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McGeorge Law Review

Volume 37
Issue 4 *Symposium: Sentencing Guideline Law and Practice in a Post-Booker World*

Article 8

1-1-2006

Duty to Avoid Disparity: Implementing 18 U.S.C. Sec. 3553(a)(6) after Booker, The

Michael M. O'Hear
Marquette University Law School

The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) After *Booker*

Michael M. O'Hear*

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Since passage of the Sentence Reform Act of 1984 (SRA), 18 U.S.C. § 3553(a)(6) ("(a)(6)") has required sentencing judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[1] At the same time, the SRA also required judges to adhere in most cases to the Sentencing Guidelines established by the United States Sentencing Commission.[2] The Guidelines specify a particular weight to be given at sentencing to each of a host of specific offense characteristics and dictate a narrow sentencing range on the basis of those characteristics.[3] The mandate to sentence within that range (absent special

* Associate Professor, Marquette University Law School; J.D., Yale Law School, 1996; B.A., Yale College, 1991; Editor, *Federal Sentencing Reporter*.

1. 18 U.S.C. § 3553(a)(6) (2000).

2. *Id.* § 3553(b).

3. For a history and description of the Guidelines, see Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 75 U. CIN. L. REV. 749, 781-84 (2006).

circumstances warranting "departure") left judges with little reason to puzzle over the meaning of their duty "to avoid unwarranted sentence disparities."

In January 2005, however, the Supreme Court ruled in *United States v. Booker* that the Guidelines could no longer be treated as mandatory.[4] More specifically, the Court rejected the Guidelines system as unconstitutional because it required sentences to be increased on the basis of offense characteristics that were not found by a jury beyond a reasonable doubt, but by a judge using the preponderance of the evidence standard.[5] In order to address the constitutional difficulties, the Court excised from the SRA the provision requiring Guidelines compliance (18 U.S.C. § 3553(b)).[6] At the same time, the Court left other provisions of the SRA in place, including (a)(6). Thus, with conversion of the Guidelines from mandatory to advisory, the (a)(6) duty to avoid unwarranted disparity may acquire new significance. Indeed, a perusal of the post-*Booker* jurisprudence indicates that several district court judges have invoked this provision in a variety of different circumstances to justify non-Guidelines sentences.[7]

Appellate courts are now turning their attention to the important issues raised by the (a)(6) cases, but a systematic account of the origin and purpose of the provision is lacking. This article seeks to fill the gap, based on a close reading of the text and legislative history of (a)(6). While neither text nor history supplies perfectly clear answers to some of the questions now raised by the cases, I nonetheless propose a new approach to (a)(6) that I believe is reasonably consistent with the both the letter and the spirit of the statute. This approach both provides a framework for judges to evaluate Guidelines sentences in a critical fashion (as they are plainly authorized to do under *Booker*) and imposes constraints on the ability of judges to assume an open-ended policy-making role (as the SRA plainly did not intend for them to have). In brief, under my reading (a)(6) requires that a sentencing judge consider the average actual sentence imposed in past cases involving a similar offense of conviction and justify any deviation from this empirical norm.

The article proceeds as follows. Part I outlines four different circumstances in which (a)(6) has been invoked post-*Booker* to justify a non-Guidelines sentence. Part II considers the text and history of the provision. Part III proposes some principles to guide implementation. Part IV describes the role that (a)(6) might play in a post-*Booker* world. Part V briefly reconsiders some of the cases discussed in Part I in light of the principles discussed in Part III.

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4. 543 U.S. 220, 245-46 (2005).

5. *Id.* at 226-27.

6. *Id.* at 258.

7. The post-*Booker* terminology remains problematic. I will use the term "Guidelines sentence" to refer to any sentence within a range established by reference to the factors set forth in chapters two through four of the United States Sentencing Guidelines Manual. I will use the term "non-Guidelines sentence" to refer to sentences based on other considerations, including, but not limited to, considerations that would have been considered appropriate grounds for a pre-*Booker* departure.

I. POST-*BOOKER* USES OF (a)(6)

In the year since *Booker* was decided, district court judges have invoked their statutory duty to avoid unwarranted disparity in a variety of different circumstances. This Part describes four particularly noteworthy types of cases in which (a)(6) has been cited as a justification for a non-Guidelines sentence. Collectively, these cases demonstrate the potentially far-reaching consequences of a reinvigorated (a)(6) jurisprudence.

A. Ensuring Similar Sentences for Similarly Situated Co-Defendants

In the post-*Booker* world, the most common use of (a)(6) has perhaps been as a basis for reducing or eliminating the differences in sentences that would otherwise be imposed on co-defendants pursuant to the Guidelines. How would application of the Guidelines result in co-defendant disparities? The cases suggest a number of possibilities.

First, co-defendants might receive different sentences if they were sentenced before and after the *Booker* decision. For instance, in *United States v. Revock*, two defendants, Revock and Harris, "jointly carried out the theft of six firearms from a licensed gun dealer."[8] Harris was sentenced prior to *Booker*, but after *Booker's* precursor, *Blakely v. Washington*.[9] Between *Blakely* and *Booker*, judges in the District of Maine, as in a number of other districts, required that aggravating facts at sentencing generally be proven to a jury beyond a reasonable doubt.[10] As a result of these procedural obstacles, Harris's sentence did not reflect the fact that the serial number of one of the stolen firearms had been obliterated, which would normally increase sentence length under the Guidelines.[11] Revock's sentence, by contrast, was delayed until after *Booker*. In performing the Guidelines calculus for Revock, the sentencing judge did take into account the obliteration of the serial number. However, the judge chose to impose a non-Guidelines sentence so as to equalize Revock's sentence with Harris's.[12] The judge reasoned that, because Harris and Revock had engaged in identical conduct and had "virtually identical" criminal records, a Guidelines sentence for Revock would "impede[] the statutory goal of sentencing uniformity."[13]

Second, co-defendants might receive different Guidelines sentences as a result of a prosecutor's decision to present aggravating facts as to only one co-defendant. For instance, in *Ferrara v. United States*, a defendant gangster was

8. 353 F. Supp. 2d 127, 128 (D. Me. 2005).

9. 542 U.S. 296 (2004).

10. *Revock*, 353 F. Supp. 2d at 128.

11. *Id.*

12. *Id.* at 129.

13. *Id.*; *see also* United States v. Colby, 367 F. Supp. 2d 1, 4 (D. Me. 2005) (adopting the reasoning of *Revock* in a case involving similar facts).

re-sentenced post-*Booker* in connection with various mafia-related crimes.[14] Co-defendants with similar or higher positions in the mob had already been sentenced in connection with the same crimes. The government argued that Ferrara's sentence should be increased on the basis of various factors that the government, apparently pursuant to cooperation agreements, had not urged in sentencing proceedings for the co-defendants, such as the murder of another mobster. The sentencing judge refused to take these considerations into account because they would result in unwarranted disparities in the defendants' sentences.[15]

Third, co-defendants might receive different sentences as a result of the Guidelines' "substantial assistance departure." For instance, in *United States v. Strange*, a group of jailhouse employees were convicted of depriving an inmate of his constitutional right to be free of excessive force.[16] The sentencing judge calculated the Guidelines range for Strange at twenty-seven to thirty-three months.[17] However, two co-defendants, Hull and Rivera, had already been sentenced and received fifteen and eighteen months, respectively.[18] They received lower sentences principally because they provided substantial assistance to the government in the investigation or prosecution of another person.[19] The Guidelines recognize "substantial assistance" as an appropriate basis for sentence reduction.[20] The sentencing judge concluded, however, that the operation of the substantial assistance departure produced an excessive disparity in the *Strange* case, and therefore reduced Strange's sentence to twenty-one months.[21] The court provided no explanation of why the disparity produced by a twenty-one-month sentence was "warranted" when the disparity produced by a twenty-seven-month sentence was "unwarranted." Nor did the court address whether the disparity might have been more appropriately addressed by higher sentences for Hull and Rivera.[22]

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14. 372 F. Supp. 2d 108, 110-11 (D. Mass. 2005).

15. *Id.* at 121-24. For a decision that seems to reflect a more skeptical view of using § 3553(a)(6) as a basis for mitigating prosecutor-created disparities, see United States v. Sandoval, No. CR-04-93-S-BLW, 2005 WL 1806418, at *2-3 (D. Idaho July 28, 2005) (refusing to reduce sentence based on lower sentences received by co-defendants as a result of plea bargains).

16. 370 F. Supp. 2d 644, 646 (N.D. Ohio 2005).

17. *Id.* at 650.

18. *Id.* at 651.

19. *Id.* at 651-52.

20. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004).

21. 370 F. Supp. 2d at 652.

22. For a similar decision, see United States v. Lee, 376 F. Supp. 2d 1276 (D. N.M. 2005). In *Lee*, the drug trafficking defendant was subject to a minimum Guidelines sentence of 135 months, in contrast to a co-defendant of "similar culpability" who received a sentence of only eighty-seven months under the Guidelines. *Id.* at 1282. The disparity was driven by the fact that Lee possessed a firearm, while the co-defendant did not. Concluding that the firearm did not fully justify the disparity, the judge reduced Lee's sentence to 120 months pursuant to § 3553(a)(6). *Id.*

B. Mitigating Federal-State Disparities

Federal law criminalizes much conduct that is also made criminal by state law, such as drug trafficking, bank robbery, and mail fraud. Federal sentences, however, tend to be far more severe.[23] Prior to *Booker*, federal defendants relied unsuccessfully in several cases on federal-state disparities as a basis for downward departure from a Guidelines sentence.[24] *Booker* may breathe new life into the argument that, at least in the sorts of cases typically handled in state court, federal judges may appropriately adjust sentences so as to minimize disparities between federal defendants and state defendants from the same locale.

For instance, in *United States v. Bariek*, the defendant was convicted of the federal crime of operating an international money transmitting business without a state license.[25] The judge calculated his Guidelines sentence as thirty-seven to forty-six months.[26] However, the defendant would have faced a one-year maximum if convicted of the same conduct in state court.[27] Moreover, the judge found little distinct federal interest in the case, as there was apparently no evidence that the illicit money transmittals had gone to support terrorism, drug trafficking, or other criminal activities.[28] The judge ultimately reduced Bariek's sentence to eighteen months, based, in part, on the disparity with state law.[29]

C. Mitigating Inter-District Disparities

If federal-state disparities are conceptualized as "vertical" disparities, then disparities across federal districts might appropriately be termed "horizontal." Studies found important horizontal disparities even before *Booker* rendered the Guidelines merely advisory.[30] Much of the phenomenon seems a result of different charging and plea-bargaining practices in the nation's ninety-four United States Attorney's Offices (USAOs).[31] As with vertical disparities, the pre-*Booker* jurisprudence rejected such horizontal disparities as an appropriate ground for departure,[32] but *Booker* may modify the analysis.

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23. Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730-32 (2002).

24. For a discussion of the cases, see *id.* at 736-39.

25. No. 01:05CR150JCC, 2005 WL 2334682, at *1 (E.D. Va. Sept. 23, 2005).

26. *Id.* at *3.

27. *Id.* at *6.

28. *Id.* at *4.

29. *Id.* at *6.

30. *See, e.g.*, U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM xii (2004) ("Notably, regional differences [in sentencing] in drug trafficking cases were increased from the preguidelines to the guidelines era.").

31. *Id.* at xii, 92.

32. *See, e.g.*, United States v. Banuelos-Rodriguez, 215 F.3d 969 (9th Cir. 2000) (en banc); United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir. 2000).

Indeed, several post-*Booker* defendants have already had success in seeking sentence reductions on the basis of generous "early disposition" programs in some districts. Congress has expressly permitted, but not required, USAOs to create early disposition programs, by which defendants who plead guilty under conditions particularly favorable to the government receive special sentencing benefits.[33] For instance, in *United States v. Medrano-Duran*, the defendant was convicted in the Northern District of Illinois of illegal entry after deportation.[34] Although thirteen districts have implemented early disposition programs pursuant to statute for illegal reentry cases, the Northern District of Illinois has not.[35] Medrano-Duran nonetheless argued that his sentence should be adjusted downward to reflect the benefits he would have had available to him if convicted in an early disposition district. Citing (a)(6), the judge agreed and imposed a below-Guidelines sentence.[36]

D. Rejecting Guidelines Provisions that Create Disparity

The cases discussed above focus on disparities that are extrinsic to the Guidelines themselves, for instance, disparities in prosecutorial early disposition programs. Yet, a persistent criticism of the Guidelines is that they themselves create unwarranted disparities through the formal distinctions they draw among categories of defendants. These criticisms have been nowhere more vigorous than as to the distinction drawn between crack and powder cocaine. Although the two forms of cocaine produce essentially the same effects, with the one easily "cooked" into the other, the Guidelines treat crack defendants much more harshly.[37] Defendants involved with a particular volume of crack are treated as if they had been involved with 100 times as much powder. For instance, trafficking in 1.5 kilos of crack is treated as an equally severe offense as trafficking in 150 kilos of powder.[38]

Since *Booker*, several district court judges have invoked (a)(6) as a basis for giving a below-Guidelines sentence to crack defendants.[39] For instance, in *United States v. Castillo*, the defendant was convicted in the Southern District of New

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33. For a discussion and critique of the early disposition statute, see generally Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 358 (2004).

34. 386 F. Supp. 2d 943, 943, 944 (N.D. Ill. 2005).

35. *Id.* at 946.

36. *Id.* at 948-49. For similar cases in which sentences were adjusted to reflect the availability of early disposition programs in other districts, see United States v. Galvez-Barrios, 355 F. Supp. 2d 958 (E.D. Wis. 2005); United States v. Ramirez-Ramirez, 365 F. Supp. 2d 728 (E.D. Va. 2005).

37. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY iv-v, 16-17 (2002).

38. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(C)(1) (2004).

39. *See, e.g.*, United States v. Smith, 359 F. Supp. 2d 771 (E.D. Wis. 2005); United States v. Castillo, No. 03 CR. 835(RWS), 2005 WL 1214280 (S.D.N.Y. May 20, 2005).

York for crack distribution. The Guidelines range was calculated as 135-168 months.[40] The judge, however, determined that adherence to the Guidelines would result in an unwarranted disparity between the defendant's sentence and the sentences of other defendants who "engaged in substantially similar conduct that involved powder cocaine rather than crack."[41] In order to mitigate the disparity, the judge rejected the 100:1 crack-powder ratio of the Guidelines in favor of a 20:1 ratio and sentenced the defendant accordingly to a term of eighty-seven months.[42]

II. SUBSECTION (a)(6): TEXT AND HISTORY

As the cases discussed in Part I demonstrate, the (a)(6) duty to avoid unwarranted disparity supplies a potentially powerful tool for judges seeking a reason to sentence outside the Guidelines. However, the judiciary has not yet developed a systematic framework for determining what is an "unwarranted disparity" and when such a disparity may appropriately call into question a Guidelines sentence. In order to lay a foundation for such a framework, this Part analyzes the text and legislative history of (a)(6).

A. Text

The (a)(6) duty to avoid unwarranted disparity appears in a list of several matters that the "court, in determining the particular sentence to be imposed, *shall* consider."[43] The mandatory "shall" indicates that the court *must* consider these matters. On the other hand, use of the term "consider" suggests that the court is not *required* to give determinative weight to any particular factor.

For purposes of determining what sorts of disparities are to be avoided, the statute indicates two parameters of concern. First, the disparities of interest are more specifically identified as "sentence disparities among defendants with similar records who are found guilty of similar conduct." By its literal terms, then, the statute indicates no concern with the disparate (or, for that matter, non-disparate) treatment of defendants who have dissimilar records or who have been "found guilty" of dissimilar conduct. The term "found guilty," though, raises important problems. In common usage, defendants are "found guilty" of crimes, not conduct. What, then, is the unit of analysis: defendants convicted of similar crimes or defendants who have engaged in similar conduct? In the next Part, I will argue that "similar crimes" is the better answer.

Second, once we identify the defendants "with similar records who have been found guilty of similar conduct," we need not avoid all disparities, but only

40. *Castillo*, 2005 WL 1214280, at *4.

41. *Id.* at *5.

42. *Id.*

43. 18 U.S.C. § 3553(a) (2000) (emphasis added).

those disparities that are "unwarranted." But what makes a disparity "unwarranted?" Consider an example: two first-time offenders are convicted of bank robbery. One brandished a loaded gun during the crime, while the other merely carried a toy gun in his pocket. If the former received a longer sentence, would the resulting disparity be warranted or not?

Under one plausible reading of (a)(6), the answer would be determined by reference to the Guidelines: if (and only if) the Guidelines authorize consideration of a sentencing factor, then that factor might appropriately be used as the basis for treating otherwise similarly situated defendants in a disparate manner. After all, Congress gave the Sentencing Commission its own mandate to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."[44] Congress, in fact, directed the Commission to give "particular attention" to this mandate in developing the Guidelines.[45] The Guidelines might accordingly be viewed as the ultimate arbiter of the boundary between warranted and unwarranted disparity.

While there might be some merit to this approach, two familiar canons of statutory interpretation indicate that § 3553(a)(6) should not be read merely to command adherence to the Guidelines. First, other provisions of § 3553(a) expressly mandate "consider[ation]" of the Guidelines.[46] If (a)(6) were interpreted to say the same thing, then the subsection would be redundant, in violation of the Surplusage Canon.[47] Second, if (a)(6) were read so as to give some particularly heavy weight to the Guidelines, then the Guidelines might come too close to the sort of mandatory system that the Supreme Court found unconstitutional in *Booker*. This sort of reading of (a)(6) conflicts with the Avoidance Canon, which indicates that courts should avoid interpretations of statutes that raise serious constitutional questions.[48]

Indeed, upon closer inspection, the strict Guidelines adherence approach does not seem terribly consistent with the structure of either the statute or the Guidelines. For one thing, while Congress directed the Commission to avoid unwarranted sentencing disparities, Congress also mandated consideration of several additional matters in the development of the Guidelines, including the need to "maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the

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44. 28 U.S.C. § 991(b)(1)(B) (2000).

45. *Id.* § 994(f).

46. 18 U.S.C. § 3553(a)(4)-(5).

47. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 833 (3rd ed. 2001) ("[I]t is a 'cardinal rule of statutory interpretation that no provision be construed to be entirely redundant.'" (quoting Kungys v. United States, 475 U.S. 355, 369 n.14 (1986))).

48. *See* Ernest Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1550 (2000) ("Where Congress has attempted to do something that may intrude on constitutional values . . . courts resist this effort by insisting that Congress make its intent absolutely clear.").

establishment of general sentencing practices."[49] The statute, in short, does not contemplate that the Guidelines will constitute an exclusive and comprehensive list of appropriate sentencing factors. Nor do the Guidelines themselves purport to operate in this manner: the Guidelines permit "departure" from an otherwise applicable sentencing range if "the court finds . . . that there exists an aggravating or mitigating circumstance . . . of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . that . . . should result in a sentence different from that described" in the Guidelines.[50]

In sum, an analysis of the language and structure of the statute suggests that the judiciary is authorized to make an independent evaluation—that is, independent of the Commission and the Guidelines—of what sorts of disparities are unwarranted.

B. Legislative History

The SRA had its origins in a series of legislative proposals made in the 1970's.[51] An especially influential early proposal was made by the participants in a workshop sponsored by Yale Law School in 1974 and 1975.[52] The "Yale" proposal became the basis for a number of bills introduced by Senator Edward Kennedy, a key congressional player in the sentencing reform movement and original sponsor of the SRA.[53]

The Yale proposal contained a series of "shall consider" provisions directed to the sentencing judge,[54] which constitute a clear precursor to § 3553(a). More specifically, the Yale proposal mandated that the sentencing judge should consider a set of traditional sentencing factors (gravity of the offense and the needs for deterrence, incapacitation, rehabilitation, denunciation, and provision of just punishment),[55] which are all now (with some tweaking of the Yale proposal's specific language) embodied in § 3553(a)(2). The Yale proposal also called for the judge to consider these factors "by reference" to "any guidelines promulgated by the United States Commission on Sentencing and Corrections,"[56] which is not far off the present mandate of § 3553(a)(4) for judges simply to "consider" the Guidelines. Absent from the Yale proposal, however, is any apparent precursor to (a)(6).

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49. 28 U.S.C. § 991(b)(1)(B).

50. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(1) (2005).

51. O'Hear, *supra* note 3, at 756.

52. *Id.* at 763.

53. *Id.*

54. For the complete text of the Yale proposal, see PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 96-127 (1977). The "shall consider" language is set forth (in substantially the same form) in § 2102(a) (for sentences of probation), § 2202(a) (for fines), and § 2302(b) (for sentences of imprisonment).

55. *See, e.g., id.* at 107.

56. *See, e.g., id.*

In January 1977, Senator Kennedy introduced Senate Bill 181 ("S. 181"), a sentencing reform bill that was based on the Yale proposal.[57] S. 181 set forth 18 U.S.C. § 3553(a), which even more clearly anticipated what is now § 3553(a). Using the same "shall consider" language of the Yale proposal, S. 181 offered a laundry list of sentencing factors that are now duplicated almost verbatim in § 3553(a)(1)-(2).[58] S. 181 also expressly mandated consideration of the Guidelines.[59] Like the Yale proposal, however, S. 181 contained no apparent precursor to (a)(6).

Instead, (a)(6) emerged from the legislative consideration of Kennedy's 1977 bill. As reported out of the Senate Judiciary Committee, section 2003(a)(6) of S. 1437 required the sentencing judge "to consider the need to avoid unwarranted sentencing disparity."[60] The Committee Report was notably silent, however, as to the purpose of this new provision. A terse, one-sentence description of (a)(6) merely directed the reader to a discussion of the *Commission's* parallel duty to avoid disparity, as set forth in proposed 28 U.S.C. § 991(b)(1)(B).[61] Here, the Committee was a bit more expansive:

> This requirement establishes two factors—the prior records of offenders and the criminal conduct for which they are to be sentenced—as the principal determinants of whether two offenders' cases are so similar that a difference between their sentences should be considered a disparity and therefore avoided unless it is warranted by other factors. The key word in discussing unwarranted sentence disparities is "unwarranted." The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records.[62]

In light of this language, the Committee apparently did not contemplate that (a)(6) would result in strictly uniform sentences on the basis of criminal conduct and record. Conduct and record would establish appropriate categories of cases for comparison purposes, but disparities within these categories were not necessarily impermissible, as long they were warranted on the basis of other factors.

More about the "original intent" of (a)(6) may be gleaned from context. In particular, the Committee's addition of (a)(6) was accompanied by other changes

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57. O'Hear, *supra* note 3, at 763.

58. The only substantial difference is that § 3553(a)(2) permits consideration of rehabilitative needs, while proposed § 3579(a)(2) did not.

59. S. 181, 95th Cong. § 3579(a)(4) (1977).

60. S. REP. NO. 95-605, at 892. S. 1437 was a broader criminal law reform bill that incorporated Kennedy's sentencing reform proposal. O'Hear, *supra* note 3, at 23. S. 1437 won passage in the Senate, but not in the House. *Id.*

61. S. REP. NO. 95-605, at 892 n.30.

62. *Id.* at 1161.

to Kennedy's proposal that had the effect of diminishing judicial discretion. It is hard to escape the conclusion that the two sorts of changes were linked. For instance, S. 181 would have permitted the sentencing judge to depart if he or she simply "makes as part of the record, and discloses to the defendant in open court at the time of sentencing, a statement of the specific reason or reasons for the particular sentence of imprisonment imposed."[63] The bill did not suggest any particular limitation on the grounds of departure, aside from a general reasonableness review that might be conducted on appeal.[64] The S. 1437 Committee Report, by contrast, specified that the statement of reason for a departure

> would essentially be a statement of why the court felt that the guidelines did not adequately take into account all of the pertinent circumstances of the case at hand. If the sentencing court felt the case was an entirely typical one for the applicable guideline category, it would have no adequate justification for deviating from the recommended range.[65]

Put differently, the Committee contemplated a role for the sentencing judge that was essentially empirical (is this case factually distinct from the typical case?) and not normative (is the Guidelines sentence in this case a just sentence?). The normative, policy-making role was left to the Commission.

The Committee specifically tied the Commission's policy-making preeminence to concerns over disparity:

> The need for consistency in sentences for similar offenders committing similar offenses should be sufficiently important to dissuade a judge from deviating from a clearly applicable guideline range simply because it [sic] would have promulgated a different range. The offender before him should not receive more favorable or less favorable treatment solely by virtue of the sheer chance that he is to be sentenced by a particular judge. A judge who disagrees with a guideline may, of course, make his views known to the Sentencing Commission, and may recommend such changes as he deems appropriate.[66]

While this language does not expressly reference (a)(6), the Committee almost certainly had (a)(6) in mind: the belief that judges will be "dissuade[d]" from inappropriate departures by the "need for consistency in sentences for similar offenders committing similar offenses" clearly echoes the mandate for judges to "consider" the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Thus, the

63. S. 181, 95th Cong. § 3579(b).
64. *Id.* § 3742(c).
65. S. REP. NO. 95-605, at 892-93.
66. *Id.* at 893.

Committee that produced (a)(6) seems to have contemplated that the provision would function, at least in part, as a check on inappropriate departures from the Guidelines, specifically, departures motivated by a simple disagreement "by a particular judge" with the Commission's policy choices.

As modified en route to Senate passage in 1978, Kennedy's 1977 sentencing bill contained much of the key language that would ultimately be enacted into law as the SRA.[67] Enactment, though, awaited House approval, which did not come until 1984. The Senate Judiciary Committee produced a new report on the later legislation ("1983 Report"), which differed in some respects from the 1977 Report.

For instance, the 1983 Report did supply a brief explanation of (a)(6):

> The[] provision[] underline[s] the major premise of the sentencing guidelines—the need to avoid unwarranted sentencing disparity. The subsection requires judges to avoid unwarranted disparity in applying the guidelines and *particularly in deciding when it is desirable to sentence outside the guidelines.*[68]

Thus, the 1983 Report, even more explicitly than the 1977 Report, linked (a)(6) to the individual judge's decision about whether to deviate from a Guidelines sentence. The 1983 Report did not indicate, though, that (a)(6) was intended only to *discourage* deviations; rather, the language emphasized above seems to take a more neutral position on the desirability of deviations, and at least suggests that the duty to avoid disparity might sometimes *support* a decision to sentence outside the Guidelines range.

In its discussion of (a)(6), the 1983 Report, like the 1977 Report, also cross-referenced the Commission's duty to avoid disparity, as set forth in 28 U.S.C. § 991(b)(1)(B). In its discussion of this latter provision, the 1983 Report duplicated much of the language quoted above from the 1977 Report.[69] The 1983 Report, though, added this disclaimer:

> [T]he sentencing guidelines system will enhance, rather than detract from, the individualization of sentences. Each sentence will be the result of careful consideration of the particular characteristics of the offense and the offender, *rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy.*[70]

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67. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 40-42 (1998).

68. S. REP. NO. 98-225, at 78 (1983) (emphasis added) [hereinafter 1983 Senate Report].

69. *Id.* at 161.

70. *Id.* (emphasis added).

Thus, like the 1977 Report, the 1983 Report reflected a desire to minimize the significance of the particular normative views of individual sentencing judges.[71]

At the same time, the 1983 Report also emphasized the importance of a thorough-going judicial assessment of the offense and the offender:

> Under a sentencing guidelines system, the judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender. This examination is made on the basis of a presentence report that notes the presence or absence of each relevant offense and offender characteristics [sic]. *This will assure that the probation officer and the sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature.*[72]

The Report, thus, apparently contemplated that the sentencing judge would look not only to the Guidelines, but also to other cases "of a similar nature" in order to determine an appropriately individualized sentence.

In sum, the legislative history emphasizes two (perhaps not entirely consistent) principles. First, (a)(6) was not intended to function as an open-ended authorization for individual judges to substitute their policy preferences for those embodied in the Guidelines. But second, (a)(6) was also not intended to promote a rigidly mechanical application of the Guidelines; judges were expected to impose truly individualized sentences in each case based on a thorough assessment of the offense and offender and a comparison with other similar cases.

III. PRINCIPLES TO GUIDE IMPLEMENTATION OF (a)(6)

While neither the text nor the history of (a)(6) offers a systematic explanation as to how the provision should be implemented, we may nonetheless construct a reasonably coherent account based on the available sources. This Part accordingly suggests several implementation principles.

A. (a)(6) Supplies a Potential Basis for Rejecting a Non-Guidelines Sentence

The SRA's legislative history reflects a pervasive concern over individual judges imposing their own idiosyncratic normative views at sentencing. Subsection (a)(6) responds to this concern by requiring judges to "consider," and possibly defer to, the norms of their colleagues. The Senate Reports particularly underscore the importance of this "consideration" in connection with a judge's

71. The Committee noted evidence that differences in the normative views of different judges was a major contributor to sentence disparity. *Id.* at 44-45, 53 n.72.

72. *Id.* at 53 (emphasis added).

decision to impose a non-Guidelines sentence. Indeed, based on the legislative history, it seems fair to conclude that (a)(6) contemplates, among other things, that judges will at least think twice before imposing a non-Guidelines sentence.

B. (a)(6) Supplies a Potential Basis for Rejecting a Guidelines Sentence

While the legislative history does not so clearly support the use of (a)(6) as a basis for sentencing *outside* the Guidelines, neither history nor text precludes such a use. Moreover, I have already suggested reasons, based on the Surplusage and Avoidance Canons, why (a)(6) should not be read exclusively as a mandate to think twice about the virtues of adhering to the Guidelines.

There is, however, a perfectly reasonable objection to this conclusion: if Congress was so concerned about judges pursuing their own idiosyncratic sentencing philosophies, then why should (a)(6) be interpreted so as to permit judges to disregard the Guidelines? However, as elaborated in the next section, (a)(6) contains an objective, empirical constraint on judicial discretion; that is, sentences can only be adjusted based on (a)(6) to move them toward a statistically based norm. Moreover, as both the SRA and its legislative history make clear, Congress recognized that the Guidelines would be unable to identify and properly weigh every relevant sentencing factor in advance; judges had to be given some discretion to deal appropriately with unusual cases as they arose.

C. (a)(6) Contemplates a Two-Step (Empirical-Normative) Analysis

Subsection (a)(6) asks sentencing judges (1) to determine, for each case, the sentences that have been imposed in similar cases and (2) to avoid unwarranted disparities relative to the outcomes in those similar cases. The first step in the analysis presents an empirical problem: what sentences have been imposed in similar cases? The second presents a normative problem: would a disparate outcome in this particular case be warranted? Both steps in the analysis present important difficulties.

1. Step One: Defining the Baseline for Comparison

Consider the empirical step first. How do we know what body of cases to consult for comparison purposes? Both the text and the legislative history point to two key criteria in establishing the baseline: the statute, in the words of the 1983 Senate Report, "establishes two factors—the prior records of offenders and the criminal conduct for which they are to be sentenced—as the principle determinants of whether two offenders' cases are so similar that a difference between their sentences should be considered a disparity."[73]

73. 1983 Senate Report, *supra* note 68, at 161.

There is an important difficulty, though, with the "criminal conduct" factor: the formal offense of conviction may not do a very good job of describing a defendant's actual criminal conduct. The *Booker* remedy decision nicely illustrates the problem with two hypotheticals. First, there are the contrasting cases of "Smith" and "Jones," both of whom violate the Hobbs Act:

> Smith threatens to injure a co-worker unless the co-worker advances him a few dollars from the interstate company's till; Jones, after similarly threatening the co-worker, causes far more harm by seeking far more money, by making certain that the co-worker's family is aware of the threat, by arranging for deliveries of dead animals to the co-worker's home to show he is serious, and so forth.[74]

Although Smith and Jones may be convicted of the same crime, their actual conduct has been quite different. Second, there are the contrasting cases of the former felons "Johnson" and "Jackson:"

> [E]ach . . . engages in identical criminal behavior: threatening a bank teller with a gun, securing $10,000, and injuring an innocent bystander while fleeing the bank. Suppose prosecutors charge Johnson with one crime (say, illegal gun possession) and Jackson with another (say, bank robbery).[75]

Assuming Johnson and Jackson are convicted as charged, the true similarity of their cases might be masked by the different formal offense of conviction.

So, for purposes of disparity analysis, should the baseline for comparison be offenders with similar offenses of conviction or similar actual conduct? While the matter is not free from doubt, my view is that offense of conviction is the better answer, based on the statutory text, the legislative history, and the constitutional values embodied in *Blakely* and *Booker*. First, the text of (a)(6) refers to the conduct of which the defendant has been "found guilty," a phrase that normally calls to mind formal conviction. In this regard, a telling contrast may be drawn between the text of the statute as finally adopted and the analogous, yet subtly different, language of a contemporaneous and competing bill approved by the House Judiciary Committee. The House bill worded the duty to avoid disparity this way: "[S]imilar offenders convicted of similar offenses *committed under similar circumstances* should receive similar sentences."[76] The italicized language clearly focuses attention on facts beyond the offense of conviction; by negative implication, the absence of comparable language in the statute that was actually adopted suggests a need to focus—at least in the

74. United States v. Booker, 543 U.S. 220, 252 (2005).

75. *Id.* at 253.

76. H.R. REP. NO. 98-1017, at 2 (1984) (emphasis added).

threshold determination of whether there is disparity (warranted or otherwise)—on the offense of conviction alone.

This is consistent with the way that the term disparity is used in the legislative history. For instance, in discussing the *judge's* duty to avoid unwarranted disparity, the Committee Reports reference the *Commission's* analogous duty in 28 U.S.C. § 991(b)(1)(B), without suggesting any substantive difference between the two. The Commission's duty, though, is specifically framed as a duty to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar *criminal* conduct." Moreover, the 1983 Report seems to use interchangeably the phrases "found guilty of similar criminal conduct" and "convicted of similar offenses"[77]—a formulation that even more clearly calls to mind the formal offense of conviction.

Even more telling is the 1983 Report's discussion of the empirical evidence demonstrating disparity in practice. Much of the comparative data used the offense of conviction as the unit of analysis.[78] For instance, the Report identified discrepancies between the average sentence for bank robbery at the national level (eleven years) versus the individual district level (five-and-one-half years in the Northern District of Illinois). To be sure, the Report also discussed some studies that purported to compare sentencing practices for particular subcategories of offenses, defined by a combination of specific offense and offender characteristics.[79] However, in the Report's terminology, sentencing variation based on relevant offense and offender characteristics was also viewed as a form of "disparity."[80] This does not mean, of course, that this type of variation was disapproved of; in the Report's view, "disparity" may be warranted (good) or unwarranted (bad). Rather, the point of immediate interest is this: when the Report used the term "disparity," the Report seemed to contemplate comparisons within broad categories of cases that were defined chiefly by reference to the offense of conviction.

This interpretation is also supported by considerations of convenience and deference to constitutional values. The offense of conviction, after all, is clearly known before sentencing, while other conduct may be subject to legitimate dispute even after conviction. Such "relevant conduct," to use the Guidelines nomenclature,[81] is determined at a post-conviction hearing by a judge, without the normal rules of evidence and beyond-a-reasonable-doubt standard that are constitutionally mandated in criminal trials.[82] Thus, using the offense of

77. 1983 Senate Report, *supra* note 68, at 161.

78. *Id.* at 41, 41 n.21, 45.

79. *Id.* at 41-45.

80. *See id.* at 45 ("The Committee finds that this research makes clear that variation in offense and offender characteristics does [sic] not account for most of the disparity.").

81. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2005).

82. *Id.* § 6A1.3.

conviction, instead of relevant conduct, in determining a baseline for comparison under (a)(6) may facilitate a quicker resolution of (a)(6) issues. This approach may also help the parties to have a better understanding pre-conviction of the sentencing consequences of potential plea deals. Finally, an emphasis on *convictions*, obtained through procedures that are subject to the traditional constitutional safeguards, reinforces the core constitutional values on which *Blakely* and *Booker* rest.[83]

One final issue bears brief discussion: should the existence of disparity be assessed by reference to local or national norms? The legislative history plainly supports the national perspective. In particular, the empirical evidence of disparity discussed above makes frequent comparison between individual districts and national averages.[84] This does not necessarily mean that Congress necessarily wanted national uniformity in sentencing—indeed, I have argued the contrary elsewhere;[85] it merely means that the baseline for empirical comparison under (a)(6) should be national.

2. *Step Two: Is Disparity Warranted?*

Once Step One is completed, the sentencing judge in a given case will know the national average sentence for other defendants convicted of the same crime as the current defendant, say, eleven years for bank robbers. Does this mean that the judge must impose an eleven-year sentence for the current bank robber? No; by its explicit terms, (a)(6) only requires judges to avoid "unwarranted" disparities. An eleven-year sentence would certainly be consistent with (a)(6), but might run afoul of competing statutory mandates, for instance, to consider the Guidelines or to consider the defendant's rehabilitative needs. If, in light of such competing considerations, the judge is inclined to impose a disparate sentence, (a)(6) then indicates a need to determine whether the disparity is warranted.

How is this to be done? As the 1983 Senate Committee Report put it, the judge is to undertake "a comprehensive examination of the characteristics of the particular offense and the particular offender. . . . This will assure that the . . . judge will be able to make informed comparisons between the case at hand and others of a similar nature."[86] In a typical case, there would seem little basis for

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83. Consider, for instance, the Jackson-Johnson hypothetical discussed above. Johnson is convicted of illegal possession of a firearm, while Jackson is convicted of the more serious crime of bank robbery. If Jackson receives a harsher sentence, should this be regarded as a form of disparity? The view here is no: the sentences cannot be appropriately compared. Johnson has never been "found guilty" of bank robbery, subject to all of the procedural safeguards that would go into such a finding. To regard Jackson as an appropriate baseline of comparison for Johnson would be to devalue the significance of the procedural safeguards and to encourage prosecutors to undermine the safeguards by seeking punishment for conduct for which no conviction was obtained.

84. 1983 Senate Report, *supra* note 68, at 41-45.

85. O'Hear, *supra* note 23, at 741-43.

86. 1983 Senate Report, *supra* note 68, at 53.

deviating from general norms. In an unusual case, disparate treatment might, in fact, be warranted.

Where a judge can identify something unusual about a case, though, disparate treatment would not automatically be warranted. The fact that a bank robber wore a pink wig, for instance, would certainly mark the case as an unusual one,[87] but would not, in and of itself, seem to warrant different treatment at sentencing. In the end, the question of whether an unusual characteristic warrants different treatment is a normative one; it is up to the sentencing judge to determine whether disparate treatment is appropriate in light of the general purposes of criminal sentencing.

At first blush, this reading of (a)(6) may seem hard to square with the intent of the SRA to ensure that sentences are not "dependent on the identity of the sentencing judge and the nature of his sentencing philosophy."[88] However, there are several important constraints on the individual judge's discretion in this area. First, this decision, like all sentencing decisions under *Booker*, is subject to reasonableness review.[89] The appellate courts can ensure that all decisions in this area are rationally justified and can develop uniform guidance for the lower courts over time.

Second, judges must heed a host of statutory commands. For instance, the judge may not impose a sentence that is "greater than necessary" to comply with the approved purposes of sentencing.[90] If a sentencing norm identified under (a)(6) exceeds this "parsimony principle" in a particular case, then any disparity resulting from a decision to follow the parsimony principle should be treated as *per se* "warranted." Likewise, the many statutory provisions addressed to the Commission in 28 U.S.C. § 994 regarding the relevance of particular factors should also be understood to apply to the judge. Thus, for instance, if Congress has indicated that the Guidelines should be "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders,"[91] it would seem odd to interpret (a)(6) such that a sentence judge could rely on these factors as a justification for otherwise unwarranted disparity.

Third, there are the Guidelines. Section 3353(a) commands that the sentencing judge "consider" the Guidelines no less than the need to avoid unwarranted disparity. Subsection (a)(6) does not authorize the judge to ignore the Guidelines, and a decision to sentence outside the Guidelines range may be subject to especially close scrutiny during reasonableness review.[92]

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87. *See* United States v. Blake, 89 F. Supp. 2d 328, 331 (E.D.N.Y. 2000) (noting the bank robbery defendant wore a pink wig).

88. 1983 Senate Committee Report, *supra* note 68, at 161.

89. United States v. Booker, 543 U.S. 220, 261 (2005).

90. 18 U.S.C. § 3553(a) (2000).

91. 28 U.S.C. § 994(d) (2000).

92. *Cf.* United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005) ("[A]ny sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness.").

Fourth, there are directionality constraints. Subsection (a)(6) focuses attention on the *average* sentence and authorizes judges to minimize deviations from the average. The provision does not authorize judges to move *away* from the average. Assume, for instance, that the average sentence for bank robbery is eleven years. Assume further that the Guidelines sentence in a particular bank robbery case is fifteen years. If the judge found this disparity to be unwarranted, the judge might impose a sentence anywhere between eleven and fifteen years. However, the judge would not—at least under (a)(6)—have the authority to impose a sentence greater than fifteen years or less than eleven, no matter how much the judge's personal views of the crime would push her in one direction or the other.

IV. THE ROLE OF (a)(6) IN A POST-*BOOKER* WORLD

By my reading, the true significance of (a)(6) in a post-*Booker* world is that the provision adds a distinct new factor to the sentencing calculus: the national average sentence imposed in other cases in which a defendant with a similar record was convicted of the same or similar offense. Of course, by the express terms of the statute, this new factor would only have to be "considered." It is entirely possible that this new factor would have little or no actual effect on sentencing practices. On the other hand, there are good reasons to think that (a)(6), as I understand it, would have a meaningful role to play.

First, there is the anchoring effect. Social psychology research has demonstrated that the articulation of a number—even an arbitrarily selected number—at the start of a decision-making process may play an important role in shaping the final outcome.[93] This may help to explain why Guidelines compliance and overall sentencing severity have not changed in more dramatic ways since *Booker* was decided.[94] The Guidelines range is still routinely calculated and likely anchors subsequent analysis. The national average sentence, if also routinely identified as salient, might provide an alternative anchor, and thereby promote a more open-minded approach to sentencing.

Second, (a)(6) focuses attention on the offense of conviction, suggesting the centrality of this factor in the sentencing calculus and indicating that sentences based on other factors must be specially justified. This approach supports the constitutional values of *Blakely* and *Booker*, and demonstrates, at least symbolically, that the post-*Booker* world is not simply business as usual.

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93. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2515-19 (2004) (describing the anchor effect).

94. *See* U.S. SENTENCING COMM'N, SPECIAL POST-*BOOKER* CODING PROJECT 7, 14-15 (2005) (indicating that, as of November 1, 2005, 61.7% of post-*Booker* sentences were within range and median sentence was thirty-three months, as opposed to 69.4% and thirty months in FY 2003 (the last year for which complete data is available) and 65.0% and thirty months in FY 2002).

Third, while (a)(6) may not be an open-ended warrant for individual judges to make sentencing policy in derogation of the Commission's role, it does provide an additional opportunity for judges to bring to bear their personal wisdom and experience. This may seem gratuitous in light of the much broader mandate of (a)(2) for judges to "consider" a laundry list of basic purposes of sentencing. Yet, many judges likely feel uncomfortable using the discretion available under (a)(2) precisely because it is so open-ended. Some judges prefer constraints on sentencing discretion as a matter of principle.[95] Others will at least want to avoid the appearance of unbridled discretion for fear of a political backlash.[96] To such judges, (a)(6) may provide a comfortable middle-ground, offering a new locus of discretionary judgment that was not available before *Booker*, but one that is circumscribed by an empirical analysis of average sentences imposed in similar cases.

V. ILLUSTRATIONS

The preceding discussion has been admittedly abstract. How would the (a)(6) analysis play out in practice? Consider, for example, the *Strange* case discussed above.[97] Strange was convicted of a civil rights violation. The median sentence for civil rights convictions is thirty-one months.[98] Strange's Guidelines range was twenty-seven to thirty-three months. Accordingly, (a)(6) would not provide a basis for reducing Strange's sentence below the Guidelines. Indeed, (a)(6) would have to be considered as a potential reason to reject a below-Guidelines sentence on other grounds, unless the judge determined that any resulting disparity (relative to the thirty-one-month average) was warranted.

Is this the right result? If the judge imposed a thirty-one-month sentence in light of (a)(6), the sentence could be justified as one that was dictated by the offense of conviction and the general judicial practices in cases involving similar offenses across the country. To be sure, Strange is left with a longer sentence than his co-defendants, but his co-defendants have done something that he has not, that is, provided substantial assistance to the authorities. Indeed, basing one defendant's sentence on co-defendants' sentences has an arbitrary quality to it. What if Strange had been sentenced first? Would the subsequent sentences for the co-defendants have been *increased* based on Strange's sentence? It surely cannot be that the speed of case processing and order of sentencing should determine severity of punishment.

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95. *See, e.g.*, United States v. Wilson, 355 F. Supp. 2d 1269, 1286 (D. Utah 2005).

96. *Id.* at 1287-88.

97. *See supra* text accompanying notes 16-22.

98. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 420 (31st ed. 2003). This data is the most recent available. In connection with crimes that are prosecuted with relative infrequency, courts, when determining a baseline average sentence for comparison purposes, might appropriately consider data from several years to ensure that the most recent year was not anomalous.

While the sentence in *Strange* seems a particularly arbitrary use of (a)(6), I am also a bit troubled by the analysis in the other cases discussed in Part I. I do not necessarily disagree with the fairness concerns articulated or the ultimate sentences imposed in the cases, but they do smack of the sort of unbridled policy-making decisions by individual judges that the SRA was intended to curtail. The analysis in all of these cases would be strengthened by a showing that the otherwise applicable Guidelines sentence exceeded established norms for defendants convicted of similar offenses.

Consider *Medrano-Duran*, the illegal reentry case.[99] The defendant sought to take advantage of early disposition programs that were not available in his district of prosecution. But why use (a)(6) to lower his sentence? Would it not make as much sense to *raise* the sentences of defendants who were prosecuted in early-disposition districts? Much as in the *Strange* case, there seems to be a certain arbitrariness as to whose sentence moves and by how much. Looking to actual sentencing outcomes may bring a somewhat objective constraint to the analysis. *Medrano-Duran* would have been a more compelling case if the defendant could have shown that not only do other districts have early-disposition programs, but that those programs have been used in such a widespread manner that they have had an appreciable effect on overall national sentencing statistics.

Finally, consider the crack-powder case. This case raises a significant problem for the (a)(6) analysis at the empirical step: Should the baseline for comparison be other crack cases or other cocaine cases (including both crack and powder)? While the drug statutes treat crack and powder offenses in a distinct manner, (a)(6) focus on the treatment of offenders found guilty of "similar conduct." There seems little reason not to regard crack and powder crimes as "similar." The baseline of comparison for crack offenders should thus be the broader category of all cocaine offenders. Where a particular crack offender's Guidelines sentence exceeds the baseline norm, it is appropriate under (a)(6) for the sentencing judge to inquire whether the resulting disparity is warranted.

VI. CONCLUSION

Subsection 3553(a)(6) had little significance prior to *Booker*, when the sentencing analysis was dominated by the mandate of subsection (b)(1) to adhere to the Guidelines absent a suitable ground for departure. In a post-*Booker* world, (a)(6) potentially plays an important role in counterbalancing the statutory mandate for judges to "consider" the Guidelines, helping to ensure the advisory Guidelines are truly advisory. Moreover, (a)(6) does so in a particularly appropriate manner, by refocusing attention on the offense of conviction, with all of the attendant procedural safeguards, as a key sentencing consideration.

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99. *See supra* text accompanying notes 34-36.

The challenge is to implement (a)(6) in a manner that retains some deference to the intent of the SRA to check the discretionary power of individual judges. I have proposed a two-step, empirical-normative analysis that attempts to strike a balance between the need to constrain discretion and the need for a robust alternative sentencing framework to the Guidelines. Envisioned in this manner, (a)(6) offers a new locus for dialogue within the judiciary over the meaning of "unwarranted disparity" and an opportunity for judges to address the unwarranted disparities created by an unduly mechanical application of the Guidelines themselves.