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Defendant Amenability to Treatment or Probation as a Basis for Departure Under the Minnesota and Federal Sentencing Guidelines

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COMMENTARY

DEFENDANT AMENABILITY TO TREATMENT OR PROBATION AS A BASIS FOR DEPARTURE UNDER THE MINNESOTA AND FEDERAL SENTENCING GUIDELINES

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Federal courts are divided on the question of whether guidelines departures may be based on offender characteristics such as the defendant's amenability to treatment.[1] Courts rejecting such departures have concluded that sentencing under the guidelines should be based primarily on the offense, not the offender, and should give little weight to rehabilitative goals.[2] Courts accepting such departures point out that the Sentencing Reform Act explicitly recognizes the relevance of offender characteristics and rehabilitative goals and that the Sentencing Commission has not ruled out such factors, at least in exceptional cases.[3]

In resolving these issues, Federal judges, attorneys and interested observers should consider the experience of states which have adopted sentencing guidelines. Minnesota's experience is of particular interest, since its guidelines have been in effect since 1980, and have generated a large body of appellate caselaw. Minnesota's Commission expressly premised its guidelines on a theory of "just deserts."[4] Despite this emphasis, appellate courts have repeatedly upheld the application of offender-based, treatment-oriented considerations—not only in choosing the sentence within the applicable guidelines range but also as a basis for departure. Minnesota's experience thus suggests that departures based on amenability to treatment or probation are compatible with a guideline scheme, even one based on retributive goals.

This article describes the three leading Minnesota amenability departure cases, and then analyzes Federal cases which have accepted or rejected similar departures. It concludes that such departures—if limited to exceptional cases—are justified under both the Minnesota and the Federal guidelines. The comparison reveals identical theories of amenability, even though Minnesota and Federal courts never cite each other. This remarkable parallelism suggests that Federal and state judges have much to learn from each other's decisions.

I. THE MINNESOTA AMENABILITY CASES

The Minnesota Sentencing Guidelines[5] establish presumptive rules governing the use and duration of imprisonment, applicable to each combination of offense severity and criminal history. Parole release has been abolished, but good-conduct credits may reduce prison terms by up to one-third. The trial court may depart from the presumptive sentence if it demonstrates that "substantial and compelling circumstances" make a departure sentence "more appropriate, reasonable or equitable."[6]

The guidelines state that all traditional punishment goals—including rehabilitation—may be considered when a court is selecting conditions of a non-prison sentence.[7] However, the guidelines do not specify the purposes of punishment which may be used to justify departures. The list of aggravating and mitigating factors which may serve as reasons for departure focuses on offense severity and culpability, but this list is *nonexclusive*. Punishment purposes are not included in the separate list of factors which may *not* be used to justify departure (e.g., race, employment history, education, marital status). The enabling statute makes no mention of purposes of punishment, although the Minnesota criminal code recognizes all traditional sentencing goals.[8]

Faced with this ambiguity, trial courts began to depart for utilitarian as well as retributive reasons. The Minnesota Supreme Court rejected departures based on assessments of offender dangerousness and need for deterrence,[9] but upheld departures under several theories of offender "amenability" to prison or probation. The first case was *State v. Park*,[10] which affirmed an upward departure (to prison, in lieu of the presumptive non-prison term) because the defendant was "unamenable to probation." The trial court's finding of unamenability was based on the strong recommendation of the probation officer, supported by evidence of defendant's serious chemical dependency problem, his refusal to accept that he had a problem or needed treatment, and his complete failure to cooperate during an earlier adult probation sentence.

In *State v. Wright*,[11] the Supreme Court upheld a downward departure (six months in jail, followed by treatment, instead of two years in prison) based on two "amenability" theories. First, the Court found that the defendant was "particularly unamenable to prison;" a court-appointed psychiatrist had strongly opposed incarceration, saying that Wright was "more child than man" and would be seriously abused in prison and/or led into criminal activity by other prisoners.[12] Second, the defendant was "particularly amenable to individualized treatment in a probationary setting;" he needed psychiatric care which was not available in any institution, and he would not endanger others provided he received appropriate out-patient treatment.

Another amenability theory was recognized in *State v. Trog*.[13] The trial court had imposed a six month jail sentence in lieu of the presumptive two-year prison term for burglary with assault. The Supreme Court affirmed, stating that departure was properly based on defendant's "particular amenability to individualized treatment in a probationary setting." No mention was made of Trog's need for or receptivity to any particular form of treatment. Instead, the Supreme Court emphasized the aberra-

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COMMENTARY

tional nature of the crime: Trog had previously been an "outstanding citizen," had no police record, had done well in school, had an excellent work record, was intoxicated during the crime, had cooperated with the police, and was extremely contrite. Among those who testified at the sentencing hearing was a retired chief of the police juvenile division who concluded that in this "very special case" nothing would be served by sending Trog to prison. The Court seemed to be saying that, in spite of his serious crime, Trog was a good person for whom lengthy imprisonment would be unnecessary or even harmful.

The Minnesota Supreme Court has never explained how these amenability departures relate to the text and "just deserts" theory of the guidelines. However, as I have argued elsewhere,[14] these departures are supported by strong practical and policy arguments. The Minnesota guidelines' heavy use of presumptive non-prison sentences, backed up by the threat of revocation, implies a theory of *limiting* retributivism: most defendants initially receive *less* than they "deserve." The guidelines rules specifying the appropriateness of initially imposing a prison or a non-prison term reflect presumptions of suitability for probation, which can be overcome in exceptional cases. Allowing such departures permits more efficient use of limited resources, and lessens the temptation for judges and prosecutors to use their discretionary powers of probation revocation and plea bargaining to achieve the same results informally. Given these substantial, unregulated discretionary powers, formal recognition of amenability departures does not significantly reduce sentencing uniformity and proportionality; instead, it encourages officials to make these decisions more openly, stating reasons.

II. THE FEDERAL AMENABILITY CASES

The Federal sentencing guidelines, like those in Minnesota, provide presumptive prison terms for each combination of offense and criminal history,[15] but allow courts to depart in "atypical" cases.[16] The enabling statute provides that the sentencing court may depart if it finds[17]

> "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from [the guidelines]."

This language has been interpreted to raise two distinct legal issues: (1) Are the trial court's asserted grounds for departure legally permissible (i.e., not "adequately" considered by the Commission)? (2) If so, are these grounds "of sufficient importance and magnitude" that a departure "should result"?[18]

As in Minnesota, Federal departure standards do not indicate which purposes of punishment may justify a departure, and lower Federal courts differ widely. They do, however, agree that all purposes of punishment may be considered in choosing the specific sentence *within* the applicable guideline range.[19]

As for departures, several Courts of Appeal have rejected consideration of offender-related concepts such as rehabilitative potential and good (or bad) character, stating that sentencing under the guidelines should be based on the crime, not the offender.[20] As explained below, however, the actual holdings of some cases are narrower, and many Federal courts now expressly accept "amenability" departures analogous to those recognized in *Wright* and *Trog*.[21] Moreover, there is substantial support in the guidelines and the enabling statute for the application of such offender factors.

The Introduction to the guidelines states that their purpose is to bring greater honesty, uniformity, and proportionality to Federal sentencing.[22] Both uniformity (treating like cases alike) and proportionality ("appropriately different sentences for criminal conduct of different severity")[23] imply a retributive, offense-oriented theory. However, the Introduction later states that the Commission decided to base its initial rules primarily on pre-guidelines sentencing practices (which recognized all traditional sentencing goals), and rejected any single "just deserts" or "crime control" model.[24]

In any case, the enabling statute provides unequivocal support for consideration of offender characteristics and utilitarian goals. 18 U.S.C. §3553(a) requires the sentencing court to consider not only the offense but also "the history and characteristics of the defendant;" the court must further consider all four traditional purposes of punishment: retribution, deterrence, incapacitation, and "the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." The Senate Report states that the drafters had "deliberately not shown a preference for one purpose of sentencing over another."[25] The Report further specifies that the goal of rehabilitation is important not only in setting conditions of probation, but also "in determining whether a sanction other than a term of imprisonment is appropriate in a particular case."[26] Another statute, 18 U.S.C. §3661, provides that "no limitation shall be placed on the information concerning the [defendant's] background, character, and conduct" which the sentencing court may consider. Recognizing these statutory mandates, Section 1B1.4 provides that, unless otherwise prohibited by law, courts may consider any such information in determining what sentence to impose within the guideline range *or whether a departure is warranted.*

A. "Particular amenability to treatment"

The First Circuit has indicated in a series of cases that it would accept departures based on a *Wright*-type "treatable-only-on-probation" theory. Although rejecting departures on the facts presented, the court stated that departure would be appropriate where the defendant has "a special need for, and receptiveness to, treatment," and the Bureau of Prisons does not have adequate treatment services meeting the defendant's needs.[27] Presumably, the First Cir-

COMMENTARY

cuit would also require, as in *Wright*, that treatment outside prison poses no great risk to public safety.[28]

Several Federal district courts have gone further and upheld probationary departures based on defendant's amenability to treatment without any showing that an adequate program was unavailable in prison.[29] These rulings reflect a preference for community treatment that is supported by Congress' clearly expressed belief that rehabilitation cannot be reliably induced in prison.[30] Such a preference might also be justified under the "parsimony of punishment" principle found in Section 3553(a): the sentence should be "sufficient, but not greater than necessary," to achieve the four traditional goals of punishment.

On the other hand, it could be argued that treatment within prison is preferable, so as to insure "sufficient" retribution, deterrence, and/or public protection. But if community treatment would be safe and *more* effective, or if the defendant has already completed most of his treatment, poses no further danger to the public, and would be more likely to *relapse* if sent to prison, the balance ought to shift back in favor of probation.[31] Such exceptional probation sentences pose minimal risks of recidivism or lost deterrence; they are also consistent with a theory of "limiting retributivism," similar to that underlying the Minnesota Guidelines:[32] defendants may not be given more than they "deserve," but they may sometimes be given less if this will promote important rehabilitative goals.

Courts which have rejected departures based on amenability to treatment have often done so on grounds that the particular facts of the case were simply not "atypical" enough to overcome the presumption in favor of the guideline sentence.[33] Other courts have appeared to categorically reject all such departures. In *U.S. v. Van Dyke*,[34] the Fourth Circuit held that defendant's participation in two drug treatment programs after his arrest was equivalent to "acceptance of responsibility" ("A/R"), which was "adequately considered" by the Commission; sentence mitigation must therefore be limited to the two-level A/R adjustment.

There is certainly some similarity between amenability considerations and acceptance of responsibility, but these concepts are not the same thing. If the A/R adjustment is granted routinely to defendants who plead guilty, as a "plea inducing discount,"[35] then it has *nothing* to do with the defendant's need for and receptiveness to treatment. Even if A/R requires something more than a guilty plea—even if it requires sincere remorse[36]—it still does not necessarily imply amenability to treatment. Defendants may fully admit and regret their crimes, without admitting the underlying causes of their criminality or making a commitment to address those causes. This is especially true where the crime pled to is not closely related to the problems needing treatment; accordingly, the Third Circuit has declined to apply the *Van Dyke* rule in such cases.[37] The First and Seventh Circuits have suggested a further limit on *Van Dyke:* even if the A/R reduction *normally* precludes any further reduction based on post-arrest rehabilitation, such reduction may be permissible in those rare cases where rehabilitation "is so extraordinary as to suggest its presence to a degree not adequately taken into consideration by the A/R reduction."[38]

In *U.S. v. Pharr*,[39] the Third Circuit held that departure based on defendant's post-arrest efforts to overcome his addiction was barred by the Chapter 5H policy statements relating to offender characteristics. The Court conceded that these policy statements are generally not binding on courts, but chose to follow them anyway. The Court then held that the departure was barred by the §5H1.4 policy statement on drug and alcohol dependence. If such dependence is never a basis for mitigation, reasoned the court, then neither is *separation* from such dependence. Otherwise, only those with the dependence could receive leniency; the result would be to reward offenders not only for overcoming their dependence, but also for being addicted.[40]

A very different interpretation of this policy statement was adopted in *U.S. v. Harrington*.[41] The district court noted that §5H1.4 states that "substance abuse is highly correlated to an increased propensity to commit crime." The implication, argued the Court, is that if successful drug treatment reduces such propensities, it thereby reduces the need for the lengthy periods of incarceration provided for drug offenses under the guidelines.[42]

The Third Circuit's *Pharr* decision also held that departure was barred by the policy statements (§§5H1.2 and 5H1.5) relating to educational skills and employment. According to the Court, Pharr's conduct in seeking treatment was analogous to a defendant's efforts to improve himself through education or steady work, which the Commission had rejected as grounds for departure. This analogy seems a bit strained, since these policy statements do not mention self-improvement efforts at all. Even if that was the intent, it is not true that the Commission absolutely "rejected" factors like education and employment; the policy statements provide that these factors are not "ordinarily" relevant, which implies that they *are* relevant in exceptional cases.[43] It could also be argued that these offender characteristics may *always* be considered, not as separate items meriting departure, but rather as evidence of broader character traits such as amenability to treatment.[44]

Both *Van Dyke* and *Pharr* could have been decided on much narrower grounds, and were arguably correctly decided on their facts. In *Van Dyke*, the government had argued that defendant's involvement in treatment during pretrial detention was a highly suspect "foxhole conversion," but the court chose to assume defendant's sincerity for purposes of the appeal. Such post-arrest conduct is very difficult to assess, especially where (as is often the case) the defendant is *required* to participate in treatment under the terms of pretrial release.[45] In both *Wright* and *Trog*, the findings of "amenability to treatment" were based largely on *pre*-arrest conduct and offender characteristics. A further problem in *Van*

COMMENTARY

Dyke was the trial court's conclusory finding that "the defendant is trying to rehabilitate himself."[46]

In *Pharr*, defendant had already completed an inpatient drug program, he was making "conscientious efforts" to overcome his addiction, and a jail sentence would disrupt his drug treatment.[47] On the other hand, Pharr's criminal history category was VI (13 or more points); the defendants in *Wright* and *Trog* had no prior records.

B. Unamenability to prison

The "unusual vulnerability" concept of *State v. Wright* finds a direct Federal counterpart in *U.S. v. Lara*.[48] The guidelines sentence for defendant Morales' cocaine violation was 121-151 months, but the trial court imposed only 60 months (the mandatory minimum), based on a finding that defendant would be sexually attacked in prison unless placed in solitary confinement. Morales was 22 but "looked 16," and was "delicate-looking" and admittedly bisexual; he had already encountered attempts by several "tough" inmates to coerce him into becoming a male prostitute for their profit and enjoyment. The Second Circuit affirmed the departure, noting that such extreme vulnerability was not taken into account by the Commission. As for the policy statements saying that age as well as mental, emotional or physical condition are not "ordinarily" relevant, the Court of Appeals held that the trial court had relied on these factors not as separate characteristics meriting departure, but as evidence of vulnerability. In any case, the trial court could properly base a departure on such "ordinarily irrelevant" factors if, as in this case, "they present an extraordinary situation." Thus, the departure factor was not adequately considered by the Commission, and the departure was not unreasonable.

In neither *Wright* nor *Lara* did the courts specify the theory of punishment which made defendant's unusual vulnerability relevant. In *Lara*, the government had argued that this factor reflected rehabilitative goals rejected by the guidelines. The Court of Appeals concluded that even if this factor does reflect such goals, the departure was valid: the role of rehabilitation, "although sharply restricted" by the guidelines, "has not been entirely eliminated from the sentencing process."[49] It would seem that departure in a case like *Lara* is actually more closely related to retributive values: the term of imprisonment should be scaled down, to compensate for the unusually punitive impact of a prison sentence which, through no fault of defendant, might have to be served entirely in solitary confinement. Other unusual-vulnerability departures have been based on *both* utilitarian and retributive theories. This was certainly true in *Wright*, where the departure was supported by a finding that the defendant would be victimized *and/or led into criminal activity* by other inmates. A similar utilitarian argument was cited in *U.S. v. Rodriguez*: jailing the defendant for the guideline term "would be the cause most likely to undo his rehabilitation."[50]

C. Other Federal amenability departures

In *U.S. v. Big Crow*[51] the Eighth Circuit appeared to recognize a departure theory analogous to that applied in *State v. Trog*: defendant is basically a good person, and the conviction offense was simply an aberration.[52] Although rejecting the trial court's reliance on defendant's lack of prior criminal record and intoxication at the time of the offense, the Court of Appeals upheld the downward durational departure, based on defendant's excellent employment record, "solid community ties" (evidenced by unsolicited letters from community leaders and a police officer), and "his consistent efforts to overcome the adverse environment of the Pine Ridge reservation." [53] These facts were found to be "sufficiently unusual" to justify departure.[54]

In *U.S. v. Carey*,[55] the Seventh Circuit recognized a similar "uncharacteristic act" theory, based on §1A.4(d): "The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures." However, the Court of Appeals reversed the departure, on the ground that the district court was clearly erroneous in finding that defendant's actions met this standard. It was not enough, said the Court of Appeals, that Carey's check-kiting scheme was his first offense, and was inconsistent with his "otherwise exemplary life and high standing in the community." The guidelines expressly bar consideration of defendant's socio-economic status, and first offender status is relevant only if the court finds "unusual circumstances," not considered by the Commission in formulating its criminal history score.[56] Moreover, the "aberrant act" must be more than just conduct "out of character"—it must be "a spontaneous and seemingly thoughtless act."[57] Carey's crime was the result of substantial planning, involving acts spread over a fifteen-month period.

The "uncharacteristic act" theory was rejected by the Fifth Circuit in *U.S. v. Reed*,[58] on the ground that "sentencing under the Guidelines is to be based on the crime committed, not the offender." As noted earlier, the guidelines and applicable statutes do not support so narrow a view of the purposes and relevant factors in sentencing. As is true of many cases announcing broad principles, however, it appears that this case could have been decided on much narrower grounds. The trial court's only support for the departure was its brief statement to the defendant that "there is something good in you."

Even if fully supported, however, the "uncharacteristic act" theory might be criticized as tending to favor white middle class offenders. But Federal cases thus far reveal, if anything, the opposite bias: in *Big Crow*, this theory was applied in favor of a socially-disadvantaged Native American defendant, and other cases suggest that Federal judges are very unsympathetic to middle class offenders with no excuse for their crimes.[59]

Neither *Trog* nor Federal cases recognizing a similar "uncharacteristic act" theory have explained

COMMENTARY

how this factor relates to punishment goals. The statement in *U.S. v. Carey* that such a defendant "is arguably less accountable,"[60] and the social-adversity factor in *Big Crow*, suggest a retributive theory. But if emphasis is placed on the idea that defendant is a "basically good person" (i.e., cooperative and non-dangerous), and if (as in *Big Crow*) the sentence includes treatment conditions, the underlying theory begins to sound more like amenability to treatment and/or probationary supervision.

CONCLUSION

Despite the Minnesota Commission's emphasis on "just deserts," the Minnesota amenability departure cases are consistent with the structure and purposes of that state's guidelines and make sentencing policy sense—provided they are limited to exceptional cases. Very similar departures have been recognized under the Federal guidelines. These have stronger statutory support than their Minnesota counterparts, and are justified by equally strong practical and policy arguments—again, provided that they are limited to exceptional circumstances. The real issue in these cases is the amount of allowable discretion, not the sentencing theory applied. Purely retributive sentencing, if allowed free reign to precisely "make the punishment fit the crime," would involve just as much discretion (and hence, just as much potential for disparity) as utilitarian sentencing. Moreover, the difficulty of pigeon-holing the precise punishment theory underlying the vulnerable-defendant and uncharacteristic-act cases suggests that any attempted limitation of departures to purely "retributive" grounds would be artificial and easily evaded. Such evasion is a serious concern, since many Federal judges, like their Minnesota counterparts, apparently still believe in utilitarian goals. If sentencing guidelines are too inflexible in their pursuit of retributive proportionality, they invite subversion, thus undercutting the goals of honesty and uniformity in sentencing.

Minnesota's experience shows that amenability departures are consistent with a guidelines scheme, and can help provide the necessary flexibility to insure that this important reform succeeds over the long term. At the same time, the striking similarity between the independently-derived Minnesota and Federal amenability doctrines suggests that fundamental issues of sentencing are the same everywhere. The evolving "common law of sentencing," like its counterparts in other fields, knows no jurisdictional bounds.

FOOTNOTES

[1] Compare *U.S. v. Pharr*, 916 F.2d 129 (3rd Cir. 1990) (rejecting departure) with *U.S. v. Harrington*, 741 F. Supp. 968 (D.D.C. 1990) (accepting departure).

[2] *See, e.g., Pharr*, 916 F.2d at 132.

[3] *Harrington*, 741 F. Supp. at 975, 977-8; *U.S. v. Rodriguez*, 724 F. Supp. 1118, 1119-21 (S.D.N.Y. 1989).

[4] Minn. Sent. Guidelines Comm., *The Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation* (1984), pp. v, 10.

[5] The guidelines can be found in MINN. RULES OF COURT 275-309 (West, 1991); *see also* MINN. STAT. ch. 244 (enabling statute).

For a fuller discussion of the Minnesota Guidelines and their implementation, *see* D. Parent, Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines (1988); Frase, "Sentencing Reform in Minnesota, Ten Years After," 75 Minn.L.Rev. 727-54 (1991) (review essay of Parent's book).

[6] *See generally* Rathke, "Departure Criteria Under the Minnesota Sentencing Guidelines," 2 Fed. Sent. R. 296-7. Minnesota caselaw has also recognized a limitation analogous to the Federal "adequately-considered-by-the-Commission" doctrine, discussed at note 17, *infra*. *See, e.g., State v. Cizl*, 304 N.W.2d 632, 634 (Minn. 1981) (lack of prior record already taken into account by criminal history scale, so it cannot be a basis for departure).

[7] Minn. Sent. Guidelines, *supra* note 5, Sec. III.A.

[8] See MINN. STAT. §609.01 (purposes of Code); MINN. STAT. §609.115, subd. 1 (contents of presentence report).

[9] *See, e.g., State v. Hagen*, 317 N.W.2d 701, 703 (Minn. 1982) (dangerousness); *State v. Schmidt*, 329 N.W.2d 56, 58, n. 1 (Minn. 1983) (need to deter defendant and others).

[10] 305 N.W.2d 775 (Minn. 1981).

[11] 310 N.W.2d 461 (Minn. 1981).

[12] Id. at 462-3.

[13] 323 N.W.2d 28, 31 (Minn. 1982).

[14] See Frase, *supra* note 5, at 742-48.

[15] U.S. Sent. Commission, Guidelines Manual (Nov. 1990) [hereafter "Guidelines Manual"], §5A.

[16] Id., §1A4(b).

[17] 18 U.S.C. §3553(b).

[18] *U.S. v. Summers*, 893 F.2d 63, 65-67 (4th Cir. 1990). See also *U.S. v. Lara*, 905 F.2d 599, 602 (2nd Cir. 1990). *Summers* further held that the first issue is reviewed *de novo* as a matter of law, whereas the second is subject to a looser, abuse-of-discretion or reasonableness standard; findings of fact are reviewed under a clearly erroneous standard. 893 F.2d at 65-57. A slightly different set of review standards was adopted in *U.S. v. Diaz-Villafane*, 874 F.2d 43 (1st Cir. 1989).

[19] *See, e.g., U.S. v. Sklar*, 920 F.2d 107, 116, n. 9 (1st Cir. 1990); *U.S. v. Lara-Velasquez*, 919 F.2d 946, 953-57 (5th Cir. 1990); *U.S. v. Duarte*, 901 F.2d 1498 (9th Cir. 1990). The first two cases are reported at pp. 306 and 310, *supra*.

[20] *See, e.g., U.S. v. Sklar*, 920 F.2d 107, 115 (1st Cir. 1990); *U.S. v. Pharr*, 916 F.2d 129, 132 (3rd Cir. 1990); *U.S. v. Mejia-Orosco*, 867 F.2d 216, 218-19 (5th Cir. 1989).

[21] See text at note 11, *supra*. There are no Federal "unamenable to probation" departures analogous to *State v. Park*, text at note 10, *supra*. Presumably this is because there are no presumptive probation sentences to depart from, under the Federal guidelines.

[22] Guidelines Manual §1A3. These are also the goals of the Minnesota Guidelines. See sources cited in note 4, *supra*.

[23] Guidelines Manual §1A3.

[24] All departure grounds listed in §5K2.1 to §5K2.15 relate to offense severity or offender culpability. However, these are all policy statements, not guidelines, and are offered as a *non-exclusive* list of departure factors. §5K2.0.

[25] S.Rep. No. 225, 98th Cong., 2nd Sess. 76-77, *reprinted in* 1984 U.S. Code Cong. & Adm. News 3182 [hereafter, "S.Rep."].

[26] *Id.* at 76-77.

[27] *U.S. v. Studley*, 907 F.2d 254, 259 (1st Cir. 1990). *See also U.S. v. Deane*, 914 F.2d 11, 14 (1st Cir. 1990). These two cases are reported at pp. 315 and 320, *supra*.

[28] *Cf.* S.Rep., *supra* note 25, at 174-5 (characteristics of offender may justify non-prison sentence "if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community").

[29] *See, e.g., U.S. v. Floyd*, 738 F.Supp. 1256 (D.Minn. 1990); *U.S. v. Rodriguez*, 724 F.Supp. 1118 (S.D.N.Y. 1989).

[30] *See*, S.Rep., *supra* note 25, at 38; *see also* 18 U.S.C. §3582(a) and 28 U.S.C. §994(k) (prison not "appropriate" means of promoting rehabilitation or treatment).

[31] See *Rodriguez*, 724 F.Supp. at 1119, citing these reasons. *Contra*: *U.S. v. Pharr*, 916 F.2d 129, 133 (3rd Cir. 1990).

[32] See text at note 14, *supra*.

[33] *See, e.g., U.S. v. Sklar*, 920 F.2d 107 (1st Cir. 1990); *U.S. v. Carey*, 2 Fed. Sent. R. 176 (7th Cir. 1990).

[34] 895 F.2d 984, 987 (4th Cir. 1990). *But see U.S. v. Braxton*, 903 F.2d 292, 296 (4th Cir. 1990) ("rehabilitation is not a factor in the consideration of acceptance of responsibility").

[35] *Cf.* Freed & Miller, "Plea Bargained Sentences, Disparity and 'Guideline Justice,'" 3 Fed. Sent. R. 175, 176 (1991) (proposing that the adjustment be increased, labelled "plea benefit," and be presumptively applicable to all guilty plea cases).

[36] *Cf.* Guidelines Manual, App. C, amendment 351 (replacing "sincere remorse" with "acceptance of responsibility"). None of the A/R examples contained in §3E1.1 strongly suggests receptivity to treatment.

[37] See *U.S. v. Pharr*, 916 F.2d 129, 131-2 (3rd Cir. 1990) (award of acceptance of responsibility reduction in stolen check case did not, by itself, prevent further reduction based on post-arrest participation in drug treatment programs).

[38] *U.S. v. Sklar*, 920 F.2d 107, 116 (1st Cir. 1990). *See also U.S. v. Carey*, 2 Fed. Sent. R. 176, 178-9 (7th Cir. 1990).

[39] 916 F.2d 129, 132-33 (3rd Cir. 1990).

[40] *Pharr*, 916 F.2d at 133.

[41] 741 F.Supp. 968 (D.D.C. 1990).

[42] *Id.* at 975-76. The court also relied heavily on the June 1990 Office of Drug Control Policy "White Paper"—a document not in existence when §4H1.4 was drafted—which concluded that in-prison drug treatment can be effective. *Id.* at 974, 977-78. Other cases recognizing defendant's efforts to overcome drug dependence as a potential mitigating factor include *U.S. v. Maddalena*, 893 F.2d 815, 817 (6th Cir. 1989); *U.S. v. Floyd*, 738 F.Supp 1256, 1259-60 (D.Minn. 1990); and *U.S. v. Rodriguez*, 724 F.Supp. 1118, 1119 (S.D.N.Y. 1989).

[43] *U.S. v. Rodriguez*, 724 F.Supp. 1118, 1121 (S.D.N.Y. 1989). See also S.Rep., *supra* note 25, at 714-5 (although 28 U.S.C. §994(e) notes "general inappropriateness" of considering offender characteristics, these factors may justify probation to provide defendant with a needed program, and assure the safety of the community; purpose of §994(e) is to avoid inappropriate use of prison for defendants who *lack* education, employment, and stabilizing ties).

[44] *Cf. Lara*, text at note 48, *infra* (similar argument).

[45] *See, e.g., Floyd*, *supra* note 29. Moreover, if treatment programs are available only in the community, allowing such departures is unfair to defendants in pretrial detention.

[46] 895 F.2d at 986.

[47] 916 F.2d at 130.

[48] 905 F.2d 599 (2d Cir. 1990).

[49] *Id.* at 604.

[50] *Rodriguez*, *supra*, 724 F.Supp. at 1119.

[51] 898 F.2d 1326 (8th Cir. 1990).

[52] *Id.* at 1329, 1331 (presentence report stated offense was "out of character" and that defendant "had been a decent citizen living in a difficult environment;" offense was a "one time matter"). *But see U.S. v. Prestemon*, 929 F.2d 1275 (8th Cir. 1991) (reversing downward durational departure in armed bank robbery case where 21-year old defendant, a biracial adopted child, was previously an excellent student).

[53] *Big Crow*, 898 F.2d at 1331-32.

[54] *Id.* at 1332. Several other district courts have also departed on grounds related to defendant character. *See, e.g., U.S. v. Sadler*, 2 Fed. Sent. R. 170 (D. Idaho 1990) (letters to court showed defendant to be a "considerate, concerned, civic-minded and socially-involved individual," whom writers would trust); *U.S. v. Naylor*, 735 F.Supp. 928 (D.Minn. 1990) (previously law-abiding and "industrious" young woman, exploited by manipulative lover 15 years her senior); *U.S. v. Pipich*, 1 Fed. Sent. R. 120 (D.Md. 1988) (exemplary military record demonstrated unusual attributes of courage, loyalty, and personal sacrifice).

[55] 2 Fed. Sent. R. 176, 177-80 (7th Cir. 1990). *Accord*: *U.S. v. Pena*, 930 F.2d 1486, 1495 (10th Cir. 1991).

[56] *Carey*, 2 Fed. Sent. R. at 180, n. 4. *See also, U.S. v. Brewer*, 899 F.2d 503, 509 (6th Cir. 1990) (aberrant nature of crime and lack of prior record are considered under criminal history score, and do not warrant departure absent "exceptional circumstances"). *Cf.* 28 U.S.C. §994(j) (guidelines should reflect general appropriateness of non-prison sentence for first offender not convicted of violent or "otherwise serious" crime).

[57] *Carey*, 2 Fed. Sent. R. at 180.

[58] 882 F.2d 147, 151 (5th Cir. 1989).

[59] *See, e.g., Carey*, *supra* note 55; *U.S. v. Brewer*, 899 F.2d 503, 508, 510 (6th Cir. 1990) (reversing departure in part due to failure of middle class defendants to offer any excuse for embezzlement of substantial sums over a ten-month period); *U.S. v. Burch*, 873 F.2d 765, 768 (5th Cir. 1989) (reversing trial court's *upward* departure based on defendant's choice to commit crime despite his "ample ability and opportunity to pursue an education and career"); *U.S. v. Rodriguez*, 724 F. Supp. 1118, 1122 (S.D.N.Y. 1989) (hypothetical defendant with a "life of abused and wasted privilege" should receive no leniency).

[60] *Carey*, 2 Fed. Sent. R. at 180.