is." 989 F. Supp. 436, 443 (E.D.N.Y. 1998). As such, a period of incarceration would not be considered cruel. *See id*. However, judges are cautioned that they must take into consideration the life expectancy of defendants when sentences are imposed. Judge Posner, for example, has said that the misuse of the sentencing guidelines

> would be plain if the judge chose a term that was so long, given the defendant's age, that the defendant was certain (barring some medical breakthrough as yet unforeseen) to die before he completed the term. A 150-year term would do the trick, regardless of the age of the defendant. So would a 120-year term for a 30-year old, or a 70-year term for a person of 80.

United States v. Prevatte, 66 F.3d 840, 846–47 (7th Cir. 1995).

offender may suffer from medical problems or be in ill health, his health status alone may be insufficient for a departure unless the offender is also elderly.[186]

The picture that emerges from these cases is that judges are indeed empowered to depart from the Federal Sentencing Guidelines where age and infirmity converge to make the defendant's case atypical compared to other defendants. Though some judges may express hesitation or even balk at granting such sentencing concessions, it would be within their sound discretion to consider whether it served the ends of justice to incarcerate offenders who are both aged and physically deteriorating. This point is made quite succinctly by Judge Hellerstein whose opinion reflects the idea that judges should not impose sentences simply for the sake of punishment but instead should pursue other goals of justice.[187]

> [P]unishment must not be draconian; the judge who sentences must be sensitive to both the goals of society reflected by the efforts of the government, and special circumstances of those awaiting sentence. The judge must sentence in a manner that reflects his role as the implementer of society's search for justice, as reflected by due and timely punishment of those who transgress, without ever being indifferent to a defendant's plea for compassion, for compassion also is a component of justice.[188]

186. This point is particularly salient in cases where offenders have been diagnosed with HIV or AIDS. In *United States v. DePew*, 751 F. Supp. 1195 (E.D. Va. 1990), for example, Judge Ellis held that AIDS was not an "extraordinary physical impairment" such that a downward departure in sentence was justified. *Id*. at 1199. Though tragic or "lamentable," AIDS and physical conditions cannot be used to defeat imprisonment. *Id*. This rather harsh interpretation of "extraordinary physical impairment" was again followed in *United States v. Rabins*, 63 F.3d 721 (8th Cir. 1995), where the court of appeals held that the defendant's physical condition at sentencing was not so grave as to be considered "extraordinary." *Id*. at 729. In this case, Judge Arnold held that the defendant failed to satisfy three requisite conditions: (1) a physical condition making imprisonment a greater hardship than normal; (2) imprisonment subjecting the defendant to abnormal inconvenience or danger; and (3) a physical condition having any substantial present effect on the defendant's ability to function. *Id*. There is disagreement, however, among some of the circuits as to whether AIDS is an "extraordinary physical impairment." For example, in *United States v. Schein*, 31 F.3d 135 (3d Cir. 1994), Judge Hutchinson acknowledged that the serious physical complications associated with AIDS may be a reason to grant a downward departure in sentencing guidelines. *Id*. at 138. However, because the district court failed to make adequate findings that his health condition justified a downward departure, Schein's sentence was vacated and the case remanded. *Id*. In *United States v. Streat*, 893 F. Supp. 754 (N.D. Ohio 1995), the defendant's AIDS condition was ruled "extraordinary." *Id*. at 757. However, the judge refused to depart downward because to release the defendant would be a sentence of death on the streets, a punishment "far greater than that currently faced by Streat." *Id*.

187. United States v. Kloda, 133 F. Supp. 345, 348 (S.D.N.Y. 2001).

188. *Id*.

Given the state of the case law, an argument can be made that Federal Sentencing Guidelines are not so restrictive that departures cannot be granted to elderly offenders or those with extraordinary physical impairments. Rather, the law is quite clear that federal judges may make departures if defendants possess characteristics of a kind and degree not adequately considered by the Sentencing Commission.[189] Moreover, the case law points out that judges should consider the purposes to be served by imprisonment when imposing sentences upon defendants.[190] Some of these purposes require that judges consider the costs associated with imprisonment as well as whether alternatives would be equally efficient.[191]

Many federal courts remain free to choose from a range of options, albeit somewhat more constrained because of the Guidelines, when it comes to sentencing elderly offenders or those with extraordinary physical impairments.[192] Clearly, no one is arguing that these judges never depart, because the Guidelines grant them the authority to do so if certain conditions are met.[193] However, the fact remains that some judges are inclined to deviate from the Guidelines while others are quite reluctant to do so.[194] These varied interpretations of the law are the primary sources of variation across the district and circuit courts. Are there other possible explanations for this variation? One such explanation lies in what various social researchers have called the organizational context.

III. Organizational Context

This research is guided by the concept of organizational context. There are several reasons why viewing departures from the Guidelines from this perspective can aid our understanding of why sentencing variation exists across judicial districts. First, the literature suggests that

189. *See* Koon v. United States, 518 U.S. 81, 92 (1996).

190. United States v. Jimenez, 212 F. Supp. 2d 214 (S.D.N.Y. 2002). In finding that a departure should be granted to the defendant, Judge Lynch found that imprisonment is sometimes necessary in order to vindicate the law. *Id*. at 220. However, there are times when this otherwise valid justification for punishment must take a backseat to other societal goals. *See id*. at 219–20.

191. *Id*.

192. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2001).

193. *Id*.

194. *See* James, *supra* note 17, at 1025 (stating that "[d]ifferent jurisdictions and judges have deviating ways of taking age into account when sentencing").

judicial and prosecutorial activities vary from court to court.[195] Second, judges operate within an environment that puts pressure on them to conform their opinions to the requirements of the law.[196] However, even within this environment, judges are often faced with situations where there is uncertainty about the proper role for courts and how atypical cases should be handled.[197] Accordingly, organizational context is useful because it allows us to understand that despite the pressures to conform their opinions to the law, judges must still render decisions that are just and equitable, even where uncertainty exists about the law itself.[198] It is the uncertainty of the law that is largely responsible for variation in sentencing within the judicial districts.[199] Although the analysis that will be presented later does not directly test the degree of uncertainty about the law or bureaucratization within the courts themselves, this framework nevertheless adds to our understanding of the processes that operate in both state and federal courts.

Decision makers, particularly judges, attempt to achieve the best sentencing outcomes by anchoring their decisions within structures such as legal rules, case law, and sentencing guidelines.[200] The primary goal of using such structures is the reduction of uncertainty and sentencing disparity.[201] The structures within which these legal rules and sentencing guidelines are created also lead to the creation of what some researchers call "shared social pasts."[202] These shared social pasts help judges determine the appropriateness of sentences for particular offenders.[203] These shared social pasts also make up part of a larger or-

195. *See generally* Dixon, *supra* note 27, at 1158.
196. *See generally* Koon v. United States, 518 U.S. 81, 94–95 (1996).
197. *See generally id.* at 93–94.
198. *See generally* Celesta A. Albonetti, *An Integration of Theories to Explain Judicial Discretion*, 38 SOC. PROBS. 247, 250 (1991) [hereinafter Albonetti, *Judicial Discretion*].
199. *See generally id.*
200. *See* Albonetti, *Judicial Discretion*, *supra* note 198; Celesta A. Albonetti, *Criminality, Prosecutorial Screening, and Uncertainty: Toward a Theory of Discretionary Decision Making in Felony Case Processing*, 24 CRIMINOLOGY 623 (1986) [hereinafter Albonetti, *Criminality*]; Joachim Savelsberg, *Law that Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law,* 97 AM. J. SOC. 1346 (1992); Jeffrey T. Ulmer & John H. Kramer, *The Use and Transformation of Formal Decision-Making Criteria: Sentencing Guidelines, Organizational Contexts, and Case Processing Strategies,* 45 SOC. PROBS. 248 (1998) [hereinafter Ulmer & Kramer, *Formal Decision-Making Criteria*].
201. *See* Albonetti, *Criminality, supra* note 200, at 625; Savelsberg, *supra* note 200, at 1347.
202. Jeffrey T. Ulmer, *The Organization and Consequences of Social Pasts in Criminal Courts,* 36 SOC. Q. 587, 588 (1995).
203. *Id*.

ganizational context in which judges operate and in which their courts are located.[204] According to Jo Dixon, courtroom actors forge interdependent relationships wherein they come to share common interests relative to the disposition of cases.[205] In addition, these courtroom actors devise a system of incentives and disincentives to promote cooperation in all stages of the justice process.[206] Thus, the shared social pasts that underpin the relationships between courtroom actors as well as their incentive systems would seem to be premised on substantive rationality rather than formal rationality.[207]

Shared social pasts also "allow[] strangers (prosecutors and judges) to transact categorical identities, assess action strategies based on behavioral expectations mobilized by these identities, and construct acts (negotiation, manipulation, conflict, etc.) more quickly than actors who lack such common backgrounds."[208] As applied to sentencing, judges would operate from a common script or baseline of knowledge to guide their decisions.[209] Insofar as older offenders and physical health are implicated, this shared script would equip judges with the knowledge that there is "functional variability" among the various offenders.[210] According to this perspective, judges will depart from the Guidelines only if there is credible evidence that extralegal factors merit consideration.[211]

204. *Id*. at 589.

205. Dixon, *supra* note 27, at 1158; *see also* JAMES EISENSTEIN ET AL., THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS (1988); Robert Emerson, *Holistic Effects in Social Decision-Making*, 17 LAW & SOC'Y REV. 425 (1983); Ulmer & Kramer, *Formal Decision-Making Criteria, supra* note 200, at 248.

206. *See* Rodney L. Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs,* 105 AM. J. SOC. 1357 (2000); Daniel P. Mears, *The Sociology of Sentencing: Reconceptualizing Decisionmaking Processes and Outcomes,* 32 LAW & SOC'Y REV. 667 (1998); Jeffrey T. Ulmer & John H. Kramer, *Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity,* 34 CRIMINOLOGY 383 (1996) [hereinafter Ulmer & Kramer, *Court Communities*].

207. *See* Ulmer & Kramer, *Court Communities*, *supra* note 206, at 403.

208. *See* Ulmer, *supra* note 202, at 589.

209. *See id*. This common baseline of knowledge is inherent within the Federal Sentencing Guidelines due to the fact that judges must operate within clearly defined parameters relative to the factors that can and cannot be considered during sentencing. *Id*. These parameters establish what is called a "heartland" of cases which categorizes offenders and their cases as typical or "normal." Koon v. United States, 518 U.S. 81, 93 (1996). Given this, federal judges are required to consider "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" when pronouncing sentences on defendants. *Id*. at 92–93.

210. Cohen, *supra* note 143, at 10.

211. In writing for the majority in *Koon*, Justice Kennedy found that courts are empowered to depart from the Guidelines where defendants are "atypical" of those cases found in the "heartland." *Koon*, 518 U.S. at 93. That is, "when a court finds an atypical case, one to which a particular guideline linguistically applies but where

Consequently, shared social pasts require that judges adopt sentencing policies that are premised on age neutrality because courtroom actors believe that criminal cases involving the elderly should be judged on an individualized basis where age is not relevant except in extraordinary cases.[212]

In keeping with Dixon's assertion that judicial and prosecutorial duties vary from court to court,[213] the argument can be advanced that shared social pasts also vary from court to court, or district to district. That is, judges who preside over courts within the same judicial district are likely to share similar judicial and sentencing philosophies. Thus, the variation in how judges view atypical defendants, such as those who are elderly and infirm, would be greatest across the judicial districts that do not share the same judicial norms.

Framing sentencing departures for elderly offenders in terms of shared social pasts also comports with the practical constraints and consequences of sentencing that have been elaborated upon by other researchers.[214] Darrell Steffensmeier's research with focal concerns suggests that when judges make sentencing decisions, they consider a myriad of factors including health condition, special needs, and costs to

conduct significantly differs from the norm, the court may consider whether a departure is warranted." *Id*.

212. Cohen correctly points out that any legal doctrine that ascribes incapacity to all elderly offenders needlessly robs them of their autonomy. Cohen, *supra* note 143, at 35. A better approach, he writes, is to focus

> on the specific functional impairment that may be associated with a physical or mental condition suffered by the elderly accused. Such an approach, where successful, does lead to full exculpation and avoids the virtually automatic commitment that follows an acquittal by reason of insanity. Where such an approach cannot be taken, the consequence is that criminal responsibility with age will possibly serve as a mitigating factor at sentencing.

Id. In many instances, judges are adamant that illnesses and age should not be "get out of jail free" cards. United States v. Spioch, 706 So. 2d 32, 36 (Fla. Dist. Ct. App. 1998). This perspective has also been adopted by federal judges who specifically look at whether elderly status or physical impairments would be a greater burden on these offenders should they be sentenced to prison. *E.g.,* United States v. Johnson, 318 F.3d 821 (8th Cir. 2003). For example, Judge Wollman did not believe a defendant's heart condition was extraordinary because it would not impair his ability to function in prison any more than other prisoners' freedom of movement would be restricted in such an environment. *Id*. at 826.

213. Dixon, *supra* note 27, at 1158–59.

214. *See, e.g*., Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male,* 36 CRIMINOLOGY 763 (1998).

the correctional system.[215] Fair and adequate consideration of these factors do not occur in a vacuum.[216] Judges must be provided with information from multiple sources, including presentence reports in order to justify their decisions to deviate from sentencing guidelines.[217] In the absence of such information, judges would have to rely upon their own assessments about offenders.[218] Individual assessments become especially relevant where judges are confronted with exceptional cases, such as older offenders or offenders with extraordinary physical impairments.[219] The shared social pasts that exists among judges will increase the likelihood that "exceptional" offenders will receive sentences that deviate from the Guidelines.[220]

The Federal Sentencing Guidelines require that judges give considerable weight to the seriousness of the offense and the criminal history of all offenders.[221] In addition, the Guidelines authorize federal judges to consider all other relevant conduct of the offender in establishing the

215. *Id*. at 767; *see also* United States v. Whitmore, 35 Fed. Appx. 307, 322–23 (9th Cir. 2002) (finding that district court judges possess a special knowledge of the defendants that they sentence). The knowledge of district court judges gives them a special vantage point to evaluate the need for punishment, treatment, and security concerns. *Whitmore*, 35 Fed. Appx. at 322–23.

216. *See* Ulmer & Kramer, *Court Communities*, *supra* note 206, at 402–04.

217. *See* Engen et al., *supra* note 104, at 110–11.

218. *See id*.; Ulmer & Kramer, *Court Communities*, *supra* note 206, at 402.

219. *See* Ronald A. Farrell & Malcom D. Holmes, *The Social and Cognitive Structure of Legal Decision-Making*, 32 SOC. Q. 529, 533 (1991). Judges are not restricted to only what is on the written record. There are instances where a judge's visual observations of the defendant provide a basis for the decision. *See, e.g*., United States v. Castro-Romero, No. 93-1415, 1995 WL 12024, at *1 (10th Cir. Jan. 12, 1995). In *Castro-Romero*, the judge based his decision partly on the fact that the defendant could still walk about and stand. *Id*. In a word, the defendant could still "function." *Id*.

220. *See* Albonetti, *Judicial Discretion*, *supra* note 198, at 249–50. It could be argued that the determinative element of the "social pasts" shared among judges is their humanity and compassion. Situations arise where judges point out that they will not sacrifice their humanity simply for the sake of punishment. *See* United States v. LaCarubba, 184 F. Supp. 2d 89, 99 (D. Mass. 2002). This issue is especially salient where the incarceration would exact an impact well beyond the incarceration of the defendant himself. *See id.* at 98–99. In *LaCarubba*, Judge Gertner adopted the view that application of the Federal Sentencing Guidelines was more than a mere word game. *LaCarubba*, 184 F. Supp. 2d at 98. In finding that the defendant should be granted a downward departure, he wrote:

> I see a continuum of cases representing the adverse impact of a defendant's incarceration can have on innocent dependants, from the "ordinary burdens" to "significantly" more burdens than usual. The issue is at what point on that continuum burdens are imposed on innocent dependents that are simply not justified by our legitimate need to punish the wrongdoer, that are cruel and unnecessary.

Id.

221. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2001).

appropriate sentencing range.[222] It is here that the notion of blameworthiness, the seriousness of the offense, as well as the degree of the harm caused by the offense, is implicated.[223] Blameworthiness is one of the key determinants of whether judges will deviate from the Guidelines.[224] Thus, it is presumed that the lesser the degree of blameworthiness attributed to an offender, the greater the likelihood that a departure will be granted.[225]

Additionally, judges consider the protection of the community when making sentencing decisions.[226] Judges must balance safety and security with concerns about recidivism.[227] In making such predictions, it is reasonable to suggest that the decision-making calculus of judges incorporates elements of substantive rather than formal legal rationality.[228]

While the research that will be presented here will not directly test whether organizational context influences judges' practices and decisions within their districts, it is nonetheless important to understand the factors that may shape or constrain their decision-making process. One possible starting point for beginning to understand how this occurs is

222. *See id*. Some judges may be fully aware that defendants are elderly; however, they will still refuse to grant a sentencing departure because of the conduct in which the defendant engaged. *See generally* United States v. Brooke, 308 F.3d 17 (D.C. Cir. 2002). Such occurrences may be commonplace where the judge believes the defendant has not learned from his past mistakes. In *Brooke*, for example, Judge Garland refused to grant a sentencing departure because the defendant continued to sell drugs from his home despite his advanced age. *Id*. at 21. Of primary concern to Judge Garland was the fact that there were no conditions outside of imprisonment that were sufficient given the defendant's past conduct. *Id*.

223. *See* Steffensmeier et al., *supra* note 214, at 766–67.

224. *See id*.

225. *Id*. at 767.

226. *Id*.

227. *Id*.

228. *See* Engen & Steen, *supra* note 206, at 1385; Savelsberg, *supra* note 200, at 1347; Ulmer, *supra* note 202, at 590; Ulmer & Kramer, *Court Communities*, *supra* note 206, at 383. In *United States v. Jimenez*, 212 F. Supp. 2d 214, 219 (S.D.N.Y. 2002), the judge weighed the physical limitations caused by the defendant's numerous medical problems with the likelihood that she would commit further crimes of the kind that led to her arrest and prosecution. In evaluating whether the defendant would neither recidivate, nor pose a danger to society, the judge concluded:

> It [would be] hard to imagine [the defendant] committing burglary, for example, or any crime of violence, in her present condition, or being able to undertake the rigors of illegal immigration yet again after being deported. Narcotics dealing may not take advanced education, but it is difficult to imagine a brain-injured, amnesiac, occasionally hallucinating individual, likely to suffer tremors and dizziness from her medication, having much success in that highly competitive field.

Id.

through the shared social pasts that they construct relative to their courts and the defendants that appear before them. In large measure, these shared social pasts are the product of the information that is available to them at the time of sentencing.[229] Because many judges have shown reluctance to depart from the Federal Sentencing Guidelines, understanding the bureaucratic and legal constraints within which they operate is important.[230] These constraints, however, may vary across the circuits relative to the degree to which judges feel they can deviate when they are confronted with unusual cases or unusual offenders.[231]

IV. The Current Study

Since the inception of the Federal Sentencing Guidelines, a number of research studies have looked at issues ranging from their impact on plea bargaining,[232] gender and ethnicity,[233] drugs,[234] and even interdistrict variation.[235] However, there is a paucity of research that has focused exclusively on downward departures based on "not ordinarily relevant factors." To be fair, there are a number of studies that have explored how the Federal Sentencing Guidelines are influenced by race[236]

229. *See* Mears, *supra* note 206, at 667.

230. *See generally* Engen et al., *supra* note 104.

231. *See id*. at 109.

232. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 501 (1992); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months,* 27 AM. CRIM. L. REV. 231, 232 (1989); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-*Minstretta *Period,* 91 NW. U. L. REV. 1284, 1284 (1997).

233. Celesta A. Albonetti, *The Effects of the "Safety Valve" Amendment on Length of Imprisonment for Cocaine Trafficking/Manufacturing Offenders: Mitigating the Effects of Mandatory Minimum Penalties and Offender's Ethnicity*, 87 IOWA L. REV. 401 (2002) [hereinafter Albonetti, *Safety Valve Amendment*]; Celesta A. Albonetti, *The Joint Conditioning Effect of Defendant's Gender and Ethnicity on Length of Imprisonment Under the Federal Sentencing Guidelines for Drug Trafficking/Manufacturing Offenders*, 6 J. GENDER RACE & JUST. 39 (2002) [hereinafter Albonetti, *Joint Conditioning Effect*].

234. Celesta Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses*, 31 LAW & SOC'Y REV. 789 (1997) [hereinafter Albonetti, *Federal Sentencing Guidelines*]; Terence Dunworth & Charles D. Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience*, 66 S. CAL. L. REV. 99 (1992); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts,* 30 CONN. L. REV. 569 (1998).

235. Hofer et al., *supra* note 37, at 239.

236. Albonetti, *The Joint Conditioning Effect*, *supra* note 233; Albonetti, *Safety Valve Amendment*, *supra* note 233; Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. CAL. L. REV. 367 (1992); David B. Mustard,

and gender,[237] but little else is known of the degree to which judges consider factors such as age and physical condition. This empirical analysis is an attempt to fill in some of the gaps in our knowledge of the influence of these factors.

More research is necessary to fully understand the impact of age on the sentencing process in the federal system. Previous case law and sentencing research at the state and federal levels suggest that the influence of extralegal factors may remain important at the sentencing phase despite the restrictive nature of the Guidelines.[238] This article examines the extent to which elderly status influences the courts' use of downward departure. Previous case law suggests that the courts differ in their views of the elderly status and/or the health of defendants.[239] Some courts appear to be more inclined to depart for reasons of age and/or infirmity, while other courts strictly interpret the Guidelines and reject the use of departures for specific offender characteristics such as age and/or health concerns.[240] Clearly the federal courts' response to older offenders has far-reaching implications for the federal corrections system.

Several issues remain unresolved in the literature on age and sentencing decisions, for which two research questions will be addressed.

> (1) To what extent does elderly or nonelderly status influence the likelihood that defendants receive a downward departure from the prescribed federal sentence, controlling for district variation within circuit courts?
>
> (2) To what extent are elderly defendants receiving downward departures for reasons related to their age and extraordinary physical impairment, compared to nonelderly defendants within each circuit court?

Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts, 44 J. L. & ECON. 285 (2001).

237. Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181 (1994).

238. *See* Kautt, *supra* note 24, at 658.

239. *See, e.g.*, United States v. Collins, 122 F.3d 1297, 1306 (10th Cir. 1997); United States v. Paradies, 14 F. Supp. 2d 1315, 1320 (N.D. Ga. 1998).

240. *Compare Collins*, 122 F.3d at 1306 ("[Age] could be germane to whether the career offender category is appropriately applied . . . .") (quoting United States v. Bowser, 941 F.2d 1019, 1024 (10th Cir. 1991)), *with Paradies*, 14 F. Supp. 2d at 1320 ("The Court is reluctant to carve out an exception in the Guidelines for those who are advanced in age.").

A. Data and Methods

Federal Sentencing Guideline departures were examined using data obtained from the U.S. Sentencing Commission's *Monitoring of Federal Criminal Sentences*.[241] The data included all cases sentenced under the Sentencing Reform Act during the 1999 fiscal year (October 1, 1998 to September 30, 1999) for the Second, Seventh, Ninth, and Eleventh Circuit Courts.[242] Circuits were purposively selected based on geographic representation and the proportion of cases involving elderly offenders. A total of 25,333 criminal defendants were included in the current study.

The U.S. Sentencing Commission collects and analyzes data about each offender sentenced under the Federal Sentencing Guidelines, including information obtained from: (1) the indictment; (2) a presentence report; (3) a statement of reasons; (4) a written plea agreement when applicable; and (5) the judgment of conviction.[243] Information from these sources was coded and added to the Commission's computerized datasets.

A series of legal, extralegal, and court context factors were utilized to address the two research questions. The U.S. Sentencing Commission tracks and collects numerous legal factors for each defendant.[244] Several of those factors were selected for inclusion in the current analysis.[245] Two of the more meaningful legal factors documented widely in the sentencing literature and used here include offense severity and criminal history.[246] Offense severity reflects the final offense level for the current offense(s) for each defendant, as established by the court.[247] The offense level ranged in value from one (least severe) to fifty-two (most severe). The criminal history of each defendant was determined by calculating points which were then categorized to denote the appropriate history score. Criminal history categories ranged from one (little) to six (a significant amount of criminal history). One additional legally relevant factor was included in the study, a dichotomous variable indicating

241. MONITORING OF FEDERAL CRIMINAL SENTENCES, *supra* note †.
242. *Id*. at 4.
243. *Id*. at 3.
244. *See id*.
245. *See id*. The legal factors that are included in the data analysis are offense severity, minimal role, and criminal history.
246. *See, e.g.*, Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 52–53 (2003).
247. *See id*. at 53.

whether the defendant played a minor (1) or significant (0) role in the commission of the crime.

The current study focuses on the importance or relevance of defendants' age in the likelihood of receiving a downward departure. Secondarily, this study examines the basis or reason for downward departures given by the circuit courts. Based on previous research,[248] elderly status was operationalized as a defendant who was fifty years of age or older (1). Defendants less than fifty years of age represented the reference group (0). Several other extralegal measures were included in the current study. Marital status was dummy coded to equal one (1) if the defendant was married or living together with someone and zero (0) if he were single.[249] The presence of dependants was measured as a continuous variable measuring the number of people for whom the defendant provided "support."[250] Race and gender were also included as dichotomized measures that reflected whether the defendant was either white (0) or nonwhite (1), and male (0) or female (1).[251]

The court context was also considered to be an important influence on the use of departures for elderly offenders. Within each circuit court, judicial districts were operationalized using a series of dummy variables reflecting the district in which the defendant was sentenced. These district court variables were introduced into the analysis as a way to control for the possible effects of district court variations within each circuit court. The final measure of interest involved the dependent variable, downward departure. The U.S. Sentencing Commission documents departures during the sentencing process by coding cases as having either no departure, an upward departure, a downward departure, or a downward departure due to substantial assistance.[252] The departure measure was recoded from four categories into two in order to reflect

248. *See* Steffensmeier et al., *supra* note 214.

249. Gayle Bickle & Ruth Peterson, *The Impact of Gender-Based Family Roles on Criminal Sentencing*, 38 SOC. PROBS. 372, 379 (1991); Keith Findley & Meredith Ross, *Access, Accuracy, and Fairness: The Federal Pre-Sentence Investigation Under* Julian *and the Sentencing Guidelines,* 1989 WIS. L. REV. 837, 841.

250. *See* Leslie Acoca & Myrna Raeder, *Severing Family Ties: The Plight of Non-Violent Female Offenders and Their Children,* 11 STAN. L. & POL'Y REV. 133, 136 (1999); Susan Ellingstad, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 983 (1992).

251. *See generally* Albonetti, *Joint Conditioning Effect*, *supra* note 233; Shawn Bushway & Anne Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing,* 35 LAW & SOC'Y REV. 733 (2001); Nagel & Johnson, *supra* note 237.

252. *See* Maria Limbert, *Problems Associated with Prosecutorial Control over Filing Substantial Assistance Motions and a Proposal for a Substantial Assistance Pre-Sentencing Hearing*, 27 J. LEGIS. 251, 253 (2001).

whether a downward departure occurred. Downward departures were coded as one (1) to reflect the fact that the defendant had received a downward departure, and all other possibilities (excluding missing data) were coded as zero (0). Because the focus in the current study was on the use of judicial discretion, substantial assistance departures were excluded because they represent motions made by prosecutors and are altogether different from other types of downward departures.[253]

B. Findings

1. DESCRIPTIVE STATISTICS ACROSS CIRCUITS

Descriptive statistics for each circuit court are presented in Table 1. The results indicate that the percentage of elderly defendants for each circuit court ranged from a high of 12.7% in the Second Circuit to a low of 6.9% in the Ninth Circuit. The percentage of nonwhite defendants varied across the circuits from 45.9% in the Seventh Circuit, followed by 43.1% in the Eleventh Circuit, 38.9% in the Second Circuit, and 16.9% in the Ninth Circuit. The percentage of female defendants ranged from a high of 17.1% of those sentenced in the Seventh Circuit to 13.3% of those sentenced in the Ninth Circuit. The percentage of cases in which the defendant played a minimal role varied across each of the circuits, ranging from 21.3% of defendants in the Ninth Circuit to 5.7% of defendants in the Seventh Circuit. The average offense severity score was highest in the Eleventh Circuit ($\bar{x}$ = 20.83; SD = 9.67) and lowest in the Ninth Circuit ($\bar{x}$ = 16.91; SD = 7.53). The average criminal history score was highest in the Ninth Circuit ($\bar{x}$ = 2.57; SD = 1.81) and lowest in the Second Circuit ($\bar{x}$ = 1.79; SD = 1.42). Finally, the use of downward departures varied rather significantly depending on the circuit. For example, the Ninth Circuit utilized downward departures in 36.4% of the cases sentenced during the year, whereas the Seventh Circuit granted downward departures in only 7.1% and the Eleventh Circuit in 6.5% of the cases.

253. *See* Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 572 (2003). A substantial assistance departure can be granted to defendants who help capture and prosecute other criminals. *Id.* at 571. In such situations, the Guidelines permit a court to depart downward, upon motion by the prosecution. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2001).

Table 1
Descriptive Information for Each Circuit Court

VARIABLE	2D CIRCUIT (*n* = 4,432)		7TH CIRCUIT (*n* = 2,289)		9TH CIRCUIT (*n* = 12,584)		11TH CIRCUIT (*n* = 6,028)	
	f	%	*f*	%	*f*	%	*f*	%
Elderly								
No (0)	3,788	87.3	2,048	89.9	10,943	93.1	5,374	89.3
Yes (1)	549	12.7	230	10.1	808	6.9	642	10.7
Nonwhite								
No (0)	2,473	61.1	1,182	54.1	9,940	83.1	3,369	56.9
Yes (1)	1,574	38.9	1,004	45.9	2,023	16.9	2,547	43.1
Female								
No (0)	3,760	85.1	1,897	82.9	10,886	86.7	5,067	84.1
Yes (1)	657	14.9	390	17.1	1,677	13.3	961	15.9
Married								
No (0)	2,174	52.3	1,319	60.3	5,610	53.4	3,146	53.9
Yes (1)	1,982	47.7	867	39.7	4,886	46.6	2,686	46.1
Dependents								
Mean	1.74		1.47		1.40		1.53	
(SD)	(1.84)		(1.79)		(1.68)		(1.68)	
Range	0 – 16		0 – 30		0 – 14		0 – 14	
Minimal Role								
No (0)	3,423	81.1	2,067	94.3	8,870	78.7	5,024	85.6
Yes (1)	797	18.9	124	5.7	2,400	21.3	846	14.4
Offense Severity								
Mean	19.13		20.11		16.91		20.83	
(SD)	(9.60)		(9.41)		(7.53)		(9.67)	
Range	2 – 50		2 – 46		2 – 43		1 – 52	
Criminal History								
Mean	1.79		2.29		2.57		2.24	
(SD)	(1.42)		(1.68)		(1.81)		(1.71)	
Range	1 – 6		1 – 6		1 – 6		1 – 6	
Departure								
No (0)	3,317	80.5	2,023	92.9	7,032	63.6	5,481	93.5
Yes (1)	802	19.5	155	7.1	4,029	36.4	384	6.5

2. DOWNWARD DEPARTURES BY DISTRICT COURT

Next, we examined downward departures within each circuit broken down by district court (see Table 2). As discussed earlier, prior research suggests that a significant amount of variation in decision making occurs at the district court level.[254] This in some ways appears to be the case in the current research with the decision of whether to use downward departures. In some circuits, such as the Second and the Ninth, there appears to be a significant amount of difference across district courts in the use of downward departures for defendants. The percentage of cases receiving a downward departure in the Second Circuit ranges from a high of 31.7% in the Connecticut District Court to a low of 8.8% in the New York Western District Court. In the Ninth Circuit, the percentage of cases receiving a downward departure ranges from a high of 57.9% in the Arizona District Court, to 26.3% in the Washington Western District Court, to 12.9% in the Montana District Court, to 0% in the Northern Mariana Islands District Court. In the Seventh and Eleventh Circuits, there is less variation across district courts. These descriptive findings seem to suggest further support for the need to control for district court variations.

Table 2

Descriptive Information for Downward Departures by District Court

2D CIRCUIT			7TH CIRCUIT			9TH CIRCUIT			11TH CIRCUIT		
	f	%		*f*	%		*f*	%		*f*	%
CT			IL—North			AZ			AL—North		
No	170	68.3	No	528	90.4	No	1,112	42.1	No	310	98.1
Yes	79	31.7	Yes	56	9.6	Yes	1,529	57.9	Yes	6	1.9
NY- North			IL—Central			CA—North			AL—Mid		
No	307	88.2	No	276	92.0	No	385	78.9	No	189	95.9
Yes	41	11.8	Yes	24	8.0	Yes	103	21.1	Yes	8	4.1
NY—East			IL—South			CA—East			AL—South		
No	931	69.4	No	339	95.8	No	681	91.0	No	279	94.9
Yes	410	30.6	Yes	15	4.2	Yes	67	9.0	Yes	15	5.1

(*Continued on next page*)

254. *See* Kautt, *supra* note 24, at 656 (finding that differential sentencing patterns exist at the district court level and that there was "locational variation" between district courts in that both legal and extralegal factors differentially influenced sentence outcomes).

Table 2—*Continued*

2D CIRCUIT			7TH CIRCUIT			9TH CIRCUIT			11TH CIRCUIT		
	f	%		*f*	%		*f*	%		*f*	%
NY—South			IN—North			CA—Central			FL—North		
No	1,483	88.3	No	293	94.2	No	721	90.4	No	373	96.6
Yes	197	11.7	Yes	18	5.8	Yes	77	9.6	Yes	13	3.4
NY—West			IN—South			CA—South			FL—Mid		
No	312	91.2	No	207	92.0	No	1,823	51.0	No	1,356	92.9
Yes	30	8.8	Yes	18	8.0	Yes	1,755	49.0	Yes	103	7.1
VT			WI—East			HA			FL—South		
No	114	71.7	No	258	92.8	No	323	93.1	No	1,814	92.7
Yes	45	28.3	Yes	20	7.2	Yes	24	6.9	Yes	142	7.3
			WI—West			ID			GA—North		
			No	122	92.9	No	112	87.5	No	605	89.6
			Yes	4	7.1	Yes	16	12.5	Yes	70	10.4
						MT			GA—Mid		
						No	242	87.1	No	333	95.4
						Yes	36	12.9	Yes	16	4.6
						NV			GA—South		
						No	400	8.9	No	222	95.3
						Yes	50	11.1	Yes	11	4.7
						OR					
						No	474	84.6			
						Yes	86	15.4			
						WA—East					
						No	168	59.2			
						Yes	116	40.8			
						WA—West					
						No	376	73.7			
						Yes	134	26.3			
						Guam					
						No	80	94.1			
						Yes	5	5.9			
						N Mariana Island					
						No	14	100			
						Yes	0	0			
						AK					
						No	121	63.6			
						Yes	31	36.4			

3. ELDERLY STATUS AND DOWNWARD DEPARTURES

In order to examine the influence of elderly status on the likelihood of defendants receiving downward departures, a logistic regression model was specified for each of the four circuit courts included in the current study. Results for the Second Circuit are presented in Table 3 with measures of significance noted.

Table 3

Logistic Regression Results for Downward Departures in the Second Circuit

VARIABLES	B	S.E.	ODDS RATIO	PROBABILITY DIFFERENCE
Elderly Status	.258	.129	1.29*	6.33
Female	.524	.118	1.69**	12.83
Nonwhite	-.104	.094	.901	-2.60
Married	-.062	.095	.940	-1.55
Dependents	.042	.025	1.04	.98
Minimal Role	.375	.107	1.45**	9.18
Offense Severity	.012	.005	1.01*	.25
Criminal History	.031	.034	1.03	.74
District				
CT	1.46	.247	4.31**	
NY—North	.383	.278	1.47	
NY—East	1.32	.214	3.74**	
NY—South	.184	.217	1.20	
VT	1.230	.277	3.42**	
Constant	-2.71	.234	.067**	

N = 3,580
-2 Log L = 3303.19
Chi-Square = 260.20
Cox & Snell R-square = .070
d.f = 13

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

Reference Group: NY—West

In the Second Circuit, elderly status ($b = .258$; $p < .05$) significantly influenced the likelihood of receiving a downward departure, control-

ling for the effects of the other factors in the model, including possible district court differences. Elderly defendants were six percent more likely to receive a downward departure compared to nonelderly defendants. Female defendants (b = .524; p < .001) also were more likely to receive a downward departure. As might be expected those defendants who played a minimal role in the offense were significantly more likely than those who assumed a more serious role in the offense to be granted a downward departure (b = 3.75; p < .001). Surprisingly, those defendants with a more severe current offense also had a greater likelihood of receiving a downward departure (b = .012; p < .05). This may be the result of decisions made by judges who believe the Guidelines are overly punitive for the offenses committed.

Logistic regression results for downward departures in the Seventh Circuit are presented in Table 4. Overall, the Seventh Circuit model was significant. Elderly defendants (b = .517; p < .05) were significantly more likely compared to nonelderly defendants to receive a downward departure, controlling for possible district court differences in sentencing defendants. In fact, elderly defendants were almost thirteen percent more likely to receive a downward departure compared to nonelderly defendants. Female defendants (b = 1.12; p < .001) were also significantly more likely compared to male defendants to receive downward departures. They were twenty-five percent more likely to obtain a downward departure over male defendants. Finally, white defendants (b = -.656; p < .05) were almost sixteen percent more likely to receive a downward departure compared to nonwhite defendants. None of the legal factors were found to be significant predictors of downward departures in this circuit court.

Table 4

Logistic Regression Results for Downward Departures in the Seventh Circuit

VARIABLES	B	S.E.	ODDS RATIO	PROBABILITY DIFFERENCE
Elderly Status	.517	.257	1.68*	12.69
Female	1.12	.211	3.07**	25.43
Nonwhite	-.656	.204	.519*	-15.83
Married	.291	.199	1.34	7.26

(*Continued on next page*)

Table 4—*Continued*

VARIABLES	B	S.E.	ODDS RATIO	PROBABILITY DIFFERENCE
Dependents	-.065	.062	.937	-1.63
Minimal Role	.166	.332	1.18	4.13
Offense Severity	.015	.011	1.02	.50
Criminal History	.070	.062	1.07	1.69
District				
IL—North	1.29	.535	3.63*	
IL—Central	1.10	.561	2.99	
IL—South	.318	.589	1.37	
IN—North	.748	.577	2.11	
IN—South	.918	.577	2.50	
WI—East	.752	.579	2.12	
Constant	-4.04	.587	.018**	

N = 1,970
-2 Log L = 957.47
Chi-Square = 62.95
Cox & Snell *R*-square = .031
d.f = 14

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

Reference Group: WI—West

The results from the logistic regression analysis for the Ninth Circuit indicated a slightly different pattern. In the Ninth Circuit, elderly status was not a significant predictor of the likelihood of obtaining a downward departure. However, male defendants (b = -.175; p < .05) compared to female defendants, and white defendants (b = -.676; p < .001) compared to nonwhite defendants were significantly more likely to be granted downward departures than their counterparts. In fact, white defendants were approximately sixteen percent more likely to be given a downward departure at sentencing compared to nonwhite defendants. Several legal factors were also important in the decision to give a downward departure. Defendants who played a minimal role (b = 1.02; p < .001), who committed a more serious offense (b = .021; p < .001), and who had a more extensive criminal history (b = .075; p < .001) were sig-

Table 5

Logistic Regression Results for Downward Departures in the Ninth Circuit

VARIABLES	B	S.E.	ODDS RATIO	PROBABILITY DIFFERENCE
Elderly Status	-.045	.106	.956	-1.12
Female	-.175	.077	.840*	-4.35
Nonwhite	-.676	.081	.509**	-16.27
Married	.078	.058	1.08	1.92
Dependents	-.002	.017	.998	-.05
Minimal Role	1.02	.071	2.79**	23.61
Offense Severity	.021	.004	1.02**	.50
Criminal History	.075	.016	1.08**	1.92
District				
AZ	2.59	.468	13.34**	
CA—North	1.02	.481	2.76*	
CA—East	-.192	.491	.825	
CA—Central	-.034	.483	.967	
CA—South	2.07	.470	7.95**	
HA	-.244	.519	.783	
ID	.135	.541	1.14	
MT	.369	.507	1.45	

(*Continued on next page*)

Table 5—*Continued*

VARIABLES	B	S.E.	ODDS RATIO	PROBABILITY DIFFERENCE
NV	.111	.491	1.12	
OR	.763	.485	2.15	
WA—East	1.78	.485	5.94**	
WA—West	1.31	.477	3.72*	
AK	1.03	.512	2.79*	
Constant	-2.74	.474	.065**	

N = 8,716
-2 Log L = 9317.11
Chi-Square = 2414.50
Cox & Snell *R*-square = .242
d.f = 21
* $p < .05$ ** $p < .001$
Reference Group: Guam & N Mariana Island

nificantly more likely to be granted a downward departure at sentencing. Those defendants determined to have played a limited role in the offense were almost twenty-four percent more likely to receive a downward departure compared to those who took a more active role in the crime. The results for criminal history and offense severity appear to be in the opposite direction. However, this may be the result of judges who feel that the Guidelines, which are primarily based on these two factors, are unduly punitive toward offenders.

Results for the final logistic regression model for the Eleventh Circuit are reported in Table 6. Overall, the model was significant, but the independent measures explained only two percent of the variance in the dependent variable. Once again, elderly defendants ($b = .969$; $p < .001$) were significantly more likely, compared to nonelderly defendants, to obtain downward departures. More specifically, elderly defendants were almost twenty-three percent more likely to be granted a downward departure compared to nonelderly defendants. Race was also a significant factor, with white defendants ($b = -2.95$; $p < .05$) more likely than nonwhite defendants to receive downward departures. Criminal history was the only legal measure that significantly predicted the outcome measure. Defendants who had a higher criminal history score ($b = .143$; $p < .001$) were significantly more likely, compared to defendants with

lower criminal history scores, to be granted downward departures at sentencing.

Table 6

Logistic Regression Results for Downward Departures in the Eleventh Circuit

VARIABLES	B	S.E.	ODDS RATIO	PROBABILITY DIFFERENCE
Elderly Status	.969	.144	2.64**	22.53
Female	.202	.157	1.22	4.95
Nonwhite	-.295	.127	.744*	-7.34
Married	.151	.120	1.16	3.70
Dependents	-.042	.038	.959	-1.05
Minimal Role	.236	.152	1.27	5.95
Offense Severity	.033	.006	1.00	.00
Criminal History	.143	.034	1.15**	3.49
District				
AL—Mid	1.06	.595	2.89	
AL—South	1.32	.525	3.74*	
FL—North	.745	.534	2.11	
FL—Mid	1.48	.465	4.38	
FL—South	1.56	.463	4.74*	
GA—North	2.07	.472	7.91**	
GA—Mid	1.18	.524	3.27*	
GA—South	1.11	.567	3.04*	
Constant	-4.64	.484	.010**	

N = 5,507

-2 Log L = 2546.31

Chi-Square = 118.87

Cox & Snell *R*-square = .021

d.f = 16

* $p < .05$

** $p < .001$

Reference Group: AL—North

4. REASONS FOR DOWNWARD DEPARTURES

Next, we examined the reasons given by the courts for downward departures in each circuit. Approximately twenty-three percent (*n* = 5370) of the criminal defendants sentenced in the Second, Seventh, Ninth, and Eleventh Circuits during 1999 received a downward departure from the U.S. Sentencing Guidelines. Judges who decided to depart downward from the Federal Sentencing Guidelines were required to indicate the reason or reasons for their decision. An analysis of these reasons indicates that judges relied on a wide variety of justifications for their decisions across the different circuits (see Table 7). The most cited

Table 7

Reasons for Downward Departures by Circuit Court

2D CIRCUIT (*n*= 802)	7TH CIRCUIT (*n*= 155)	9TH CIRCUIT (*n*= 4,029)	11TH CIRCUIT (*n*= 384)
Family Ties (23.2%)	Criminal History Score Over-Represents Involvement (20.0%)	Plea Agreement (25.9%)	Criminal History Score Over-Represents Involvement (29.4%)
Mitigating Circumstances (14.6%)	Mitigating Circumstances (13.5%)	Deportation (17.0%)	Mitigating Circumstances (9.9%)
Plea Agreement (11.3%)	Family Ties (11.6%)	Isolated Incident (16.3%)	Physical Condition (8.6%)
Deportation (10.5%)	Diminished Capacity (10.3%)	Mitigating Circumstances (12.4%)	Diminished Capacity (7.8%)
Criminal History Score Over-Represents Involvement (9.0%)	Plea Agreement (9.0%)	Criminal History Score Over-Represents Involvement (7.7%)	Not Representative of the "Heartland" (6.8%)

(*Continued on next page*)

Table 7—*Continued*

2D CIRCUIT (*n*= 802)	7TH CIRCUIT (*n*= 155)	9TH CIRCUIT (*n*= 4,029)	11TH CIRCUIT (*n*= 384)
Rehabilitation (7.6%)	Physical Condition (8.4%)	Other Reasons (3.8%)	Age (5.7%)
Physical Condition (6.0%)	Other Reason (5.2%)	Family Ties (2.8%)	Other Reason (5.7%)
Other Reason (5.6%)	Missing / Indeterminable (5.2%)	Diminished Capacity (1.5%)	Family Ties (4.7%)
Isolated Incident (5.5%)	Acceptance of Responsibility (3.9%)	Physical Condition (1.3%)	Plea Agreement (4.4%)
Acceptance of Responsibility (4.2%)	Not Representative of the "Heartland" (3.2%)	Not Representative of the "Heartland" (1.0%)	Isolated Incident (3.6%)

reason for giving a downward departure to offenders in the Second Circuit involved family ties (23.2%), followed by general mitigating circumstances (14.6%), a plea agreement (11.3%), and deportation (10.5%). A different pattern emerges in the Seventh Circuit where the most reported reason for granting a downward departure involved the recognition that the defendant's criminal history score overrepresented their involvement in the offense (20.0%), followed by general mitigating circumstances (13.5%), family ties (11.6%), and diminished capacity (10.3%). A plea agreement (25.9%) was the most cited reason in the Ninth Circuit, followed by deportation (17.0%), the crime being an isolated incident (16.3%), and general mitigating circumstances (12.4%). In the Eleventh Circuit, the most frequently reported reason for granting a downward departure involved the belief that the criminal history score overrepresented the defendant's involvement in the crime(s) (29.4%), followed by general mitigating circumstances (9.9%), and the defendant's physical condition (8.6%).

Reasons for downward departures were examined next for just the elderly defendants. In the Second Circuit, the most cited reason for granting downward departures involved family ties (28.6%), followed

by physical condition (18.8%), and general mitigating circumstances (13.4%). Family ties (16.7%) were also the most cited departure reason in the Seventh Circuit, followed by physical condition (16.7%), and other reasons (12.5%). In the Ninth Circuit, the most reported reason for granting a downward departure involved the observation that the crime was an isolated incident (17.3%), followed by general mitigating circumstances (16.3%), plea agreements (13.9%), and the defendant's physical condition (9.9%). In the Eleventh Circuit, physical condition of the defendant (27.4%) was the most cited departure reason, followed by age (23.8%) and the belief that the criminal history score of the defendant overrepresented their involvement (16.7%).

Table 8
Downward Departure Reasons for Elderly Defendants

2D CIRCUIT (*n*= 112)	7TH CIRCUIT (*n*= 24)	9TH CIRCUIT (*n*= 202)	11TH CIRCUIT (*n*= 94)
Family Ties (28.6%)	Family Ties (16.7%)	Isolated Incident (17.3%)	Physical Condition (27.4%)
Physical Condition (18.8%)	Physical Condition (16.7%)	Mitigating Circumstances (16.3%)	Age (23.8%)
Mitigating Circumstances (13.4%)	Other Reason (12.5%)	Plea Agreement (13.9%)	Criminal History Score Over-represents Involvement (16.7%)
Age (8.0%)	* 6 reasons tied (8.3%)	Physical Condition (9.9%)	Not Representative of the "Heartland" (9.5%)
Isolated Incident (8.0%)		Other Reasons (6.9%)	Isolated Incident (6.0%)
		Deportation (6.9%)	Diminished Capacity (6.0%)

V. Implications and Conclusions

Prior to the introduction of the Federal Sentencing Guidelines, the expertise of federal judges for choosing the right punishment for defen-

dants that would maximize their rehabilitative chances yet systematically impose punishment was largely unchallenged in the sentencing arena.[255] However, this presumed expertise led to wildly varied and inconsistent punishment for similarly situated defendants.[256] As this disparity increased over the years, there was increased pressure to reform the sentencing laws.[257] Ultimately, the Federal Sentencing Guidelines were promulgated in 1987 as the antidote for the seemingly arbitrary and inconsistent sentences that were handed down by federal judges.[258] To this end, the Guidelines adopted the basic approach of restoring honesty, uniformity, and integrity to sentencing through narrowing the number of legally relevant characteristics that could affect the sentence of defendants.[259] Despite the apparent recognition that the discretion of judges needed to be constrained, some were still concerned that consideration of every conceivable combination of offender characteristics and crimes would render the Guidelines unwieldy, unworkable, and impossible to use.[260] In order to resolve this issue, the Sentencing Commission adopted both an empirical and philosophical approach to sentencing wherein categories of offenses and offenders were developed that were broad enough to capture a range of crimes and other characteristics that were believed to be most relevant to sentencing.[261]

Though the philosophical approach adopted by the Sentencing Commission seemed to reflect a "just deserts" orientation, it did recognize that there would be occasions where it would be appropriate to sentence some offenders outside of the categories that it prescribed.[262] Two such areas were elderly status[263] and extraordinary physical impairment.[264] While it is clear that the Sentencing Commission did not intend for these two categories to serve as "get out of jail free" cards, it is equally clear that the Commission was aware that extended terms of imprisonment were not appropriate punishments for some offenders.[265]

255. *See* Marvin Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 226 (1984).
256. *Id*. at 226–27.
257. *Id*. at 234.
258. U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A (2001).
259. *Id*.
260. *See id*.
261. *See id*.
262. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (2001).
263. *Id.* § 5H1.1.
264. *Id.* § 5H1.4.
265. *See id.* ch. 5, pt. H, introductory cmt.

This legal and empirical analysis of sections 5H1.1 and 5H1.4 of the Federal Sentencing Guidelines had the goal of investigating two primary questions: (1) the extent to which elderly status influences decisions in the circuit courts and (2) the extent to which elderly offenders receive downward departures for reasons related to their age and physical condition. In general, the analyses revealed that there is significant variation within circuits relative to offenders who receive sentencing departures. The greatest amount of variation was found in two circuits (Second and Ninth) relative to the use of downward departures whereas the remaining circuits (Seventh and Eleventh) had much less variation. The differential use of downward departures may suggest that these district judges really do engage in the construction of shared social pasts to determine the appropriate sentences for defendants.[266] In other words, the judicial and sentencing philosophies from which they operate differs from district to district such that judges within similar districts use common experiences and knowledge to define elderly status and the conditions under which it is permissible to use it as a basis for a downward departure. These common experiences may explain why departures are granted in 57.9% of cases in Arizona but only granted in 11.1% of cases in Nevada. Although the analysis did not directly test the theory that underlies shared social pasts, the inference can be drawn that judges within the same judicial circuits hold or share common beliefs about the proper interpretation of provisions in the Guidelines and their applicability to elderly offenders.

Even beyond these general findings, the analysis indicated that there were variations in the degree to which the circuits used elderly status as the basis for a downward departure. In three of the circuit courts, elderly status proved to be a significant predictor of whether a downward departure would be granted. Elderly status was not a significant predictor in the Ninth Circuit. This finding was surprising in light of the fact that some legal commentators have described this circuit as the most "liberal" of all the circuits.[267] These findings may be best viewed in light of what some researchers have called the "ecological fal-

266. *See* Ulmer, *supra* note 202, at 587.

267. Jeffrey Bleich, *The Reversed Circuit,* OR. ST. B. BULL, May 1997, at 17, 20; *see also* Clay Calvert & Robert Richards, *Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press,* 23 LOY. L.A. ENT. L. REV. 259 (2003); Jerome Farris, *The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction?,* 58 OHIO ST. L. J. 1465 (1997); Arthur Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989).

lacy," where there is an assumption that all cases are handled in the same manner within a given circuit.[268]

What is most salient about the findings is that the jurisdiction in which a defendant is tried and sentenced significantly influences the likelihood that elderly status will be a sufficient reason for granting a downward departure.[269] This variation lies at the heart of the frustration that judges have expressed relative to some of the provisions of the Guidelines, notably sections 5H1.1 and 5H1.4.[270] Clearly, it cannot be argued that all elderly offenders or those with extraordinary physical impairments merit downward departures in all judicial circuits. However, the proposition can be advanced that they are mitigating factors that deserve solicitous scrutiny by the courts. To this end, several proposals can be offered. Initially, it is suggested that a uniform definition of elderly status be adopted. Some commentators believe elderly status should be defined in accordance with Social Security Administration standards.[271] Adopting this definition would in many instances alleviate the problem of guesswork in which some federal courts engage.[272] A uniform definition would also ensure that the federal courts have a baseline that would then shift the burden to the offender to demonstrate that his or her age is such that incarceration would be unduly burdensome. Some courts have already shifted this burden to defendants when it is clear that offenders are in good physical health and still lead active lives.[273]

Nevertheless, some criminal justice professionals tend to use very different definitions of elderly status.[274] For example, in a report written by the Coalition for Federal Sentencing Reform, it was found that "two states reported age 50 and above as qualifying for elderly, four states

268. *See* Paul Mohai, *The Demographics of Dumping Revisited: Examining the Impact of Alternate Methodologies in Environmental Research*, 14 VA. ENVTL. L.J. 615, 619 (1995).

269. This finding is in line with research which has shown that "location" is a significant predictor of the disparity that exists in sentencing. *See id.*

270. Some judges, in evaluating whether a departure is merited, have commented that section 5H1.1 and section 5H1.4 are elusive concepts. *See* United States v. LaCarubba, 184 F. Supp. 2d 89, 92–95 (D. Mass. 2002). As such, who or what is elderly is dependent upon individual assessments of the defendant by the judge. Judge Gertner, for example, has said that what is exceptional or extraordinary rests in the "eyes of the beholder" to the extent that few judges will view the same defendant and the problems presented by him/her in the same manner. *Id*. at 95.

271. JOANN B. MORTON, U.S. DEP'T OF JUSTICE, AN ADMINISTRATIVE OVERVIEW OF THE OLDER INMATES 4 (1992), http://www.nicic.org/pubs/1992/010937.pdf.

272. *Id*.

273. United States v. Tocco, 200 F.3d 401, 434 (2000).

274. *See* COALITION FOR FED. SENTENCING REFORM, EXECUTIVE SUMMARY, Dec. 1998, http://www.sentencing.org/exec.pdf.

used 55 years, one state 60 years, and two states 65 years."[275] A number of state correctional agencies have taken different approaches to the issue of elderly status.[276] In Texas, for example, elderly status is ascribed to inmates who are fifty-five years of age.[277] However, states such as Georgia, Ohio, and Oklahoma all define elderly or older inmates as those who have attained the age of fifty years.[278]

In light of these reports, one can see that there are divergent views on the issue of what constitutes elderly status. Though it is likely that a true consensus will never emerge regarding this issue, it would seem that the better course of action would be to rely on the expertise of professionals who intimately work with this special population of offenders. As such, federal judges should use the age cutoff adopted by the National Institute of Corrections that designates age fifty as elderly status.[279] This recommendation is based largely on the fact that offenders at age fifty present problems that are typically seen in those with the physical age of sixty.[280] This is not to suggest that all offenders who are age fifty or older should receive an automatic reprieve from punishment. Rather, it is to suggest that age should be looked at as a factor that could aggravate the intensity and duration of any punishment that is meted out by the courts. Adopting such a position would also be in line with a policy of age neutrality that has seemingly been adopted by some of the circuits.[281]

Given this proposition, a second recommendation is offered which suggests that federal judges should adopt a more uniform standard for defining extraordinary physical impairment.[282] This belief is not meant to suggest that any physical impairment should be sufficient to reduce a sentence or term of imprisonment. Rather, this proposal suggests that

275. *Id*.
276. *See id*.
277. ELDERLY OFFENDERS IN TEXAS PRISONS, *supra* note 5, at i.
278. GEORGIA'S AGING INMATE POPULATION, *supra* note 5, at 1; OLDER OFFENDERS: THE OHIO INITIATIVE, *supra* note 5, at 9; MICHAEL WHEELER ET AL., OKLA. DEP'T OF CORR., THE AGING OF PRISON POPULATIONS: DIRECTIONS FOR OKLAHOMA, http://www.doc.state.ok.us/DOCS/OCJRC/Ocjrc95/950725a.htm (last visited Nov. 16, 2003). In addition, the state of Florida ascribes elderly status to inmates who are fifty years old in large part due to the physical and mental health issues attached to offenders at or above this age. *See* AN EXAMINATION OF ELDER INMATE SERVICES: AN AGING CRISIS, *supra* note 5, at 8–10.
279. *See* GEORGIA'S AGING INMATE POPULATION, *supra* note 5, at 1–3.
280. *See id*. at 2.
281. *See e.g.*, United States v. Tocco, 200 F.3d 401, 434–35 (6th Cir. 2000); United States v. Marin-Castaneda, 134 F.3d 551, 556–57 (3d Cir. 1998).
282. *See* United States v. Mattox, 417 F. Supp. 343, 346 (S.D.N.Y. 1976).

where physicians can with some degree of medical certainty demonstrate that a disease or ailment is so grave that it compromises the health or physical safety of the offender, the burden should be shifted to the government to rebut the presumption that a reduced sentence is appropriate. Though this proposal is analogous to the *Carey* standard,[283] it differs to the extent that it only requires certification to the court by two independent physicians that the offender suffers from a disease or ailment that endangers his life or would impose undue burdens upon him if incarcerated.

Adopting such a standard would be akin to proposing that the federal courts adopt a rebuttable presumption of infirmity. Under such a presumption, the burden would rest upon the defendant to demonstrate that the nature and severity of his or her physical condition or impairment warrants a departure. Such a presumptive burden would be met only through the presentation of medical evidence that shows that the defendant's medical needs require the solicitous care and expertise that can only be provided by medical experts outside of the prison setting. Once this initial threshold showing has been met, the burden would then shift to the government to demonstrate that the Bureau of Prisons does in fact possess the medical expertise capable of treating the defendant. Such a showing would require more than merely suggesting that the government (Bureau of Prisons) has treated defendants with similar medical conditions in the past. Instead, the government (Bureau of Prisons) would be required to demonstrate that it has specialists on staff who are trained to deal with the myriad of conditions and illnesses that are presented by various defendants, as well as the modern medical facilities that are equipped to handle these medical problems.

Should the federal courts adopt this recommendation, it would in fact coincide with the standard first articulated in *Carey* wherein particularized findings must be made relative to a defendant's age and physical condition.[284] In addition, this recommendation would also demonstrate that both the defendant and the government have a shared burden in advocating for punishment, or a lesser punishment, under the Guidelines. Lastly, the goals that are pursued through the policy statement

283. *See* United States v. Carey, 895 F.2d 318, 324 (7th Cir. 1990).
284. *See id*.

contained in section 5K2.0 of the Federal Sentencing Guidelines Manual[285] would be reinforced.

This proposal serves the additional aim of ensuring that the punishments imposed on elderly offenders are not unduly harsh. This proposal does not suggest that elderly status and physical health should exonerate an offender. Instead, the punishment of elderly offenders should be tempered by compassion and continual evaluation of whether the ends of justice are being served. Judge Frankel provided keen insight into just such a point in *United States v. Mattox*[286] when commenting that judges should not hesitate to impose lengthy punishments in accordance with the severity of the crime.[287] At the same time, he noted that there is a point at which one moves beyond punishment into a realm of cruelty.[288] His opinion in *Mattox* thus suggests that what looks good on paper often does not match reality:[289]

> Unless the power to discriminate [in sentencing] is left somewhere, the criminal law tends to produce monstrosities. The power has been exercised imperfectly, to be sure, by the judges, as it would be by anyone under principles only dimly stated insofar as our law states them at all. There is a need for clearer, more uniform, more humane standards. But there will always remain the need for judgment.[290]

Accordingly, Judge Frankel possessed an acute awareness of the fact that punishment was neither meant to destroy offenders, nor reduce them to enfeebled shells of their former selves.

Following Judge Frankel's logic, a third proposed recommendation would entail requiring that federal judges make findings relative to the costs associated with imprisoning elderly and infirm defendants. To begin, both section 5H1.1 and section 5H1.4 of the Federal Sentencing Guidelines suggest that alternative forms of punishment may be imposed on defendants provided that they are "equally efficient" and "less

285. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2001). This policy statement recognizes that certain characteristics such as age and physical condition or infirmity are usually irrelevant. *Id.* However, they do become relevant for the purposes of sentencing when they are "present to an unusual degree and distinguish[] the case from the 'heartland' cases covered by the guidelines." *Id*. As such, making their relevance conditional upon the production of corroborative medical evidence would not violate the spirit of the federal guidelines.

286. *Mattox*, 417 F. Supp. at 343.

287. *See id*. at 346.

288. *See id*.

289. *See id*.

290. *Id*.

costly" than incarceration.[291] Thus, the costs associated with imprisonment, including efficiency, are considered valid considerations for downward departures under the Guidelines.[292] In fact, such a position was adopted in *United States v. Martinez-Guerrero* where a federal judge held that:

> [a] determination of efficiency, by definition, requires a preliminary determination of the relevant goal to be achieved without waste. The relevant goal is not imposition of a full term of incarceration; instead, the relevant goals to be achieved are framed by . . . the basic purposes of sentencing—deterrence, incapacitation, just punishment, and rehabilitation.[293]

It seems that states are belatedly adopting this position in recognizing that there may be more efficient ways of achieving the ends of sentencing and justice, other than through prolonged periods of incarceration.[294] For example, California is dealing with the reality that it will face serious financial consequences if current trends and sentencing practices continue with regards to elderly offenders.[295] Similarly, a report commissioned by the Texas Department of Criminal Justice found that admissions for elderly offenders outpaced overall admissions in all corrections facilities.[296]

If the federal courts are truly serious about efficiency and waste as possible conditions for granting departures to elderly offenders then they should give serious attention to the problems that the states are

---

291. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1, .4 (2001).

292. *See* United States v. Martinez-Guerrero, 987 F.2d 618, 621 (9th Cir. 1993).

293. *Id*.

294. *See* RYAN S. KING & MARC MAUER, SENTENCING PROJECT, AGING BEHIND BARS: "THREE STRIKES" SEVEN YEARS LATER 13 (2001), http://www.sentencing project.org/pdfs/9087.pdf.

295. In a 2001 report, researchers in examining the Three Strikes law in California found that

> [c]urrent estimates are that it will cost $1.5 million to incarcerate an elderly prisoner for the minimum 25 years, in part due to the fact that elderly inmates will require more expenditures for health care and other needs than a younger prisoner. By extrapolating this number to an aging prison population due to "three strikes," it becomes apparent that we may be incarcerating ourselves into an epidemic.

Id. at 12.

296. *See* ELDERLY OFFENDERS IN TEXAS PRISONS, *supra* note 5, at 4. This special report painted a rather ominous picture insofar as the future of corrections in Texas. It found that

> [b]etween 1994 and 1998, admissions to prison for offenders age 55 and older increased by 55% compared to an overall increase in admissions of 24%. Elderly inmates [were] also admitted to prison with longer sentences than offenders in other age groups, resulting in relatively longer time to serve in prison.

Id. at i.

now facing. Judge Ferguson of the Ninth Circuit suggested that when making decisions regarding departures that implicate physical impairments or medical conditions there should be "a comparison between the efficiency and costs of a full term of incarceration as opposed to a lesser or alternative sentence in achieving deterrence, incapacitation, just punishment, and rehabilitation."[297] Accordingly, judges should not make their sentencing decisions without having an acute awareness of both the intended and unintended consequences associated with sentencing elderly offenders for lengthy periods of time.

In the end, serious consideration will have to be given to how to best address the issues related to elderly offenders and those with extraordinary physical impairments. While there may be near unanimous consensus that elderly offenders deserve punishment in some form,[298] a compelling argument could also be made that some of them should be given what amounts to a discounted sentence in light of their age and health. These factors would not immunize elderly offenders against prosecution, but they would put effective limits on the duration of their punishment.

297. *See Martinez-Guerrero*, 987 F.2d at 621–22.
298. James, *supra* note 17, at 1042.