

EQUAL JUSTICE UNDER LAW: POST-BOOKER, SHOULD FEDERAL JUDGES BE ABLE TO DEPART FROM THE FEDERAL SENTENCING GUIDELINES TO REMEDY DISPARITY BETWEEN CODEFENDANTS' SENTENCES?

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In the 2005 case of United States v. Booker, the Supreme Court held that the Federal Sentencing Guidelines were merely advisory and therefore no longer binding on trial judges. Since then, some judges have based departures from the Guidelines on the finding that the disparity between codefendants' sentences is unwarranted. Although basing a departure on this consideration was universally impermissible before Booker, most circuits have now held that consideration of codefendant disparity is a permissible basis for departure. However, some circuits have held that this disparity is still not a justification for departure or that departures may not be based on codefendant disparity in certain types of cases. This Note argues that Booker and subsequent Supreme Court decisions permit trial judges to remedy disparity between codefendants' sentences in all cases where the judge finds that the disparity is unwarranted. It then shows how consideration of this disparity furthers Congress's goal of increased sentencing uniformity and ensures greater fairness in the sentencing of defendants who only played a minor role in a crime.

INTRODUCTION

Congress passed the Sentencing Reform Act (“SRA”) in 1984,¹ reining in judicial discretion over sentencing.² The SRA established the Federal Sentencing Guidelines (the “Guidelines”), which were meant to achieve uniform sentencing nationwide for federal defendants. When calculating sentences under the Guidelines, judges were to consider “the need to avoid unwarranted sentence disparities” under § 3553(a)(6) of the SRA.³ However, because the Guidelines were mandatory, judges were unable to depart from the prescribed sentencing range except in unusual cases where the Sentencing Commission had not adequately taken into account the defendant’s situation when drafting the Guidelines.⁴ Appellate courts held that the issue of codefendant disparity had been adequately considered by the Sentencing Commission, and was thus not an “unwarranted” disparity. They were therefore universal in reversing dis-

1. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.).

2. See *infra* Part I.A.

3. 18 U.S.C. § 3553(a)(6) (2006).

4. See *id.* § 3553(b)(1) (“[T]he court shall impose a sentence of the kind, and within the range [set forth by the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission . . .”), invalidated by *United States v. Booker*, 543 U.S. 220, 245 (2005).

strict court judges who based departures from the Guidelines on considerations of disparity between codefendants' sentences.⁵

In 2005, the Supreme Court decided *United States v. Booker*,⁶ which effectively made the Guidelines advisory.⁷ Since then, federal courts at both the district and circuit levels have been grappling with the practical implications of an advisory system. One of the current issues dividing circuit courts is whether district court judges are now permitted to consider codefendant sentencing disparity under § 3553(a)(6).⁸ Some circuits have held that consideration of codefendant disparity is still impermissible,⁹ arguing that it circumvents Congress's goal of nationwide uniformity. Other circuits have held that this type of consideration is permitted and, in fact, better promotes the goal of nationwide uniformity Congress sought to achieve when it passed the SRA. The Supreme Court has not yet ruled on this issue, but has suggested in other post-*Booker* decisions that these types of questions should be answered in favor of increased judicial discretion.¹⁰ In one of these decisions, *Gall v. United States*, the Court implicitly found that consideration of codefendant sentencing disparity is a valid use of § 3553(a)(6), although it did not specifically address whether trial judges can depart from the Guidelines to remedy unwarranted codefendant sentencing disparity.¹¹

This Note argues that district court judges can consider codefendant sentencing disparity under § 3553(a)(6) post-*Booker* and should be allowed to depart from the Guidelines to remedy this disparity in cases that warrant doing so. *Booker's* language suggests that courts must now reevaluate factors that were once impermissible under a mandatory system.¹² This Note argues that, as one of the § 3553(a) factors judges are now expected to consult when fashioning a defendant's sentence, courts must reinterpret "the need to avoid unwarranted sentence disparities" to include codefendant disparity in order to avoid the problems associated with the mandatory Guidelines system that gave primary departure authority to prosecutors.¹³ Part I provides an overview of the history behind the Federal Sentencing Guidelines and the shift in sentencing power from judges to prosecutors. Part II discusses the current circuit split regarding whether district court judges are permitted under § 3553(a)(6) to consider codefendant sentencing disparity. Part III shows that *Booker*

5. See *infra* Part II.A.

6. 543 U.S. 220.

7. See *infra* Part I.B.

8. See *infra* Parts II.B–C.

9. Circuits differ, however, regarding whether consideration of codefendant sentencing disparity is impermissible in all cases or only in specific types of cases. See *infra* notes 125–130 and accompanying text; Part II.C.

10. See *infra* Part III.B.

11. 128 S. Ct. 586, 598–600 (2007); see also *infra* notes 166–171 and accompanying text.

12. See *infra* Part III.A.

13. See *infra* Part I.A.2.

and other recent Supreme Court decisions allow this type of consideration and argues that judges should be able to depart from the Guidelines to remedy codefendant disparity. Increased judicial discretion in various types of multidefendant cases¹⁴ will provide systemic benefits such as increased sentencing uniformity among similarly situated defendants, decreased judicial manipulation of the Guidelines, and increased fairness in the sentencing of defendants who only played a minor role in a crime.¹⁵

I. THE EVOLUTION OF THE FEDERAL SENTENCING GUIDELINES AND THE SHIFTING POWER OF JUDGES AND PROSECUTORS

The creation of the Guidelines and the decision in *Booker* twenty years later have shaped and reshaped judges' discretion in the sentencing process. Part I.A explores the creation of the Guidelines and judges' limited ability to depart from them pre-*Booker*. In addition, Part I.A provides an overview of the rise in prosecutorial power over sentencing under the Guidelines and of the critical treatment of this increased power. Part I.B discusses the Supreme Court's decision in *Booker*, which made the Guidelines advisory and required a more deferential standard of review of trial judges' sentencing decisions. Ultimately, this Part demonstrates how the Guidelines limited judicial sentencing discretion, and how *Booker* expanded it.

A. Reining in Judicial Discretion Under the Guidelines

1. *Creation of the Guidelines.* — In the middle of the twentieth century, trial judges had exclusive discretion over sentencing criminal defendants.¹⁶ In *Williams v. New York*, the Supreme Court made clear that judges could give practically any sentence (within statutory and constitutional limits) to a convicted defendant.¹⁷ Because sentencing was left to the trial judge's discretion, all sentences were likely to survive appeal as long as they did not exceed the maximum prescribed by law.¹⁸

14. See *infra* Part III.D.

15. See *infra* Part III.C.

16. See Christine De Maso, Note, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker?*, 106 *Colum. L. Rev.* 2095, 2099 (2006) (noting that, prior to the Guidelines, "judges had nearly absolute and unreviewable sentencing discretion"); see also Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9 (1998) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.").

17. See 337 U.S. 241, 247 (1949) ("[The sentencing judge's] task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.").

18. See Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *Yale L.J.* 1681, 1688 (1992) (explaining that Supreme Court in *Williams* "conveyed the message that any authorized sentence, based on any available information, was likely to survive appeal"); Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 *Nw. U. L. Rev.*

Commentators began to criticize this regime of “unfettered discretion” and argue for a new sentencing system.¹⁹ Congress responded with the Sentencing Reform Act of 1984.²⁰ The SRA established the United States Sentencing Commission, which was responsible for creating the Federal Sentencing Guidelines for distribution to the federal courts.²¹ The Guidelines reined in judicial discretion by dictating a narrow sentence range primarily based on two factors: the seriousness of the defendant’s offense and the extent of his past criminal history.²² The Guidelines were mandatory and left little room for judges to sentence outside a defendant’s specific range. Absent a motion from the government, judges could depart from the Guidelines only in the unusual case where a judge believed the Sentencing Commission had not taken an

1247, 1270 (1997) (noting that sentences were generally not reviewed by appellate courts under discretionary system).

19. See Fred Cohen, Sentencing, Probation, and the Rehabilitative Ideal: The View from *Mempa v. Rhay*, 47 Tex. L. Rev. 1, 16 (1968) (arguing for limits on judicial discretion); Becky Gregory & Traci Kenner, A New Era in Federal Sentencing, 68 Tex. B.J. 796, 798 (2005) (noting criticism of judicial discretion from both liberals and conservatives); Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 916 (1962) (“[T]he new penology has resulted in vesting in judges . . . the greatest degree of uncontrolled power over the liberty of human beings that one can find in the legal system.”). Judge Marvin E. Frankel was the greatest critic of judges’ unfettered sentencing discretion, and his book was the driving force behind the creation of the Federal Sentencing Guidelines. See Marvin E. Frankel, *Criminal Sentences: Law Without Order* *passim* (1973) (arguing for guidelines system to restrain judicial sentencing discretion).

20. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.); see Adam Lamparello, Social Psychology, Legitimacy, and the Ethical Foundations of Judgment: Importing the Procedural Justice Model to Federal Sentencing Jurisprudence, 38 Colum. Hum. Rts. L. Rev. 115, 137 (2006) (“Congress enacted the SRA . . . to establish a cohesive sentencing structure that would both guide and constrain the exercise of judicial discretion during the sentencing process.”); see also Antoinette Marie Tease, Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Codefendants, 53 Mont. L. Rev. 75, 76 (1992) (noting when SRA took effect and who was affected by it).

21. See 28 U.S.C. §§ 991, 994 (2006) (describing establishment, purposes, and duties of Sentencing Commission). Determinate sentencing systems had already been instituted to some degree on the state level. See Michael C. Dorf & Jeffrey A. Fagan, Forward, Problem-Solving Courts: From Innovation to Institutionalization, 40 Am. Crim. L. Rev. 1501, 1503 n.13 (2003) (noting start of modern determinate sentencing era with changes in California, Washington, and Indiana).

22. See U.S. Sentencing Guidelines Manual § 1B1.1 (2008) [hereinafter Guidelines Manual] (providing instructions on how to calculate sentencing range); see also Jacob Loshin, Beyond the Clash of Disparities: Cocaine Sentencing After *Booker*, 29 W. New Eng. L. Rev. 619, 623–24 (2007) (“This algorithmic approach to sentencing left little room for judicial discretion. Judges could choose within the narrow range computed from the Guidelines”); Tease, *supra* note 20, at 77 (describing method for calculating applicable sentencing range for defendant under Guidelines). By standardizing sentences for offenders, Congress hoped to reduce nationwide sentencing disparity. See *infra* notes 26–27 and accompanying text.

aggravating or mitigating factor into account when fashioning the Guidelines.²³

2. *Departing from the Guidelines and the Rise of Prosecutorial Discretion over Sentencing.* — Before *Booker*, every appellate court prohibited trial judges from departing from the Guidelines to remedy disparity between codefendants' sentences.²⁴ The courts held that the Commission had taken codefendant disparity into account when fashioning the Guidelines, and it was therefore not a permissible factor for departure.²⁵ By reining in judges' ability to individualize sentences, Congress hoped to reduce unwarranted sentencing disparity among similarly situated federal defendants.²⁶ In theory, these defendants, no matter where they were convicted, would receive approximately identical sentences.²⁷

The Guidelines did allow departures, however, for some defendants who cooperated with the government. The "substantial assistance" provi-

23. See 18 U.S.C. § 3553(b)(1) (2006) ("[T]he court shall impose a sentence of the kind, and within the range [set forth by the Guidelines] . . . unless the court finds that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission . . ."), invalidated by *United States v. Booker*, 543 U.S. 220, 245 (2005).

24. See, e.g., *United States v. Ives*, 984 F.2d 649, 651 (5th Cir. 1993) (holding that considerable sentencing disparity with equally culpable codefendant was not valid basis for departure from Guidelines); *United States v. Gessa*, 944 F.2d 265, 270 (6th Cir. 1991) ("[D]eparture solely for the sake of conformity among co-defendants is not authorized under the guidelines . . ."); *United States v. Wogan*, 938 F.2d 1446, 1448 (1st Cir. 1991) ("[A] perceived need to equalize sentencing outcomes for similarly situated codefendants, without more, will not permit a departure from [the Guidelines]."); *United States v. Joyner*, 924 F.2d 454, 460 (2d Cir. 1991) (holding that consideration of codefendant sentencing disparity was impermissible ground for departure because Congress's primary concern was with nationwide disparity). But see *United States v. Wright*, 211 F.3d 233, 238–39 (5th Cir. 2000) (holding, in contradiction to *Ives*, that codefendant sentencing disparity could be basis for downward departure after Supreme Court's decision in *Koon v. United States*, 518 U.S. 81, 109 (1996), which held that departure factors should not be ruled out on a categorical basis).

25. See, e.g., *United States v. Carr*, 932 F.2d 67, 73 (1st Cir. 1991) ("[J]udicial dissatisfaction with the comparative outcome [of Guideline sentencing for codefendants] cannot justify a departure."); *Joyner*, 924 F.2d at 460 ("We think the entire structure of the sentencing guideline system indicates that the Commission fully considered the resulting disparities that would result among co-defendants and was satisfied that the different ranges . . . were appropriate, rather than the 'unwarranted' disparities that Congress sought to eliminate.").

26. See 28 U.S.C. §§ 991(b)(1)(B), 994(f) (stating Sentencing Commission's purpose of avoiding unwarranted sentencing disparities); see also Tease, *supra* note 20, at 76–77 ("Congress aimed [through the SRA] to provide reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.").

27. In practice, this ideal of nationwide uniformity has not been realized. See *infra* notes 199–200 and accompanying text. In large part, this is due to the variation in frequency of substantial assistance motions made by prosecutors from district to district. See Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 *Stan. L. Rev.* 85, 114–15 (2005) (reviewing data on frequency of substantial assistance motions).

sions of the SRA²⁸ and the Guidelines²⁹ provided one of the most widely used avenues of departure available to defendants.³⁰ These provisions allowed judges to give a more lenient sentence when the defendant cooperated “in the investigation or prosecution of another person.”³¹ However, judges could only depart for this reason if the government made a motion.³² This gave prosecutors sole discretion to decide which defendants were worthy of substantial assistance motions. As a result, defendants who possessed more valuable information because of their greater involvement in a crime could receive lower sentences than less involved codefendants who did not have useful information to offer—a phenomenon known as “inverted sentencing.”³³ Since judges could not depart from the Guidelines based on consideration of codefendants’ sentences, they were unable to remedy this disparity created by the substantial assistance provisions. In addition, a prosecutor’s decision about which defendant received a substantial assistance motion was, and still is, unreviewable.³⁴ Unlike district court judges, whose decisions are monitored by appellate courts, prosecutors receive much less oversight, a fact which has received considerable criticism.³⁵

28. 18 U.S.C. § 3553(e).

29. Guidelines Manual, *supra* note 22, § 5K1.1.

30. See Freed, *supra* note 18, at 1710 (describing substantial assistance provisions as “major escape route” from rigid Guideline sentences); Bruce M. Selya & John C. Massaro, The Illustrative Role of Substantial Assistance Departures in Combatting Ultra-Uniformity, 35 B.C. L. Rev. 799, 807 (1994) (characterizing section 5K1.1 as “king of the departure mountain”).

31. Guidelines Manual, *supra* note 22, § 5K1.1; see also Cynthia K.Y. Lee, From Gatekeeper to Concierge: Reigning in the Federal Prosecutor’s Expanding Power over Substantial Assistance Departures, 50 Rutgers L. Rev. 199, 204–07 (1997) (describing substantial assistance departure and its main purposes).

32. See Freed, *supra* note 18, at 1710 (“5K1.1 authorizes a downward departure of unlimited magnitude by a court *on motion of the Assistant United States Attorney.*”); Lee, *supra* note 31, at 201 (“Unique to the substantial assistance departure is a government motion requirement.”).

33. See Lee, *supra* note 31, at 209 (providing example of case where more culpable defendant received lighter sentence); Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 213 (1993) (explaining how “mandatory system can become an inverted pyramid” whereby minor participants receive harsher sentences than more culpable codefendants); Jeffrey J. Shebesta, Note, The “Safety Valve” Provision: Should the Government Get an Automatic Shut-Off Valve?, 2002 U. Ill. L. Rev. 529, 534–35 (describing inverted sentencing phenomenon). But see Frank O. Bowman, III, Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on “Substantial Assistance” Departures Follows a Decade of Prosecutorial Indiscipline, 29 Stetson L. Rev. 7, 48–53 (1999) (arguing that inverted sentencing is most likely an uncommon occurrence).

34. See Lee, *supra* note 31, at 237 (“[P]rosecutorial decision making regarding substantial assistance is largely invisible, internal, and not subject to scrutiny by outsiders.”); see also *infra* note 45 and accompanying text.

35. See *infra* notes 50–55 and accompanying text.

3. *The "Safety Valve" Amendment.* — In response to criticism over occurrences of inverted sentencing,³⁶ Congress amended the SRA in 1994 with a "safety valve" provision that allowed judges to "impose a sentence . . . without regard to any statutory minimum sentence" under certain conditions.³⁷ Under § 3553(f), a defendant who fits five specific qualifications (aimed at identifying defendants who only played a very minor role in a crime)³⁸ can receive a sentence outside the Guidelines range as well as below the statutory minimum.³⁹ Unlike the substantial assistance provision, a judge invoking the safety valve does not first need a motion from the government.⁴⁰ While this amendment was able to ameliorate some instances of inverted sentencing, the provision was (and remains) "extremely limited" in scope.⁴¹

4. *The Increased Role of Prosecutors in Fashioning Sentences.* — Under the Guidelines, prosecutors gained tremendous power over sentencing.⁴² Because the SRA made the Guidelines mandatory,⁴³ judges were forced to impose sentences based on the crimes with which the prosecutor chose to charge the defendant and the aggravating and mitigating factors he chose to present.⁴⁴ In addition, prosecutors decided which defendants deserved the filing of a substantial assistance motion.⁴⁵ Though the

36. See Freed, *supra* note 18, at 1705 (noting "serious imbalances" in drug cases); Tease, *supra* note 20, at 88–90 (decrying system where more culpable codefendants are rewarded for greater involvement in crime compared to their less involved cohorts).

37. Pub. L. No. 103-322, 108 Stat. 1796, 1985–86 (1994) (codified at 18 U.S.C. § 3553(f) (2006)).

38. The following are the required qualifications: (1) defendant has no more than one criminal history point; (2) defendant did not use violence, make threats, or possess a weapon; (3) offense did not result in death or serious injury; (4) defendant was not a supervisor of others in the offense, nor engaged in a criminal enterprise; and (5) defendant has provided all known information concerning the offense. 18 U.S.C. § 3553(f).

39. *Id.*

40. See Molly N. Van Etten, Note, *The Difference Between Truth and Truthfulness: Objective Versus Subjective Standards in Applying Rule 5C1.2*, 56 Vand. L. Rev. 1265, 1277 (2003) (discussing application of safety valve provision).

41. Gerard E. Lynch, *Sentencing Eddie*, 91 J. Crim. L. & Criminology 547, 563 (2001); see also Shebesta, *supra* note 33, at 535 (noting safety valve provision is applicable only to "narrow class of defendants"); *id.* at 556 (criticizing fact that "for some defendants, the safety valve has had no impact").

42. See Freed, *supra* note 18, at 1696 ("[M]ore often than before the guidelines, the prosecutor shares and often overshadows the judge's function."); Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. Crim. L. & Criminology 239, 300 (1999) ("[T]he last ten years have witnessed the creation of new tools by which prosecutors can control sentencing.").

43. See *supra* note 23 and accompanying text.

44. See De Maso, *supra* note 16, at 2100, 2118 (noting that prosecutors' decisions were what determined defendants' ultimate sentences).

45. See Lee, *supra* note 31, at 251 (describing prosecutors' discretion whether to file substantial assistance motion as "virtually unreviewable"). Whether, post-*Booker*, a judge still has to wait for the prosecution to make a motion before she can depart based on substantial assistance is a subject that has begun to be explored. See I. India Geronimo,

safety valve amendment allowed judges to depart from the Guidelines when sentencing defendants who only played a very minor role in a crime,⁴⁶ it only applied to a small subset of cases.⁴⁷ Therefore, for the vast majority of cases, judges could not depart from the Guidelines to remedy sentencing disparity between codefendants. Criticism of prosecutors' control over sentencing⁴⁸ has caused some to call for nationwide prosecutorial guidelines that encourage uniform charging practices and allow for judicial review of prosecutorial decisions.⁴⁹ For now, however, a prosecutor's decision to charge a defendant or file a substantial assistance motion remains solely within the prosecutor's discretion.

5. *Criticism of Prosecutorial Sentencing Power.* — Commentators have leveled a number of criticisms at the expanded power given to prosecutors under the SRA. First, both judges and academic commentators have argued that prosecutors' sole control over substantial assistance motions has led to sentencing disparity.⁵⁰ Second, unlike trial judges' decisions, prosecutors' decisions are generally not reviewable.⁵¹ This lack of accountability has resulted in disparate treatment of defendants by prosecu-

Comment, "Reasonably Predictable": The Reluctance to Embrace Judicial Discretion for Substantial Assistance Departures, 33 *Fordham Urb. L.J.* 1321, 1331–33 (2006) (noting judges' use of § 3553(a) to depart downward even in the absence of substantial assistance motion by government). This Note argues that under § 3553(a)(6) the government should not have to make a substantial assistance motion before a judge can depart from the Guidelines in multidefendant cases. See *infra* notes 193–196 and accompanying text (discussing benefits of allowing judges to consider disparity between codefendants' sentences).

46. See *supra* notes 37–40 and accompanying text.

47. See *supra* note 41 and accompanying text.

48. See *infra* Part I.A.5.

49. See Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 *Penn St. L. Rev.* 1087, 1088–90 (2005) (arguing that unique prosecutorial guidelines system in New Jersey could serve as model for all fifty states).

50. See, e.g., Freed, *supra* note 18, at 1712 (explaining how some district judges believed that by giving prosecutors power over substantial assistance departures, Congress had "invited the very disparity that the SRA had sought to eliminate"); Lee, *supra* note 31, at 236 (discussing how some prosecutors have used substantial assistance motions to manipulate the Guidelines, thereby undermining Congress's goal of sentencing uniformity for similarly situated defendants). The Supreme Court in *Booker* was apparently also concerned with expanding the power of the government to dictate sentences. See *United States v. Booker*, 543 U.S. 220, 256–57 (2005) (refusing to adopt dissent's remedy because it would allow prosecutors to control sentencing range through charging decisions). But cf. Lee, *supra* note 31, at 235 (discussing how government motion requirement for substantial assistance departures provides a check on judge's ability to depart from Guidelines range).

51. See, e.g., *United States v. Robertson*, 15 F.3d 862, 876 (9th Cir. 1994) (Reinhardt, J., concurring) (labeling prosecutor's discretion "generally unreviewable"), *rev'd* on other grounds, 514 U.S. 669 (1995); Lee, *supra* note 31, at 251 (arguing that prosecutors' "virtually unreviewable discretion" can lead to sentencing disparity).

tors,⁵² inverted sentencing among codefendants,⁵³ disparate use of substantial assistance motions across districts,⁵⁴ and ultimately, an increase in sentencing disparity.⁵⁵ These problems undercut the SRA's goal of nationwide sentencing uniformity for similarly situated defendants.

B. Booker *Loosens the Reins on Judicial Discretion*

While the Federal Sentencing Guidelines remained mandatory for approximately two decades, a line of cases regarding the constitutionality of judges increasing sentences based on facts not found by a jury culminated in a recharacterization of the Guidelines that made them merely advisory. Part I.B.1 provides an overview of the three primary cases that set the stage for *Booker*. Part I.B.2 describes the transition from mandatory to advisory Guidelines, and Part I.B.3 describes the new level of appellate review after *Booker*.

1. *Paving the Path to Booker*. — In 1986, the Supreme Court held Pennsylvania's Mandatory Minimum Sentencing Act constitutional in *McMillan v. Pennsylvania*.⁵⁶ At issue was whether Pennsylvania could label "visible possession of a firearm" (an aggravating factor that triggered a minimum five-year sentence) a sentencing factor rather than an element of the offense.⁵⁷ This distinction was important because, as the Court noted, "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."⁵⁸ By upholding Pennsylvania's right to label visible possession of a firearm a sentencing factor, the Court held that possession did not need to be found beyond a reasonable doubt by a jury, but could instead be found by a preponderance of the evidence by the sentencing judge.⁵⁹ However, the Court ac-

52. See Alschuler, *supra* note 27, at 105 (criticizing fact that prosecutors sought departures less often for blacks and Latinos than white defendants). Fear of disparate treatment by prosecutors in a determinate sentencing system is not a recent concern. See 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, 560 (1992) ("[U]nfettered prosecutorial discretion . . . may reproduce unwarranted disparity or, worse, discrimination based on race, gender, and social class . . .").

53. See *supra* note 33 and accompanying text.

54. See Freed, *supra* note 18, at 1712 (noting percentage of substantial assistance departures ranged from zero in some districts to over twenty percent in others).

55. See Alschuler, *supra* note 27, at 102 ("[S]ome reduction in judge-produced disparity was more than offset by an increase in prosecutor-produced disparity.").

56. 477 U.S. 79, 86, 91 (1986).

57. *Id.* at 85–86.

58. *Id.* at 85 (emphasis omitted) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)).

59. *Id.* at 92–93. This type of sentencing is commonly known as "real offense" sentencing; it allows judges to base defendants' sentence on the real conduct underlying the offense even though this conduct is not captured in the charges brought against the defendant. See David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and*

knowledge that states did not have free rein over which facts they could label sentencing factors.⁶⁰

The Court answered the question of what type of fact triggers a jury requirement in *Apprendi v. New Jersey*.⁶¹ In this case, the defendant challenged a New Jersey hate crime statute that allowed the sentencing judge to increase the defendant's maximum sentence if she found, by a preponderance of the evidence, that the defendant's crime was motivated by a discriminatory purpose.⁶² The Court held that the Sixth Amendment right to a jury trial required that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."⁶³ It was this holding that eventually led to the Court's decision in *Booker* that made the Guidelines advisory.⁶⁴

The final case to signal the coming of *Booker* was *Blakely v. Washington*.⁶⁵ Here, the defendant challenged the trial judge's finding that he had acted with "deliberate cruelty" and the resulting increase in his sentence beyond the standard range for kidnapping under Washington's Sentencing Reform Act.⁶⁶ At issue was whether the upper limit of the sentencing range was the "statutory maximum" for *Apprendi* purposes and therefore required a jury determination to sentence above it.⁶⁷ Because the Act prohibited judges from departing from the standard sentencing range except in light of a substantial aggravating factor (such as "deliberate cruelty"),⁶⁸ the Court classified the upper limit as a "statutory maximum" and therefore held that the judge violated *Apprendi* by using a fact not found by the jury to increase the defendant's sentence beyond the sentencing range.⁶⁹ Foreshadowing *Booker*, the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."⁷⁰

the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403, 408 (1993) ("[A] 'real-offense element' is any sentencing factor not included in the definition of the offense of conviction . . ."). Its use under the Guidelines as a way to increase defendants' sentences has received substantial criticism. See *infra* note 148 and accompanying text.

60. See *McMillan*, 477 U.S. at 86 (noting "there are constitutional limits to the State's power" to define what constitutes elements of crime and what constitutes sentencing factors).

61. 530 U.S. 466 (2000).

62. *Id.* at 468–69.

63. *Id.* at 490; see also *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (holding similarly in interpretation of federal statute).

64. See *infra* Part I.B.2 (describing transition from mandatory to advisory Guidelines).

65. 542 U.S. 296 (2004).

66. *Id.* at 299–300.

67. See *id.* at 303–04 (discussing what constitutes a maximum sentence for *Apprendi* purposes in a guidelines system).

68. *Id.* at 299.

69. *Id.* at 303–04.

70. *Id.* at 303 (emphasis omitted).

2. *A Switch to Advisory Guidelines.* — The Court’s decision in *United States v. Booker*⁷¹ came swiftly on *Blakely*’s tail. The challenge here was based on the trial judge’s finding—not submitted to the jury—that the defendant had possessed an additional 566 grams of crack cocaine, which, under the Federal Sentencing Guidelines, required the judge to sentence Booker between 360 months and life imprisonment.⁷² Based solely on the facts proved to the jury beyond a reasonable doubt, however, the Guidelines mandated a sentence between 210 and 262 months.⁷³

Reaffirming its holdings in *Apprendi* and *Blakely*, the Court reiterated that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”⁷⁴ By applying *Blakely*’s holding to the Guidelines, the Court found that the trial judge had violated Booker’s Sixth Amendment right to a jury determination of the facts.⁷⁵ Having found an aspect of the Guidelines unconstitutional, the Court was faced with choosing an appropriate remedy.⁷⁶

Justice Breyer, writing for a majority of the Court, concluded that the provision making the Guidelines mandatory, § 3553(b)(1), was no longer applicable⁷⁷ and made the Guidelines merely advisory.⁷⁸ This remedy was based on the holding in *Blakely* that the upper limit of a sentencing range in a mandatory guidelines system was the statutory maximum for *Apprendi* purposes.⁷⁹ If the Guidelines were not mandatory, then the upper limit of a sentencing range was no longer the statutory maximum because the judge was not required by law to stay within the range. While holding that judges must still take the Guidelines into consideration, along with the sentencing goals established in 18 U.S.C. § 3553(a), the Court did not decide how much deference judges should give to the

71. 543 U.S. 220 (2005).

72. *Id.* at 227.

73. *Id.*

74. *Id.* at 244.

75. See *id.* at 245.

76. See *id.*

77. *Id.* (“We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory . . . incompatible with today’s constitutional holding.”). Excising § 3553(b)(1) was not the only remedy open to the Court. In his partial dissent, Justice Stevens advocated grafting a Sixth Amendment requirement onto the Guidelines. *Id.* at 302 (Stevens, J., dissenting in part) (“Merely requiring all applications of the Guidelines to comply with the Sixth Amendment . . . would have required no more complicated procedures than the procedural regime the majority enacts today . . .”). The majority of the Court disagreed. See *id.* at 252 (majority opinion) (“To engraft the Court’s constitutional requirement onto the sentencing statutes, however, would destroy the system.”).

78. *Id.* at 245.

79. *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004).

Guidelines.⁸⁰ The decision also raised the question this Note addresses: Under an advisory Guidelines system, can judges consider, and depart from the Guidelines to remedy, codefendant sentencing disparity?

3. *A Switch to Reasonableness Review.* — Booker deleted one other provision from the SRA. Because it contained “critical cross-references to the (now-excised) § 3553(b)(1),” the Court severed and excised § 3742(e), the provision that established de novo appellate review.⁸¹ In its place, the Court found an implied standard of review—review for unreasonableness.⁸² Justice Breyer envisioned that in determining whether a sentence is reasonable or not appellate courts would be guided by the same sentencing factors in § 3553(a) that would guide trial judges in their sentencing decisions.⁸³ One of these factors, § 3553(a)(6), advises trial judges to consider “the need to avoid unwarranted sentence disparities” among similarly situated defendants.⁸⁴ Thus, if consideration of codefendant disparity were a permissible factor under (a)(6), appellate courts would presumably find sentences based on that consideration to be reasonable.

The Supreme Court’s decision in *Booker* returned a considerable amount of discretion to trial judges, drastically changing the federal sentencing regime. Part II explores the current circuit split regarding whether judges can now consider the disparity between codefendants’ sentences when fashioning an individual’s sentence. Part III discusses the reasons both for and against allowing consideration of codefendant disparity. It explains how returning this particular discretion to trial judges would ameliorate some of the concerns regarding increased prosecutorial control over sentencing that this Part discussed. In addition, it shows how permitting consideration of this factor is in line with the Supreme Court’s recent decisions in *Gall v. United States*⁸⁵ and *Kimbrough v. United States*.⁸⁶

80. See *Booker*, 543 U.S. at 259–60, 264 (requiring judges to take Guidelines into account, but without discussing how much deference must be given); see also *id.* at 311 (Scalia, J., dissenting in part) (“The worst feature of the scheme is that no one knows—and perhaps no one is meant to know—how advisory Guidelines . . . will function in practice.”).

81. *Id.* at 260 (majority opinion).

82. *Id.* at 261.

83. *Id.*; see also Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, U. Chi. Legal F., 2005, at 149, 182 (discussing Justice Breyer’s remedy regarding reasonableness review and questions it left unanswered).

84. 18 U.S.C. § 3553(a)(6) (2006).

85. 128 S. Ct. 586 (2007).

86. 128 S. Ct. 558 (2007).

II. CAN JUDGES CONSIDER CODEFENDANT DISPARITY AFTER *BOOKER*?

Since the Guidelines are now advisory,⁸⁷ trial judges have greater discretion to sentence outside the range prescribed by the Guidelines.⁸⁸ This Part examines the current circuit split regarding whether judges may use their newfound discretion to depart from the Guidelines based on consideration of disparity between codefendants' sentences.

Part II.A explores judges' inability to consider codefendant disparity when fashioning sentences pre-*Booker*. Parts II.B and II.C discuss the current circuit split regarding whether judges can now consider codefendant disparity. Ultimately, Part II reveals the current trend in the law to allow consideration of this disparity.

A. Consideration of Codefendant Disparity Was Not Permitted Before *Booker*

Prior to *Booker*, every circuit held that trial judges could not depart from the Guidelines based on consideration of codefendant sentencing disparity.⁸⁹ The SRA directs judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" when fashioning a defendant's sentence.⁹⁰ On its face, the statute thus seems to permit judges to shape sentences so that defendants with similar criminal histories receive similar sentences when convicted of the same crime. However, appellate courts repeatedly reversed trial judges who equalized sentences between codefendants.⁹¹ Courts believed that the Sentencing Commission had expected the Guidelines to occasionally create disparity between code-

87. See *supra* notes 77–78 and accompanying text.

88. While trial judges must still calculate the appropriate Guidelines range for a defendant, they can then choose to depart from the Guidelines based on consideration of the factors in 18 U.S.C. § 3553(a). See *Gall*, 128 S. Ct. at 596–97.

89. See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747, 764–65 (2005) ("Every federal circuit has ruled that disparity is neither a basis for dismissal nor a basis for challenge to a sentence that exceeds the sentences imposed on co-defendants . . .").

90. 18 U.S.C. § 3553(a)(6).

91. See, e.g., *United States v. Carr*, 932 F.2d 67, 73 (1st Cir. 1991) (holding "judicial dissatisfaction" with codefendant sentencing disparity cannot justify departure); *United States v. Joyner*, 924 F.2d 454, 460–61 (2d Cir. 1991) ("[N]either Congress nor the Commission could have expected that the mere fact of a difference between the applicable guidelines range for a defendant and that of his co-defendant would permit a departure . . ."); *United States v. Enriquez-Munoz*, 906 F.2d 1356, 1360 (9th Cir. 1990) ("[A]n upward departure for purposes of equalization is not permissible."). However, some circuits made very limited rules that allowed trial judges to consider the disparity in unusual circumstances. See *United States v. Meza*, 127 F.3d 545, 549 (7th Cir. 1997) (allowing consideration of codefendant disparity created by improper application of Guidelines); *United States v. Ray*, 930 F.2d 1368, 1372 & n.7 (9th Cir. 1991) (allowing consideration of disparity in "unique situation" where one defendant was sentenced under Guidelines and codefendants were sentenced while Guidelines were temporarily suspended in Ninth Circuit).

defendants' sentences and thus was not "unwarranted" within the meaning of the statute.⁹²

Courts refused to allow equalization of codefendant sentences regardless of whether the departure was downward or upward. In *United States v. Joyner*, the Second Circuit explained that downward departures simply reflected a value judgment on the trial judge's part that the Sentencing Commission had made the sentencing range too high for the defendant as compared to his codefendants.⁹³ In the same breath, the court noted in dicta that a judge could achieve the same result if the judge could find other criteria for departure that "coincidentally" decreased the gap between the defendant and his codefendants' sentences.⁹⁴ This language invites manipulation of the Guidelines.⁹⁵ A judge could pay lip service to permissible factors for departure while actually basing the departure on consideration of codefendant disparity.

In *United States v. Enriquez-Munoz*, the government argued that the defendant should receive a higher sentence (an upward departure from the applicable Guidelines range) because his codefendants had received greater sentences.⁹⁶ The government based its argument on the assertion that the defendant and his codefendants had engaged in similar criminal conduct.⁹⁷ However, the Ninth Circuit refused to do so, reasoning that equalization was not a factor included in the Guidelines.⁹⁸

92. See, e.g., *Carr*, 932 F.2d at 73 (asserting that codefendant disparity was not unwarranted within meaning of statute); *Joyner*, 924 F.2d at 460 ("We think the entire structure of the sentencing guideline system indicates that the Commission fully considered the resulting disparities that would result among co-defendants and was satisfied that the different ranges . . . were appropriate, rather than the 'unwarranted' disparities that Congress sought to eliminate.").

93. *Joyner*, 924 F.2d at 461.

94. *Id.*

95. Admittedly, the court required a judge to find "in good faith" the criteria that would decrease the disparity, but provided the trial record gave some indication that such criteria were present, an appellate court would presumably find that the judge had acted in good faith—even if the judge's reason for departure was actually based on consideration of codefendant disparity. Cf. James A. McLaughlin, Case Note, Reducing Unjustified Sentencing Disparity, 107 Yale L.J. 2345, 2350 (1998) (noting increased "judicial circumvention" of Guidelines and arguing for departure to address codefendant disparity to reduce temptation to manipulate Guidelines).

96. *Enriquez-Munoz*, 906 F.2d at 1358. Interestingly, in this case, the government argued for equalization of codefendant sentences when doing so would *increase* the defendant's sentence while arguing against equalization in *Joyner*—a downward departure case. Although these two cases occurred in different circuits, prosecutors in any circuit might feel differently about equalization when the defendant faces an upward, rather than downward, departure.

97. *Id.* ("The government argues that equal sentences for the defendants are appropriate since they engaged in similar conduct."). However, the SRA advises judges to consider "the need to avoid unwarranted sentence disparities among defendants" who have been convicted of similar conduct *and* have similar records. 18 U.S.C. § 3553(a)(6) (2006). Thus, neither the SRA nor this Note would suggest that all codefendants convicted of the same crime should receive the same sentence.

98. *Enriquez-Munoz*, 906 F.2d at 1359.

As these cases show, prior to *Booker*, judges did not have the discretion to depart either upward or downward based on consideration of codefendant sentencing disparity. In response, both courts and commentators alike criticized the Guidelines for restricting trial judges' ability to consider the disparity.⁹⁹ Because judges were unable to depart from the Guidelines to remedy codefendant disparity, judges were sometimes required to sentence defendants more harshly than their more culpable codefendants.¹⁰⁰

B. Most Circuits Now Permit Consideration of Codefendant Disparity

With the decision in *Booker*, courts have had to grapple with new sentencing issues. Before *Booker*, courts held that codefendant disparity had been taken into account by the Commission when fashioning the Guidelines, and therefore was not a permissible factor on which to base a departure.¹⁰¹ After *Booker*, this issue is no longer relevant; the question is instead whether codefendant sentencing disparity is a reasonable basis for departure based on the sentencing goal of § 3553(a)(6)—“to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”¹⁰² Most courts answer this question by permitting judges to consider codefendant disparity as a basis for departure.¹⁰³ This new trend toward greater judicial discretion is not universal, however.¹⁰⁴ And even in some circuits where considera-

99. See *United States v. Ray*, 930 F.2d 1368, 1372 (9th Cir. 1991) (“This restraint on judicial discretion has caused district judges nationwide to regard the [G]uidelines with less than wholehearted enthusiasm.”); McLaughlin, *supra* note 95, at 2350 (arguing “systemic benefits are lost” when judges cannot consider codefendant disparities); Tease, *supra* note 20, at 83–84, 89 (noting judges’ inability to consider disparity and arguing for revision of Guidelines). Some of this criticism may have led to the creation of the safety valve provision discussed above. See *supra* Part I.A.3.

100. See Tease, *supra* note 20, at 86–87 (providing two cases as examples where minor participants in a crime were treated more harshly than their more culpable codefendants). While the safety valve amendment may have remedied some of these unfair outcomes, its scope remains limited. See *supra* note 41 and accompanying text.

101. See *supra* notes 24–25 and accompanying text.

102. 18 U.S.C. § 3553(a)(6).

103. See, e.g., *United States v. Clark*, 289 F. App’x 44, 53 (5th Cir. 2008) (per curiam) (“18 U.S.C. § 3553(a)(6) bars only *unwarranted* sentencing disparities among similarly-situated co-defendants.”); *United States v. Smart*, 518 F.3d 800, 804 (10th Cir. 2008) (“After *Gall*, it is clear that codefendant disparity is not a per se ‘improper’ factor”); *United States v. Conatser*, 514 F.3d 508, 521 (6th Cir. 2008) (“[T]he district judge *could* but was not required to consider disparities between codefendants.” (emphasis added)); *United States v. Neufeld*, 223 F. App’x 887, 890 (11th Cir. 2007) (per curiam) (holding departure based on codefendant disparity was not unreasonable); *United States v. Parker*, 462 F.3d 273, 277 (3d Cir. 2006) (holding that while § 3553(a) does not require judges to consider codefendant disparity, neither does it prohibit them from doing so); *United States v. Lazenby*, 439 F.3d 928, 934 (8th Cir. 2006) (concluding that district court should have given more weight to extreme disparity between codefendants’ sentences since such disparity fails to serve legislative intent of § 3553(a)(6)) .

104. See *infra* Part II.C.

tion of codefendant disparity is allowed, the courts have forbidden trial judges from remedying codefendant disparity in cases where the disparity is a result of a substantial assistance motion.¹⁰⁵

The Eleventh Circuit directly addressed the current split in *United States v. Neufeld*.¹⁰⁶ In that case, the government appealed a reduction in sentence that was based on codefendant sentencing disparity.¹⁰⁷ The court upheld the reduction in sentence, stating that “we can not say that the government met its burden to show that the ultimate sentence imposed was unreasonable.”¹⁰⁸ Because of the split, the court acknowledged that the issue is no longer “clear under current law.”¹⁰⁹

The Eighth Circuit has also held that § 3553(a)(6) permits consideration of codefendant disparity.¹¹⁰ *United States v. Krutsinger*¹¹¹ is a good example of how § 3553(a)(6) is now being used by some courts, and it also reveals the tension between prosecutorial and judicial discretion regarding sentencing.¹¹² The case involved two defendants, Krutsinger and O’Meara, who played minor roles in a drug distribution conspiracy.¹¹³ The government recommended sentences of sixty months and seventy months, respectively.¹¹⁴ Their codefendants, Quam and Dietz, received sentences of fifteen months and twenty months.¹¹⁵ The government made substantial assistance motions for both Dietz and Krutsinger.¹¹⁶ However, the government recommended a seventy-one percent departure for Dietz, but only a forty percent departure for Krutsinger.¹¹⁷ The

105. See *infra* notes 125–129 and accompanying text.

106. 223 F. App’x at 889 (“Our sister circuits have split on whether section 3553(a)(6) permits consideration of sentence disparity among codefendants.”).

107. See *id.*

108. *Id.* at 890. The court seemed to rely on the fact that the government failed to make an objection at trial regarding the district court’s consideration of codefendant disparity, and thus the defendant’s sentence could only be reversed if the district court had committed plain error. Whether the court of appeals would have upheld the defendant’s reduction in sentence if the government had made an objection is uncertain. Regardless, for future cases, there now exists what did not before—a “post-*Booker* binding precedent of [the Eleventh] Circuit [that] addresses squarely this issue.” *Id.* at 889.

109. *Id.* at 889 (internal quotation marks omitted).

110. See *United States v. Krutsinger*, 449 F.3d 827, 830 (8th Cir. 2006) (holding district court had not improperly applied § 3553(a)(6) or abused its discretion when it compared sentences between similarly situated defendants who had committed same crime); *United States v. Lazenby*, 439 F.3d 928, 934 (8th Cir. 2006) (concluding that district court should have given more weight to extreme disparity between codefendants’ sentences since such disparity fails to serve legislative intent of § 3553(a)(6)).

111. 449 F.3d at 827.

112. For a discussion of prosecutorial power over sentencing, see *supra* Parts I.A.2, I.A.4.

113. *Krutsinger*, 449 F.3d at 828.

114. *Id.* at 828–29.

115. *Id.* at 829.

116. *Id.* at 828–29.

117. *Id.* Arguably, a prosecutor should be able to recommend differing levels of departure based on differing levels of cooperation. However, in reference to Mr. Krutsinger, the court of appeals made the following statement: “We cannot say the district

district court concluded that the government's recommendation did not fully take into account Krutsinger's cooperation, creating an unwarranted disparity between the codefendants' sentences.¹¹⁸ Because of this, the court decided to give Krutsinger a lower sentence (twenty-one months instead of sixty) in order to reduce the disparity between his sentence and that of Dietz.¹¹⁹ Likewise, the court gave O'Meara a lighter sentence than the government recommended (twenty-four months instead of seventy) so that her sentence was closer to that of Quam, a conspirator who was "nearly identically situated" but was tried in a prior proceeding.¹²⁰

In upholding the district court's use of § 3553(a)(6) to remedy sentencing disparity between codefendants, the Eighth Circuit in *Krutsinger* showed how permitting consideration of this disparity can increase fairness in sentencing. For defendants like Krutsinger, who provide as much cooperation as their codefendants,¹²¹ trial judges can point to § 3553(a)(6) if they find that the prosecutor's sentencing recommendation does not give adequate weight to the defendant's cooperation. This promotes the SRA's overall goal of uniformity in sentencing for similarly situated defendants,¹²² and ensures that future defendants know cooperation will be rewarded, which may increase the likelihood that defendants will choose to cooperate. For defendants like O'Meara, whose greater sentence recommendation was based on nothing more than the timing of her conviction,¹²³ the ability to depart from the Guidelines based on the need to avoid codefendant disparity also promotes sentencing uniformity. A departure in this situation is consistent with the principle that co-

court abused its discretion in granting a similar departure to a co-defendant who provided as much or more cooperation." *Id.* at 830. This language lends support to the notion that both prosecutors and judges should determine the extent to which defendants are cooperating. If a prosecutor arbitrarily gives a defendant a greater departure recommendation when his codefendant has provided as much cooperation, then the trial judge should be able to take a second look and provide equal departures. Before *Booker*, however, this type of judicial intervention was prohibited under the SRA. See *supra* note 45 and accompanying text. Giving judges some power over substantial assistance departures also mitigates some of the negative effects seen when prosecutors have complete control. See *supra* notes 50–55 and accompanying text.

118. *Krutsinger*, 449 F.3d at 829.

119. *Id.* at 830.

120. *Id.* at 829–30. The government apparently did not claim that O'Meara and Quam were different in terms of their criminal conduct or criminal history. See *id.* Rather, the government recommended a higher sentence for O'Meara simply because she was convicted at a later date, at which time the government was able to attribute a greater amount of methamphetamine to the conspiracy. *Id.*

121. See *supra* note 117.

122. See 18 U.S.C. § 3553(a)(6) (2006) (advising judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); *United States v. Booker*, 543 U.S. 220, 253–54 (2005) (noting congressional intent to create increased sentencing uniformity based on defendants' real conduct rather than specific crimes chosen by prosecutors).

123. See *supra* note 120.

defendants who are convicted of the same crime should receive similar sentences. This result is more just, and promotes greater uniformity among similarly situated defendants, than a system that forces judges to sentence codefendants differently based on an arbitrary factor such as the timing of their convictions.¹²⁴

Since *Krutsinger*, however, the Eighth Circuit has created a rule that prohibits judges from remedying codefendant disparity when it is created by a substantial assistance motion. In *United States v. Gallegos*, the Eighth Circuit held that “[d]isparity in sentences between a defendant who provided substantial assistance and one who provided no assistance . . . is not ‘unwarranted’” for purposes of § 3553(a)(6).¹²⁵ The Fifth Circuit has chosen to adopt this rule as well.¹²⁶ This limitation on judges’ discretion undermines one of the major goals of considering codefendant disparity: ameliorating problems associated with prosecutorial control over sentencing.¹²⁷ As discussed above, the fact that prosecutors have sole, unreviewable control over who receives substantial assistance motions has created a number of problems, including increased sentencing disparity nationwide.¹²⁸ This per se rule forbidding trial judges to remedy disparity caused by substantial assistance motions invites the very disparity Congress sought to avoid when it passed the SRA. This argument is particularly strong in cases of inverted sentencing.¹²⁹ These cases show how important it is that a judge have some control over remedying unwarranted disparity caused by substantial assistance motions.¹³⁰

124. Quam’s lower sentence *may* have been justified had he pled guilty while O’Meara insisted on going to trial. However, this was actually opposite to how it really happened—O’Meara pled guilty and Quam went to trial. See *Krutsinger*, 449 F.3d at 830. As the court noted, this “is a difference that would indicate O’Meara should receive a lower, not a higher, sentence.” *Id.*

125. 480 F.3d 856, 859 (8th Cir. 2007). Presumably this rule would not have affected the judge’s ability to remedy disparity in *Krutsinger* since both defendants received substantial assistance motions. However there may be similar cases where both defendants are willing to cooperate, but the prosecutor only files a motion for one defendant, creating a disparity that the judge deems unwarranted based on the circumstances of the case. The rule established in the Eighth Circuit forbids the trial judge from remedying codefendant disparity in these cases.

126. See *United States v. Duhon*, 541 F.3d 391, 397 (5th Cir. 2008) (“[D]isparity in sentences between a defendant who provided substantial assistance and one who provided no assistance . . . is not unwarranted.” (quoting *Gallegos*, 480 F.3d at 859)).

127. See *supra* Part I.A.2 (discussing disparity caused by prosecutorial control over substantial assistance motions).

128. See *supra* Part I.A.5 (identifying problems associated with prosecutorial sentencing power).

129. See *supra* notes 33, 36 and accompanying text; *infra* note 194 and accompanying text.

130. Arguably, a defendant who cooperated with the government should receive a lower sentence than his codefendant who obstinately refused to cooperate. This Note does not advocate a system where noncooperation is always rewarded as much as cooperation. However, in cases where one defendant was willing to cooperate, or even did provide some cooperation, but the government only filed a substantial assistance motion for his codefendant, the judge should have the discretion to depart from the Guidelines to

C. *The Seventh Circuit Still Finds Consideration of Codefendant Disparity Impermissible*

While some courts have forbidden consideration of codefendant disparity in substantial assistance cases, the Seventh Circuit has held post-*Booker* that consideration of codefendant disparity is never a permissible sentencing factor under § 3553(a)(6).¹³¹ The Seventh Circuit reasoned that § 3553(a)(6) was meant only to address sentencing disparity nationwide, and therefore could not be used to remedy sentencing disparity between codefendants.¹³²

In *United States v. Pisman*, the Seventh Circuit vacated the trial judge's sentence on the basis of its finding that consideration of codefendant disparity is an impermissible factor.¹³³ Despite the fact that the trial judge had found that Pisman was less culpable than his codefendant Wilkerson, and thus did not deserve a greater sentence,¹³⁴ the court of

remedy this disparity. This is especially true if the codefendant received a 5K1 recommendation because he was more deeply involved in the crime and therefore had more information to provide to the government—treating the minor participant more harshly would punish him for being less culpable than his codefendant. See *supra* note 33 and accompanying text. In addition, judges would have the discretion to depart in cases where the judge believes that the government made a substantial assistance motion for one defendant while refusing to make a motion for a codefendant based on impermissible reasons, such as race or gender. See *supra* note 52 (discussing discrimination in prosecutorial decisionmaking).

131. See *United States v. Omole*, 523 F.3d 691, 700 (7th Cir. 2008) (“This court refuses to view the discrepancy between sentences of codefendants as a basis for challenging a sentence.”); *United States v. Pisman*, 443 F.3d 912, 916 (7th Cir. 2006) (“[C]omparison of co-defendants . . . is not a proper application of the § 3553(a) mandate that a court minimize unwarranted disparities in sentences.”). Until recently, the Tenth Circuit agreed that codefendant disparity was not grounds for challenging a sentence; certiorari was denied when one defendant tried to appeal the Tenth Circuit's decision to the Supreme Court in 2008. See *United States v. Davis*, 437 F.3d 989, 997 (10th Cir. 2006) (“[A] criminal defendant alleging a disparity between his sentence and that of a codefendant is not entitled to relief from a sentence that is properly within the sentencing guidelines and statutory requirements.”), cert. denied, 128 S. Ct. 2523 (2008). However, after the Supreme Court's decision in *Gall v. United States*, 128 S. Ct. 586 (2007), which held that sentences must be reviewed “under a deferential abuse of discretion standard,” *id.* at 591, the Tenth Circuit has aligned its thinking with the majority of circuits. See *infra* notes 182–183 and accompanying text.

132. *Pisman*, 443 F.3d at 916 (holding that § 3553(a) does not apply to codefendant sentencing disparity).

133. *Id.*

134. *Id.* at 915. Although *Pisman* was a case where the disparity was caused by only one defendant receiving a substantial assistance motion, the Seventh Circuit has shown in numerous cases that it believes consideration of codefendant disparity is impermissible under § 3553(a)(6) in all cases, not just cases involving cooperation. See, e.g., *Omole*, 523 F.3d at 700 (holding that a sentence may be disturbed only if codefendant disparity creates a disparity between defendant's sentence and all other sentences for similar offenders imposed nationwide); *United States v. McMutuary*, 217 F.3d 477, 490 (7th Cir. 2000) (“[T]he sentencing court should consider unjustified disparities in only those cases where the unjustified disparity between co-defendants actually creates a disparity between the length of the appellant's sentence and all other similar sentences imposed nationwide.”).

appeals held that “the § 3553(a) concern with sentence disparity is not one that focuses on differences among defendants in an individual case, but rather is concerned with unjustified difference across judges or districts.”¹³⁵ The court explicitly stated that it held no opinion on whether the district court could impose the lighter sentence; it simply could not do so based on express considerations of codefendant sentencing disparity.¹³⁶ This statement invites judicial manipulation of the Guidelines in order to effect the same result using other means, thereby decreasing transparency in sentencing.¹³⁷

At least one commentator seems to agree with the Seventh Circuit that § 3553(a)(6) should be used solely to consider nationwide disparity.¹³⁸ Professor O’Hear argues that “basing one defendant’s sentence on co-defendants’ sentences has an arbitrary quality to it.”¹³⁹ However, a case like *Krutsinger* illustrates the arbitrariness of *not* basing a defendant’s sentence on his similarly situated codefendant.¹⁴⁰ Regardless of the merits of either approach, *Booker* supports the argument that codefendant sentencing disparity is now a permissible factor to consider under § 3553(a)(6). Part III will argue that, post-*Booker*, trial judges should be allowed to depart from the Guidelines to remedy codefendant sentencing disparity.

III. WHY CODEFENDANT DISPARITY SHOULD BE CONSIDERED POST-*BOOKER*

This Part argues that *Booker* allows judges to consider codefendant disparity under § 3553(a)(6) and concludes that judges should be allowed to depart from the Guidelines to remedy this disparity. Part III.A discusses how *Booker* implicitly allows judges to consider codefendant disparity. Part III.B looks to recent Supreme Court decisions regarding sentencing and shows how consideration of codefendant disparity is in line with current sentencing jurisprudence. Part III.C discusses some of the policy arguments both for and against considering codefendant sentencing disparity. Part III.D provides examples, by no means exhaustive, of some of the types of cases where trial judges should depart from the Guidelines to remedy the disparity. Ultimately, Part III will show that

In *McMutuary*, the Seventh Circuit recognized, in dicta, one possible exception: Codefendant disparity might be a permissible factor for departure in those cases where the prosecutor abused his discretion, *id.*, a tough standard to meet considering the wide latitude and unrevisability of prosecutorial decisions. See *supra* note 51 and accompanying text.

135. *Pisman*, 443 F.3d at 916.

136. *Id.*

137. See *supra* notes 94–95 and accompanying text.

138. See Michael M. O’Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) After Booker*, 37 *McGeorge L. Rev.* 627, 645 (2006).

139. *Id.* at 646.

140. See *supra* notes 112–120 and accompanying text. To impose the sentences recommended by the government in *Krutsinger* would result in arbitrary sentencing whereby similarly situated defendants receive very different sentences.

judges should depart from the Guidelines to remedy sentencing disparity between similarly situated codefendants in order to promote the SRA's goals of uniformity and fairness in sentencing.

A. *How Booker Allows Judges to Consider Codefendant Disparity*

After *Booker*, courts began grappling with the question of what considerations are now permissible reasons for departing from the Guidelines.¹⁴¹ The scholarly reaction to *Booker* suggested that the Supreme Court had announced a major change in sentencing doctrine, though the decision's precise impact was hotly debated.¹⁴² Regardless of how dramatic *Booker's* impact will ultimately be, it is clear that trial judges now have greater discretion over sentencing than they did under mandatory Guidelines.¹⁴³ This Note argues that, based on *Booker's* language, district court judges can now consider codefendant sentencing disparity.

While *Booker* does not directly address the issue of codefendant disparity,¹⁴⁴ there is language relevant to the issue. First, in Justice Breyer's remedy majority opinion, the Court held that the SRA still requires judges to take account of the Guidelines together with "the need to avoid unwarranted sentencing disparities."¹⁴⁵ Since the Guidelines are advisory, trial judges must determine how this provision will advise them in the sentencing decision. Thus, judges may find that sentencing disparity once warranted under the strict, mandatory pre-*Booker* Guidelines (e.g., codefendant disparity) now falls within the type of "unwarranted sentenc-

141. See *supra* Part I.B for a discussion regarding the history leading up to, and the two main holdings of, *United States v. Booker*, 543 U.S. 220 (2005).

142. See, e.g., Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 *Pepp. L. Rev.* 615, 645 (2006) (arguing that *Booker* will make courts reevaluate notions about sentencing that have taken hold over past two decades, possibly making those notions obsolete). But see Norman C. Bay, *Prosecutorial Discretion in the Post-Booker World*, 37 *McGeorge L. Rev.* 549, 568–69 (2006) (arguing that dramatic change in sentencing procedures is unlikely as judges are used to sentencing under Guidelines and will take time to adjust). Finally, some commentators asserted that *Booker* established an "ideal middle ground" that returned some aspects of sentencing to the pre-Guidelines era, but ultimately kept sentencing within Guidelines ranges for the majority of cases. See, e.g., Robert J. Anello & Jodi Mishner Peikin, *Evolving Roles in Federal Sentencing: The Post-Booker/Fanfan World*, 1 *Fed. Cts. L. Rev.* 301, 327 (2006).

143. See Regina Stone-Harris, *How to Vary from the Federal Sentencing Guidelines Without Being Reversed*, 19 *Fed. Sent'g Rep.* 183, 183 (2007) (characterizing decision in *Booker* as "radical change" in way Guidelines are now to be used); De Maso, *supra* note 16, at 2108 ("For *Booker's* constitutional remedy to work, the advisory regime must differ from the mandatory one.").

144. The Supreme Court has discussed codefendant disparity in a post-*Booker* decision, however. See *infra* notes 172–178 and accompanying text.

145. *Booker*, 543 U.S. at 260. For the complete statutory language, see 18 U.S.C. § 3553(a)(6) (2006) (directing judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" when sentencing).

ing disparities” courts should consider.¹⁴⁶ Because judges’ decisions about the factors on which to base departures are now evaluated for reasonableness rather than solely on whether the Commission had considered the factor when fashioning the Guidelines, appellate courts must give deference to trial judges unless it is clearly unreasonable to base departures on considerations of codefendant disparity—a position rejected by the majority of federal circuits.

In addition, Justice Breyer acknowledged that reducing sentencing disparity depends on judges’ ability to base sentences on the “*real conduct*” underlying the offense.¹⁴⁷ While real offense sentencing under the Guidelines has received its fair share of criticism,¹⁴⁸ *Booker* makes it clear that Congress expected this type of sentencing to continue.¹⁴⁹ In the context of codefendants, at least, the goals of real offense sentencing are easily achieved by making sure defendants who are convicted of the same criminal acts receive similar sentences. Thus, even if the Guidelines (or the government) suggest two different sentences for codefendants, the judge can achieve equity under § 3553(a)(6).¹⁵⁰ This approach also avoids some of the criticism of real offense sentencing because it only compares the conduct of two similarly situated codefendants to see if they should be sentenced similarly rather than searching for conduct not captured by the defendant’s crime in order to increase his sentence.¹⁵¹

Lastly, Justice Breyer asserted that district courts are simply “not bound to apply the Guidelines.”¹⁵² While judges must still consider them

146. See O’Hear, *supra* note 138, at 628 (“[W]ith conversion of the Guidelines from mandatory to advisory, the (a)(6) duty to avoid unwarranted disparity may acquire new significance.”).

147. *Booker*, 543 U.S. at 250.

148. See, e.g., *id.* at 288 (Stevens, J., dissenting in part) (“[T]he goal of such sentencing—increasing a defendant’s sentence on the basis of conduct not proved at trial—is contrary to the very core of *Apprendi*.”); H.R. Rep. No. 98-1017, at 98 (1984) (“To permit ‘real offense’ sentencing guidelines would present serious constitutional problems as well as substantial policy difficulties.”); David Yellen, *Reforming the Federal Sentencing Guidelines’ Misguided Approach to Real-Offense Sentencing*, 58 *Stan. L. Rev.* 267, 275 (2005) (labeling Guidelines approach to real offense sentencing as “one of [its] most unseemly aspects”); Robert L. Boone, *Comment, Booker Defined: Examining the Application of United States v. Booker in the Nation’s Most Divergent Circuit Courts*, 95 *Cal. L. Rev.* 1079, 1085 (2007) (describing real offense sentencing as “[p]erhaps the most controversial feature of the Guidelines”).

149. *Booker*, 543 U.S. at 251 (majority opinion).

150. For an illustration, see *supra* notes 112–124 and accompanying text.

151. See Carol P. Getty, *Twenty Years of Federal Criminal Sentencing*, 7 *J. Inst. Just. & Int’l Stud.* 117, 122 (2007) (describing real offense sentencing as way for prosecutors and judges to add years to defendant’s sentence based on facts not presented to jury); *supra* note 148.

152. *Booker*, 543 U.S. at 264. Justice Breyer also held, however, that district court judges must still take the Guidelines into account when sentencing a defendant. *Id.* However, *Booker* does not clarify what it means to “take [the Guidelines] into account,” or whether a judge can consider the range suggested by the Guidelines, but then depart from it simply because she disagrees with the sentence.

when sentencing,¹⁵³ this assertion supports the idea that a judge can depart with much greater ease than before.¹⁵⁴ This suggests that appellate judges should not—as the Seventh and, to a lesser degree, the Fifth and Eighth Circuits, have done—create per se rules forbidding consideration of factors such as unwarranted disparity between codefendants' sentences.

B. *Gall and Kimbrough: Analysis of Booker's Progeny Supports Judicial Consideration of Codefendant Disparity*

On December 10, 2007, the Supreme Court decided two cases relating to judicial discretion over post-*Booker* sentencing under the Guidelines. Both cases expanded the degree of discretion exercised by trial judges: *Gall* held that appellate courts must review trial judges' decisions under an abuse of discretion standard,¹⁵⁵ and *Kimbrough* held that judges could depart from the Guidelines to remedy sentencing disparity caused by the higher penalties for crack, as opposed to powder, cocaine offenses.¹⁵⁶

Gall clarified the standard of review courts of appeals must use when reviewing sentences imposed by district court judges.¹⁵⁷ In *Gall*, the trial judge sentenced the defendant to probation despite a Guidelines range of thirty to thirty-seven months imprisonment.¹⁵⁸ The court of appeals reversed the sentence and remanded for resentencing, finding that a departure from the Guidelines must be explained by a proportional justification.¹⁵⁹ In other words, an extraordinary departure must be supported by an extraordinary justification. The Supreme Court, in a seven-to-two decision, reversed the court of appeals, holding that all sentences post-*Booker* must be reviewed "under a deferential abuse of discretion standard."¹⁶⁰

153. *Id.*

154. See *supra* note 23 and accompanying text (discussing restriction on granting departures pre-*Booker*).

155. *Gall v. United States*, 128 S. Ct. 586, 597 (2007).

156. *Kimbrough v. United States*, 128 S. Ct. 558, 574 (2007).

157. As discussed above, *Booker* changed the standard of review for Guidelines departures from de novo to a more deferential reasonableness standard. See Part I.B.3. *Gall* clarified exactly how much deference is due. See *Gall*, 128 S. Ct. at 591.

158. *Gall*, 128 S. Ct. at 592–93. The district court judge based the more lenient sentence on a number of factors under § 3553(a), including the defendant's voluntary withdrawal from the drug distribution conspiracy, his exemplary conduct after the withdrawal, the existence of a support network, his lack of a criminal history, and his young age. *Id.* at 593.

159. *Id.* at 594.

160. *Id.* at 591; see also Linda Greenhouse, Court Restores Sentencing Powers of Federal Judges, *N.Y. Times*, Dec. 11, 2007, at A1 (declaring decision made it "clear that an appeals court must have a very good reason of its own to displace the trial judge's judgment").

While the decision in *Gall* did not return unfettered discretion to trial judges,¹⁶¹ it did bolster their sentencing power. For example, the Court recognized the need for trial judges to be free to individualize sentences based on the totality of the circumstances.¹⁶² Justice Stevens compared attempting to quantify mitigating facts using a rigid mathematical formula with “attempting to measure an inventory of apples by counting oranges.”¹⁶³ Furthermore, allowing trial judges to depart from the Guidelines to remedy disparities in codefendants’ sentences legitimizes one of many factors judges are already using to fashion a defendant’s sentence. As the Court said, the court of appeals “must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.”¹⁶⁴ Thus, if the district court judge decides that § 3553(a)(6) justifies a departure that equalizes a defendant’s sentence with that of his codefendants, the court of appeals must defer to that judgment. Even if the appellate court believes that the defendant should have instead received a sentence within the Guidelines range, the district court cannot be reversed.¹⁶⁵

Most importantly for purposes of this Note, the Court in *Gall* implied that consideration of codefendant disparity is a proper use of § 3553(a)(6). Despite the statement to the contrary by the court of appeals,¹⁶⁶ the Supreme Court found that the district judge had given specific attention to the disparity between *Gall*’s sentence and that of his

161. See *Gall*, 128 S. Ct. at 594 (holding district court judge must still provide sufficient explanation for any unusual departure from Guidelines range). The Court seemed to partly base its conclusion that judges must still provide justification for departures on the fact that the Guidelines were to some degree the product of “extensive empirical evidence derived from the review of thousands of individual sentencing decisions.” *Id.*; see also *Rita v. United States*, 127 S. Ct. 2456, 2464 (2007) (“The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences . . .”). However, as the Court pointed out, “not all of the Guidelines are tied to this empirical evidence.” *Gall*, 128 S. Ct. at 594 n.2.

162. See *Gall*, 128 S. Ct. at 597 (“[The district judge] must make an individualized assessment based on the facts presented.”); *Rita*, 127 S. Ct. at 2469 (“The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.”); cf. Freed, *supra* note 18, at 1728–30 (arguing pre-*Booker* that appellate judges are too removed from case and district judges are better suited to approach sentencing with view of all relevant information).

163. *Gall*, 128 S. Ct. at 596.

164. *Id.* at 597.

165. See *id.* (“The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.”).

166. *United States v. Gall*, 446 F.3d 884, 890 (8th Cir. 2006) (“[T]he record does not show that the district court considered whether a sentence of probation would result in unwarranted sentencing disparities.”), *rev’d*, 128 S. Ct. 586. Interestingly, *Gall*’s case came up from the Eighth Circuit, one of the circuits that have held that codefendant disparity is a permissible consideration under § 3553(a)(6). See *supra* notes 110–124. Like the Eighth Circuit, the Supreme Court seemed to agree that considering unwarranted sentencing disparity between codefendants is important, but disagreed in this instance that the trial judge failed to do so. *Gall*, 128 S. Ct. at 599–600.

three codefendants.¹⁶⁷ Even the prosecutor in the case drew attention to the fact that there was a disparity between the codefendants' sentences and argued that the district court should try to avoid any unwarranted disparities.¹⁶⁸ The Supreme Court found that the district court judge considered the disparity, but held that Gall's voluntary withdrawal and subsequent rehabilitation warranted the lesser sentence.¹⁶⁹ This analysis by the Court, which specifically referred to § 3553(a)(6),¹⁷⁰ supports the notion that trial judges should take into account codefendant disparity when considering "the need to avoid unwarranted sentence disparities"¹⁷¹

The second recent sentencing case, *Kimbrough v. United States*,¹⁷² resolved a circuit split in favor of providing trial judges with greater discretion. Focusing on the issue of the 100-to-1 sentencing disparity between crack and powder cocaine offenses,¹⁷³ the Court held that judges were free to depart from the Guidelines based on consideration of that disparity.¹⁷⁴ The Court reasoned that trial judges have "discrete institutional strengths" that put them in the best position to fashion individualized sentencing decisions that best reflect the § 3553(a) considerations for each particular defendant before them.¹⁷⁵ In addition to the comparison that can be made between consideration of this disparity and consideration of codefendant sentencing disparity,¹⁷⁶ *Kimbrough* is important be-

167. *Gall*, 128 S. Ct. at 599–600.

168. *Id.*

169. *Id.* at 600.

170. *Id.* at 598.

171. 18 U.S.C. § 3553(a)(6) (2006). This is not to say that the Supreme Court has ruled on this issue. First, Gall's sentence was not imposed in order to equalize his sentence with that of his codefendants, nor vice versa. Second, even if Gall's sentence had been the same as that of his codefendants, it would have been within the Guidelines range. The issue addressed by this Note, and the question which has split the circuits, is whether a district court judge can *depart* from the Guidelines after consideration of codefendant sentencing disparity. Still, it is telling that the Supreme Court implied that consideration of codefendant disparity is permissible under § 3553(a)(6). The Court could have simply avoided the discussion entirely by stating that § 3553(a)(6) does not refer to defendants in the same case, but rather to similarly situated defendants nationwide. Cf. *supra* notes 131–137 and accompanying text (discussing Seventh Circuit's interpretation of § 3553(a)(6)).

172. 128 S. Ct. 558 (2007).

173. *Id.* at 564 (explaining that crack cocaine dealer is subject to same sentence as dealer trafficking in 100 times more powder cocaine); see also 21 U.S.C. § 841(b) (2006) (describing penalties for crack and powder cocaine).

174. *Kimbrough*, 128 S. Ct. at 564.

175. *Id.* at 574 ("The sentencing judge . . . has 'greater familiarity with . . . the individual case and the individual defendant before him than the Commission or the appeals court.' He is therefore 'in a superior position to find facts and judge their import under § 3553(a)' in each particular case." (quoting *Rita v. United States*, 127 S. Ct. 2456, 2469 (2007), and *Gall*, 128 S. Ct. at 597)).

176. Of course, these issues refer to two different types of sentencing disparities. However, both disparities are created by following the Guidelines, and both have created disagreement among circuits as to whether their consideration warrants departure from

cause it, like *Gall*,¹⁷⁷ seems to be a clear sign from the Supreme Court that trial judges are the best institutional actors to make sentencing decisions, and should thus be given great discretion.¹⁷⁸ Appellate courts should adhere to the Supreme Court's reasoning and permit district court judges to consider, without limitation, codefendant sentencing disparity as one factor relevant in fashioning an appropriate individualized sentence. This approach, which most courts follow,¹⁷⁹ is in line with the recent trend to expand the discretion of trial judges; the approach that the Fifth, Seventh, and Eighth Circuits follow is not.¹⁸⁰

Lower courts have already started reacting to *Gall* and *Kimbrough*. Most important for purposes of this Note, the decision in *Gall* has caused the Tenth Circuit to change its position on whether codefendant sentencing disparity is a permissible consideration under § 3553(a)(6). Like the Seventh Circuit,¹⁸¹ the Tenth Circuit held post-*Booker* that codefendant sentencing disparity was not grounds for departure.¹⁸² However, in *United States v. Smart*, the Tenth Circuit recognized that “[a]fter *Gall*, it is clear that codefendant disparity is not a per se ‘improper’ factor.”¹⁸³ This change in the Tenth Circuit's sentencing law is representative of a significant change in attitude toward judicial discretion nationwide. This change in attitude is not apparent in the Seventh Circuit, however, where post-*Gall* the appellate court has continued to find that codefendant sen-

the Guidelines. See *id.* at 566 n.4 (describing appellate courts' division over whether consideration of crack/powder disparity was permissible); *supra* Parts II.B, II.C (explaining appellate courts' division over whether consideration of codefendant disparity is permissible). In addition, some of the same concerns raised by codefendant sentencing disparity also seemed to push the Supreme Court toward its decision in *Kimbrough*. Compare *Kimbrough*, 128 S. Ct. at 568 (noting that 100-to-1 ratio can “lead to the ‘anomalous’ result” that retail dealers receive longer sentences than more culpable wholesale dealers), with Adriano Hrvatin, Comment, Unconstitutional Exploitation of Delegated Authority: How to Deter Prosecutors from Using “Substantial Assistance” to Defeat the Intent of Federal Sentencing Laws, 32 *Golden Gate U. L. Rev.* 117, 153–58 (2002) (discussing how less culpable defendants may receive greater sentences than more culpable conspirators under Guidelines). Inverted sentencing is discussed in greater detail above. See *supra* notes 28–33 and accompanying text.

177. See *supra* notes 157–171 and accompanying text.

178. See Greenhouse, *supra* note 160 (“In [*Gall* and *Kimbrough*], the court said federal district judges have broad discretion to impose what they think are reasonable sentences, even if federal guidelines call for different sentences.”).

179. *Supra* note 103 and accompanying text.

180. See *supra* notes 125–126, 131 and accompanying text.

181. See *supra* Part II.C.

182. See *United States v. Davis*, 437 F.3d 989, 997 (10th Cir. 2006) (stating defendant's sentencing disparity claim lacked merit and citing pre-*Booker* case that held Guideline's purpose was “not to eliminate disparity between co-defendants” (quoting *United States v. Gallegos*, 129 F.3d 1140, 1143 (10th Cir. 1997))), cert. denied, 128 S. Ct. 2523 (2008).

183. 518 F.3d 800, 804 (10th Cir. 2008).

tencing disparity can never be “unwarranted” within the meaning of § 3553(a)(6) and is therefore not a basis for departure.¹⁸⁴

Because the sentencing landscape has changed so dramatically after *Booker*, the Seventh Circuit should permit consideration of codefendant disparity, and the Fifth and Eighth Circuits should remove their limitation on the types of cases in which judges can consider the disparity.

This Note, having argued how *Booker*, *Gall*, and *Kimbrough* allow consideration of codefendant disparity, examines next why judges *should* be allowed to depart from the Guidelines to remedy sentencing disparities between codefendants.

C. *Permitting Judges to Consider Codefendant Disparity Mitigates the Negative Effects of Increased Prosecutorial Power over Sentencing*

The SRA and the subsequent creation of the Federal Sentencing Guidelines transferred much of the trial judge’s traditional role in fashioning sentences to the prosecutor.¹⁸⁵ This led to widespread criticism from both the courts and commentators.¹⁸⁶ Part III.C.1 explains how permitting judges to consider codefendant disparity remedies some of these criticisms by promoting individualized sentences and increasing transparency in sentencing decisions. Part III.C.2 considers some of the possible counterarguments to this solution such as the potential for increased nationwide sentencing disparity and a return to unfettered judicial sentencing discretion.

1. *Increased Judicial Discretion Provides Systemic Benefits.* — This Note has already discussed many of the policy arguments for allowing judges to consider codefendant disparity under § 3553(a)(6). First, the SRA’s goal of sentencing uniformity is promoted when judges are able to consider all aspects of a multidefendant case and sentence similarly situated defendants to similar sentences.¹⁸⁷ Both judges and academic commentators have faulted the Guidelines for being too rigid and not allowing for the nuanced assessment of defendants that a trial judge can provide.¹⁸⁸ This

184. See *United States v. Omole*, 523 F.3d 691, 700 (7th Cir. 2008) (“This court refuses to view the discrepancy between sentences of codefendants as a basis for challenging a sentence.”).

185. See *supra* Parts I.A.2, I.A.4.

186. See *supra* Part I.A.5.

187. See *supra* notes 26, 121–124 and accompanying text; see also McLaughlin, *supra* note 95, at 2349 (noting that multidefendant cases give judges a “concrete frame of reference from which to evaluate the culpability of each defendant”).

188. See Freed, *supra* note 18, at 1690 (“The [Guidelines] are more complex, inflexible, and severe than those devised by any other jurisdiction.” (footnotes omitted)); McLaughlin, *supra* note 95, at 2350 (describing Guidelines as “mechanical computation of offense levels” and judge’s individual assessment as “rational consideration of each codefendant’s culpability”). But see Lynch, *supra* note 41, at 562–63 (arguing that, compared to absolutely rigid mandatory minimum statutes, Guidelines seem “masterpieces of subtlety, nuance, and thoughtfulness”).

leads to a second benefit: promotion of individualized sentencing.¹⁸⁹ By comparing codefendants under § 3553(a)(6), judges seek not only to depart from the Guidelines in order to remedy unwarranted disparities, but also to see if such disparity is in fact warranted. A third benefit—avoiding manipulation of the Guidelines¹⁹⁰—is realized when judges are permitted to consider whether a defendant’s Guidelines sentence is appropriate compared to his codefendants’ sentences. This approach allows judges to justify departures from the Guidelines based on the actual reason for departure rather than relying on other means provided by the Guidelines to achieve the same result.¹⁹¹ Transparency during this process benefits not only the appellate judge, who can see how the trial judge arrived at her decision, but also the prosecutor, who can construct arguments against departure if he knows the judge is considering codefendant disparity, and the defendant, who knows the precise reason for his particular sentence.¹⁹²

The other benefits of allowing consideration of codefendant disparity are related to the criticisms directed at prosecutorial power over sentencing.¹⁹³ First, allowing the trial judge to depart from the Guidelines for any defendant in a multidefendant case, rather than just the narrow range of defendants subject to the safety valve provision, can ameliorate the phenomenon of inverted sentencing.¹⁹⁴ If the judge finds that the disparity between the defendant and his more culpable codefendants—which resulted from substantial assistance motions for the latter but not the former—is unwarranted, then the judge can reduce the defendant’s sentence under § 3553(a)(6). Second, if the judge believes a defendant has received a higher sentence recommendation for discriminatory reasons based on race, gender, or social class,¹⁹⁵ the judge can equalize the

189. See O’Hear, *supra* note 138, at 639 (arguing that § 3553(a)(6) was “not intended to promote a rigidly mechanical application of the Guidelines; judges were expected to impose truly individualized sentences in each case”); *supra* note 162 and accompanying text.

190. See *supra* notes 94–95 and accompanying text.

191. See *supra* notes 94–95 and accompanying text.

192. Cf. Freed, *supra* note 18, at 1711–12 (“One major difficulty with vesting exclusive power in the prosecutor to decide whether defendants are eligible or ineligible for downward departures is that there are no visible standards to guide the prosecutor’s exercise of discretion.”); Lee, *supra* note 31, at 237–39 (contrasting transparency of judicial decisions with unreviewable nature of prosecutorial decisions). A lack of transparency can in fact cause the precise problems the Guidelines were meant to remedy. See *id.* at 251 (“Virtually unreviewable discretion is problematic because it may reproduce the unwarranted sentencing disparity that the Guidelines seek to correct.”).

193. See *supra* Part I.A.5.

194. See Shebesta, *supra* note 33, at 556 (noting how safety valve provision has not impacted some defendants who should have received relief); *supra* note 41 and accompanying text; cf. Lee, *supra* note 31, at 215–16 (noting how absence of government motion requirement in safety valve provision was signal by Congress that judges should have some discretion to decide whether defendant has cooperated and thus deserves departure).

195. See *supra* note 52 and accompanying text.

defendant's sentence with that of his codefendants who did not receive discriminatory treatment. Since discriminatory treatment is often hard to prove, and perhaps even unintentional, allowing the judge to consider codefendant disparity where discrimination may be a factor increases the overall fairness of the sentencing process. Third, if a defendant demonstrates a genuine willingness to assist the government, but cannot actually provide useful assistance, the judge can consider departing from the Guidelines without the need for a substantial assistance motion from the prosecutor. In essence, consideration of codefendant disparity provides trial judges with a useful way of analyzing whether codefendants' sentences are appropriately based on the criminal offense and defendants' criminal histories, or if they are based on inappropriate factors such as discrimination in the prosecutor's sentencing recommendation or unjustified withholding of a substantial assistance motion. Permitting judges to then depart from the Guidelines to remedy unwarranted disparity provides judges with a way to promote uniform sentencing for similarly situated defendants.

For these reasons, the decisions in the Fifth and Eighth Circuits adopting a *per se* rule against considering codefendant disparity in cases where the disparity is created by substantial assistance motions should be overturned.¹⁹⁶ Additionally, other circuits should avoid adopting this rule. By forbidding trial judges from considering the reasons for codefendant disparity in these cases, circuit courts invite the problems related to prosecutorial control over sentencing that consideration of codefendant disparity can ameliorate.

2. *Possible Arguments Against Consideration of Codefendant Disparity.* —

There are at least three counterarguments to allowing consideration of codefendant disparity. First, it could potentially increase nationwide disparity.¹⁹⁷ Critics have suggested that departing from the Guidelines based on this consideration “‘creates a new and entirely unwarranted disparity between the defendant's sentence and that of all similarly situated defendants throughout the country.’”¹⁹⁸ However, studies have shown that increased judicial discretion does not increase sentencing disparity between jurisdictions.¹⁹⁹ In fact, *decreasing* judicial discretion seems to increase this disparity; geographic disparity more than tripled after the

196. See *supra* text accompanying notes 125–129.

197. See *United States v. Pisman*, 443 F.3d 912, 916 (7th Cir. 2006) (“[T]he focus on the differences among defendants in an individual case in which one defendant cooperates could actually increase sentence disparity, because the resulting lower sentence for the offense to redress that disparity will be out of sync with sentences in similar cases nationwide . . .”). But see *Freed*, *supra* note 18, at 1737–38 (arguing that it is counterproductive to avoid remedying sentencing disparity in the same courthouse because doing so might affect some conjectural nationwide ideal).

198. *United States v. Carr*, 932 F.2d 67, 73 (1st Cir. 1991) (quoting *United States v. Joyner*, 924 F.2d 454, 460–61 (2d Cir. 1991)).

199. See *Alschuler*, *supra* note 27, at 101 (describing two studies by Sentencing Commission that concluded variation in sentences between jurisdictions increased after

Guidelines reined in judicial discretion, most likely due to an increase in prosecutor-produced disparity.²⁰⁰

Second, allowing consideration of codefendant disparity might reduce prosecutors' ability to secure plea agreements or receive cooperation from all defendants in multidefendant cases. For example, a defendant might believe that he can assert his right to a trial, but if he is convicted, he can ask the trial judge to equalize his sentence with the sentences of his codefendants who pled guilty and cooperated. However, under § 3553(a)(6), the trial judge is only interested in avoiding unwarranted disparities between *similarly* situated codefendants.²⁰¹ The judge is therefore free to deny departures to defendants who the judge finds are differently situated than their codefendants—for example, because they refused to plead guilty or cooperate.²⁰²

Finally, there is the argument that allowing judges to consider codefendant disparity would signal the return of unfettered judicial discretion in sentencing—a regime that sometimes resulted in widely varying sentences among equally culpable codefendants.²⁰³ However, this doomsday prophecy fails to consider that sentencing is still closer in form and function to that of a regulatory system rather than a system of discretionary justice. Administrative agencies have become the primary regulator of our criminal justice system and, of these agencies, sentencing commissions are perhaps the most important in shaping criminal justice policy.²⁰⁴ Judges are still required to calculate a defendant's range under the Guidelines, and are advised in their sentencing determinations by the goals set out by the U.S. Sentencing Commission in § 3553(a).²⁰⁵ Furthermore, not all judges support increased judicial discretion, and even if many do, they do not have the financial or electoral influence over legislators common to traditional interest groups.²⁰⁶ For this reason, judges do not comprise a unified interest group able to substantially influence

Guidelines went into effect); see also *id.* at 102 (“[S]ome reduction in judge-produced disparity was more than offset by an increase in prosecutor-produced disparity.”).

200. See *id.* at 101–02.

201. See 18 U.S.C. § 3553(a)(6) (2006).

202. Of course, a judge might find that a defendant who refused to plead guilty or cooperate was nonetheless similarly situated to his codefendants who did. This might be especially true if the judge believes a defendant should not be punished for exercising his right to a trial, or if the defendant wanted to cooperate, but, unlike his more culpable codefendants, did not have any valuable information to offer. Cf. *supra* notes 33, 194 and accompanying text.

203. See *Blakely v. Washington*, 542 U.S. 296, 315 (2004) (O'Connor, J., dissenting) (“This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories.”).

204. See Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. Rev.* 715, 721–23 (2005) (explaining role of regulatory agencies in criminal justice system).

205. See *Gall v. United States*, 128 S. Ct. 586, 596 (2007).

206. See Barkow, *supra* note 204, at 724.

the agencies that regulate them.²⁰⁷ The U.S. Sentencing Commission is therefore free to regulate independent of judicial influence, and to serve as a check against unfettered judicial discretion. “[T]he need to avoid unwarranted sentence disparities”²⁰⁸ is a goal promulgated by this regulatory system, however, and judges should have the discretion to achieve this goal through consideration of codefendant disparity.

D. *How Trial Judges Should Consider the Disparity*

Though district court judges should be able to consider codefendant disparity under § 3553(a)(6), they will not need to do so in every case. Some cases will involve defendants who are so differently situated that the judge will recognize that different sentences are appropriate. Allowing consideration of codefendant disparity is therefore not likely to result in a drastic change in the number of defendants who receive below-Guidelines sentences. But in those cases where the judge believes a defendant’s sentence should not be higher than that of his codefendant, the judge can depart from the Guidelines. The following cases should not be seen as a limitation on the types of cases in which a judge should consider codefendant sentencing disparity, but rather as examples of cases where trial judges should give particular attention to the reasons for codefendant disparity in order to decide whether that disparity is warranted.

One possible use of § 3553(a)(6) to remedy codefendant disparity will be in cases where one defendant receives a lighter sentence for substantial assistance, but another defendant does not.²⁰⁹ While the judge may give consideration to the prosecutor’s decision to provide only one defendant with a substantial assistance motion, the judge would be free to use § 3553(a)(6) as a reason to lower the sentences of other defendants whom the judge believed provided as much information, or were at the very least willing to do so.²¹⁰ This would solve the problem of inverted sentencing for those defendants who are not eligible for the safety valve provision, but who nonetheless deserve sentences equal to or less than their more culpable codefendants.²¹¹ The judge could also use § 3553(a)(6) in these types of cases to consider whether a defendant who did not plead guilty or cooperate should nonetheless receive a lower sentence like his more culpable codefendants who cooperated.²¹² For exam-

207. See *id.* at 724–25 (“It is hard to think of another context where the direct target of regulation is so ill-positioned to mobilize for its position.”).

208. 18 U.S.C. § 3553(a)(6) (2006).

209. See *supra* notes 28–33, 45 and accompanying text.

210. Cf. *United States v. Krutsinger*, 449 F.3d 827, 829 (8th Cir. 2006) (noting that district court judge reduced defendant’s sentence to reduce disparity between his sentence and that of his codefendant since both had provided valuable information); *supra* notes 112–120 and accompanying text.

211. See *supra* notes 33–41 and accompanying text.

212. Cf. *United States v. Pisman*, 443 F.3d 912, 915–16 (7th Cir. 2006) (discussing how district court judge reduced defendant’s sentence so defendant would not receive a

ple, if the judge believes the defendant should not be punished for exercising his right to a trial, or if the prosecutor did not give the defendant an opportunity to cooperate, the judge should be able to depart from the Guidelines to give the defendant a lower sentence based on his lower level of culpability.²¹³

Another type of case in which § 3553(a)(6) should be used as a basis for departure is one where codefendants who commit the same crime are nonetheless recommended different sentences under the Guidelines—either because the prosecutor chooses to present aggravating facts for only one of the defendants²¹⁴ or because the timing of their convictions is different.²¹⁵ Departing from the Guidelines to remedy codefendant disparity in these types of cases promotes Congress's goal of real offense sentencing.²¹⁶ Judges can make sure similarly situated defendants who are convicted of the same crime receive similar sentences, thereby promoting Congress's other goal of uniformity in sentencing²¹⁷—a goal that has not been achieved by mechanical application of the Guidelines.²¹⁸

These types of cases are only examples where consideration of codefendant disparity might be appropriate. In any case where a district court judge reasonably believes that the disparity between codefendants' sentences is unwarranted, the judge can remedy that disparity by basing a departure on § 3553(a)(6).

CONCLUSION

Federal courts continue to debate the effects of the Supreme Court's decision in *Booker*. Part of this new sentencing regime involves deciding what aspects of the Guidelines era to keep and which to reform. Until Congress chooses to redraft the Federal Sentencing Guidelines, the extent of that reform is obviously limited. However, the switch from mandatory to advisory Guidelines allows some previously prohibited considerations to receive new attention. Permitting district court judges to consider, without limitation, codefendant disparity under § 3553(a)(6) provides solutions for some of the criticisms both courts and commentators have directed at the Guidelines. Congress's goal of sentencing uniformity is better served when judges are given greater discretion to con-

greater sentence than his more culpable codefendant even though codefendant had pled guilty and cooperated); supra notes 133–135 and accompanying text.

213. See supra note 202.

214. See O'Hear, supra note 138, at 629–30 (describing case where judge refused to consider aggravating facts for only one defendant “because they would result in unwarranted disparities in the defendants' sentences”).

215. Cf. *Krutsinger*, 449 F.3d at 830 (noting how timing of convictions allowed prosecutor to present evidence that increased defendant's sentence even though her conduct was nearly identical to that of codefendant); supra note 120 and accompanying text.

216. See supra notes 147–151 and accompanying text.

217. See supra note 26 and accompanying text.

218. See supra notes 199–200 and accompanying text.

sider all aspects of the case before them, thereby ensuring that defendants who are similarly situated receive similar sentences. Since both mechanical application of the Guidelines and prosecutorial power over departures have resulted in anomalous results in multidefendant cases, judges should have the discretion to depart from the Guidelines to remedy unwarranted sentencing disparity among codefendants.