

Case Notes

Justifiable Limitations on Title VII Anti-Retaliation Provisions

Merritt v. Dillard Paper Co., 120 F.3d 1181 (11th Cir. 1997).

Title VII prohibits not only discrimination, but also retaliation against employees who complain about discriminatory practices. The anti-retaliation provision extends protection both to employees who have “opposed any practice made an unlawful employment practice” under Title VII (the “opposition clause”) and to employees who have “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under” Title VII (the “participation clause”).¹ The importance of defending employees against retaliation for invoking statutory protection is clear: Without such protection, employees would be dissuaded from pressing their claims in the first place.² In *Merritt v. Dillard Paper Co.*,³ however, a panel of the Eleventh Circuit extended this protection too far, reading the scope of Title VII’s anti-retaliation provision so broadly as to cover harassers who participate in proceedings brought on account of their own unlawful behavior.

Existing Title VII jurisprudence did not mandate this result. The *Merritt* court should have paid more explicit attention to the purposes of Title VII when interpreting the language of section 704(a). In addition, the court should have balanced employer and employee interests in determining whether or not to shield the employee from retaliation, as courts have done in the opposition clause context. Either way, by denying harassers the protection of section 704(a), the court would have contributed to employer efforts to create work environments free from harassment and discrimination.

1. Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (1994).

2. See *Jones v. Flagship Int’l*, 793 F.2d 714, 726 (5th Cir. 1986); Douglas E. Ray, *Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405, 406 (1997).

3. 120 F.3d 1181 (11th Cir. 1997).

I

Janet Moore, a receptionist at Dillard Paper Company, initiated a lawsuit under Title VII alleging sexual harassment by several men in her office, including Harry Merritt. During his deposition, Merritt reluctantly admitted to conduct that plainly constituted harassment.⁴ Dillard subsequently settled Moore's case. The company president then reviewed the deposition testimony and decided on this basis to terminate Merritt, who in turn filed his own Title VII suit, alleging unlawful retaliation. The district court granted summary judgment for the employer, ruling that Title VII "does not protect those who participate in another's case involuntarily and without any intent or desire to assist."⁵

The Eleventh Circuit reversed. In the panel's view, the participation clause of section 704(a) extends protection by its own terms even to those whose participation is neither voluntary nor intended to aid the complainant.⁶ The panel refused to read the provision through the lens of clear statutory purposes, as the lower court had done,⁷ and defended its literal interpretation by distinguishing the relevance of limits imposed in opposition clause cases.⁸

II

The court's interpretation of section 704(a) is in some tension with Supreme Court precedent and the general practice of the federal judiciary in retaliation cases. The panel applied a well-supported canon of statutory construction: "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."⁹ And it concluded that the language of the retaliation provision clearly and unambiguously included the plaintiff.¹⁰ Surprisingly, however, the panel failed even to mention *Robinson v. Shell Oil Co.*,¹¹ a recent decision in which the Supreme Court interpreted the retaliation provision at issue in *Merritt*. A unanimous Court determined that the term "employees" as used in section 704(a) includes former employees,¹² even though a literal reading of the statute would not support this result. The Court applied the same canon as the *Merritt* court, but emphasized that clarity in meaning cannot be determined merely by

4. *See id.* at 1184 ("Despite Merritt's lack of candor and reluctance, Moore's attorney . . . succeed[ed] in extracting from Merritt deposition testimony useful to Moore in proving her Title VII claim.").

5. *Id.* (discussing the district court's unpublished opinion).

6. *See id.* at 1185.

7. *See id.* at 1186.

8. *See id.* at 1186-87.

9. *Id.* at 1185 (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

10. *See id.* at 1186 (articulating the literal meaning of the word "testified" and the phrase "participated in any manner").

11. 117 S. Ct. 843 (1997).

12. *See id.* at 849.

considering words alone: “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”¹³ Finding ambiguity, the Court resolved this lack of clarity in a fashion “more consistent with the broader context of Title VII and the primary purpose of § 704(a)” than a literal reading.¹⁴

If the Eleventh Circuit had applied *Robinson*, it could not have relied as it did on literal interpretation divorced from context. Just as the word “employee” is subject to interpretation, it is far from clear that the phrase “participated in any manner” necessarily includes the testimony of an individual who is not attempting to assist the complainant, much less that of the person responsible for the alleged Title VII violation in the first place. Indeed, the clear purpose of section 704(a) is to protect employees who utilize the tools provided by Congress to assert their rights.¹⁵ Under *Robinson*, therefore, it is reasonable to deny protection to those whose participation was not intended to vindicate those rights.¹⁶

III

Even though the *Merritt* court adopted a literal interpretation, thereby including *Merritt* within the scope of the anti-retaliation provision, it should have acknowledged that the protection for participation is not limitless. Although those who *participate* in Title VII proceedings generally enjoy more

13. *Id.* at 846.

14. *Id.* at 849. The Court has refused to allow too-literal readings of provisions to defeat underlying statutory purposes in other contexts as well. *See, e.g.,* *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (stating, in interpreting the tax laws, that “[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute”); *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856) (stating, in interpreting the patent laws, that “it is well settled that, in interpreting a statute, the court will not look merely to a particular clause . . . , but will take in connection with it the whole statute . . . and the objects and policy of the law . . . and give to it such a construction as will carry into execution the will of the Legislature”).

Lower courts interpreting the participation clause have likewise emphasized the need to be guided by statutory purpose, not narrow textual construction. *See, e.g.,* *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) (interpreting the retaliation provision “liberally” in order “to accomplish its evident purpose” of protecting “complainants and witnesses”); *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 545 (6th Cir. 1993) (noting that “courts have routinely adopted interpretations of retaliation provisions . . . that might be viewed as outside the literal terms of the statute in order to effectuate Congress’s clear purpose in proscribing retaliatory activity”); *Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985) (“[L]iteral statutory construction is inappropriate if it would produce a result in conflict with the legislative purpose clearly manifested in an entire statute . . .”).

15. *See Robinson*, 117 S. Ct. at 848 (describing the maintenance of “unfettered access to statutory remedial mechanisms” as “a primary purpose of antiretaliation provisions”); *Pettaway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1004-05 (5th Cir. 1969) (“There can be no doubt about the purpose of § 704(a). In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights.”).

16. It might be argued that the purpose of the clause is to encourage truthful testimony, even by the perpetrators of unlawful conduct. *See Merritt*, 120 F.3d at 1184. But such honesty can be promoted through alternative means—such as laws against perjury—that do not immunize the wrongdoer from punishment.

protection than those who merely *oppose* activities made unlawful by Title VII,¹⁷ courts have imposed some restrictions on participation and would be justified in going further—namely, by incorporating the balancing test developed in opposition clause cases—to ensure that the purposes of Title VII are not frustrated. In this way, standards developed in both the participation and opposition contexts could easily have been applied to exclude Merritt from coverage.

In opposition clause cases, courts have explicitly embraced a balancing test.¹⁸ To determine whether an employee's activities are protected, courts balance the plaintiff's interest in vindicating her Title VII rights with the employer's interest in taking the adverse employment action.¹⁹ Under this test, employee opposition generally loses statutory protection if it is too damaging to the employer's business goals,²⁰ if it is excessively disruptive of workplace affairs (including the job performance of the employee and her coworkers),²¹ or if it is unreasonable under the circumstances.²²

Strictly speaking, participation clause cases are not subject to the same sort of balancing. Employees are protected without question when they themselves invoke the processes established by law for the resolution of equal employment disputes.²³ And courts do not limit coverage merely to complainants: The participation clause also shelters from retaliation *other* employees who participate in various ways in their coworkers' claims.²⁴

17. See *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (“[F]ederal courts have generally granted less protection for opposition than for participation in enforcement proceedings.”); *Croushorn v. Board of Trustees of Univ. of Tenn.*, 518 F. Supp. 9, 21 (M.D. Tenn. 1980) (“While the ‘participation’ clause covers a narrower range of activities than the other, it gives those activities stronger protection than the ‘opposition’ clause provides.”); *Ray*, *supra* note 2, at 409-10 (“Courts have interpreted the participation clause as providing nearly absolute protection. . . . Protection under the opposition clause, by contrast, has limits.”).

18. See R. Bales, *A New Standard for Title VII Opposition Cases: Fitting the Personnel Manager Double Standard into a Cognizable Framework*, 35 S. TEX. L. REV. 95, 112-17 (1994); Elizabeth Chambliss, *Title VII as a Displacement of Conflict*, 6 TEMP. POL. & CIV. RTS. L. REV. 1, 21-22 (1997).

19. See, e.g., *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 233 (1st Cir. 1976) (“[T]he employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare.”); see also *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978) (“[T]he means of opposition chosen must be . . . reasonable in view of the employer's interest in maintaining a harmonious and efficient operation.”).

20. See, e.g., *Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 373-74 (7th Cir. 1984); *Wrighten v. Metropolitan Hosps., Inc.*, 726 F.2d 1346, 1355-56 (9th Cir. 1984); *Hochstadt*, 545 F.2d at 233.

21. See, e.g., *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014-15 (9th Cir. 1983); *Rosser v. Laborers' Int'l Union, Local No. 438*, 616 F.2d 221, 223-24 (5th Cir. 1980).

22. See, e.g., *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763-64 (9th Cir. 1994); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036-37 (5th Cir. 1980).

23. See *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978).

24. See, e.g., *Smith v. Georgia*, 749 F.2d 683, 684 (11th Cir. 1985) (protecting an employee who had testified on behalf of a coworker in the latter's discrimination action against the employer); *Van Richardson v. Burrows*, 885 F. Supp. 1017, 1023 (N.D. Ohio 1995) (protecting an employee who had filed an affidavit in support of another employee's discrimination claim); *Smith v. Columbus Metro. Hous. Auth.*, 443 F. Supp. 61, 64 (S.D. Ohio 1977) (protecting an employee who had refused to assist the employer in preparing its defense against another employee's claim of discrimination); see also *Bales*, *supra* note 18, at 104-05 (“An employee is protected if the employee encourages co-workers to enforce their Title VII rights, refuses to sign an inaccurate affidavit on behalf of an employer, testifies on behalf of a co-worker, . . . participates

Nevertheless, courts have excluded certain activities from protection under the participation clause—sometimes explicitly,²⁵ sometimes implicitly. In cases like *Merritt*, involving plaintiffs who have not filed charges themselves, protection has been extended only to those who help coworkers vindicate their own discrimination charges.²⁶ More fundamentally, although courts officially employ a balancing test only in the opposition clause context,²⁷ such considerations are clearly relevant—and often emerge—in participation cases as well. Where participation itself disrupts business affairs, for example, the employee's interest in vindicating her rights may be outweighed by the employer's interest in a well-functioning and productive workplace.²⁸ Participation conduct may also be subjected to a balancing test when it interferes directly with the employee's own job performance—because the employee spends too much work time pursuing the complaint,²⁹ because she fails to fulfill job duties,³⁰ or because the very filing of a complaint impedes

in a conciliation meeting on behalf of a co-worker, [or] submits affidavits on behalf of a co-worker to the EEOC . . .”).

25. Due to the terms of the anti-retaliation provision, neither participation in internal investigations, see *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990); *Morris v. Boston Edison Co.*, 942 F. Supp. 65, 71 (D. Mass. 1996), nor participation in proceedings involving charges of discrimination not prohibited by Title VII, see *Learned v. Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988), enjoys statutory protection.

26. See, e.g., *Pagano v. Frank*, 815 F. Supp. 30, 31 (D. Mass. 1992) (“Plaintiff did not oppose any unlawful employment practice; plaintiff allegedly engaged in an unlawful employment practice. Plaintiff’s claim that he is entitled to Title VII protection for his ‘participation’ in an investigation . . . seems of doubtful legal merit.”).

All of the coworker participation clause cases cited by the *Merritt* court involved retaliation against individuals who testified at administrative hearings or in court on behalf of those alleging discrimination. See *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1571-73 (5th Cir. 1989); *Smith v. Georgia*, 684 F.2d 729, 730 (11th Cir. 1982); *Truelove v. Trustees of the Univ. of D.C.*, 744 F. Supp. 307, 313 (D.D.C. 1990). In addition, all of the examples of protected “assist[ance]” and “participat[ion]” cited in a major treatise on employment discrimination involve individuals in some way “allied with” the aggrieved employee. BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 651-52 (3d ed. 1996). Thus, it is far from clear that the *Merritt* court was correct to conclude that precedent supported the protection of an employee whose participation was neither voluntary nor intended to assist the complainant.

27. See *McKenna v. Weinberger*, 729 F.2d 783, 790 n.54 (D.C. Cir. 1984) (suggesting that the district court erred in applying a balancing test to determine whether the plaintiff’s participation in an investigation of sex discrimination was protected activity); *EEOC v. Pacific Press Publ’g Ass’n*, 482 F. Supp. 1291, 1308 (N.D. Cal. 1979) (noting that opposition conduct “must meet a balancing test,” while participation activities are “absolutely protected”).

28. See *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1390 (8th Cir. 1987) (concluding that an employee’s actions in investigating his claim—including the harassment of a potential witness—were not reasonable and were too “bizarre” and disruptive to qualify for protection); *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F. Supp. 66, 71 (S.D.N.Y. 1975) (“Under some circumstances, an employee’s conduct in gathering or attempting to gather evidence to support his charge may be so excessive and so deliberately calculated to inflict needless economic hardship on the employer that the employee loses . . . protection . . .”).

29. See *Hernandez v. Alexander*, 607 F.2d 920, 924 (10th Cir. 1979) (balancing employee and employer interests where the complaining employee spent a significant amount of his time at work preparing Title VII complaints).

30. See *Brown v. Ralston Purina Co.*, 557 F.2d 570, 572 (6th Cir. 1977) (noting that “an EEOC complaint creates no right on the part of an employee to miss work, fail to perform assigned work, or leave work without notice”); *Blizard v. Fielding*, 454 F. Supp. 318, 325-26 (D. Mass. 1978) (applying a balancing test where the employee so avidly pursued her Title VII claims that she failed to do her job effectively, *aff’d sub nom.* *Blizard v. Frechette*, 601 F.2d 1217 (1st Cir. 1979)).

successful completion of the employee's assigned tasks.³¹

A more explicit importation of a balancing test into participation cases would be both appropriate and useful. This standard would not disrupt the holdings in conventional cases, in which the employee's interest (vindicating her own or another employee's Title VII claim) is strong and the employer's interest in preventing such participation is weak. In cases like *Merritt*, on the other hand, where the employee lacks a strong legitimate interest and the employer has a significant countervailing interest related to the purposes of the Act itself, a different outcome would result. Even if Dillard's president was more upset by the hassle and expense Merritt had caused the company than by his acts of harassment,³² however, Dillard still had a legitimate interest in an efficient and harmonious work environment. Although Merritt's testimony did not itself undermine this interest, it did reveal to the company president that Merritt had engaged in activities with such deleterious effects. A balancing test would preserve existing protections for employees who participate willingly and supportively in their colleagues' Title VII actions without including Merritt and others like him in the protected class.

IV

The decision in *Merritt* impedes the creation of a workplace culture free of harassment and discrimination. Under the Eleventh Circuit's doctrine, employers do remain free to discipline or terminate harassers—so long as their decisions are based on the harassment itself, not the testimony provided in Title VII proceedings.³³ In certain cases, however, the facts that emerge during these hearings and trials may be the employer's primary source of reliable information about the true course of events resulting in the complaint. *Merritt* shortsightedly limits the flexibility of employers in such cases to impose discipline on harassers. A more sophisticated and well-supported approach to interpreting Title VII and precedent would have avoided this result, which is largely incompatible with the goals of the statute.

—*Brian J. Kreiswirth*

31. This situation arises most frequently in cases involving equal employment opportunity (EEO) officers. See *Jones v. Flagship Int'l*, 793 F.2d 714, 726 (5th Cir. 1986) (balancing an EEO officer's interests in filing a charge against the employer's interests in informal resolution of discrimination disputes); *Smith v. Singer Co.*, No. C-76-2367 RFP, 1979 WL 263, at *4 (N.D. Cal. June 1, 1979) (noting that "the filing of charges, for which Smith [an EEO officer] seeks protection, must be evaluated in relation to his prescribed duties and his particular responsibilities to his employer"), *aff'd*, 650 F.2d 214 (9th Cir. 1981).

32. According to Merritt, the company president told him: "Your deposition was the most damning to Dillard's case, and you no longer have a place here . . ." *Merritt*, 120 F.3d at 1183. A balancing test should consider the employer's demonstrated rationale for the adverse action, thus weighing less heavily the interests of an employer motivated by anger or revenge than those of an employer more clearly driven by a desire to address workplace discrimination.

33. See *id.* at 1188-89.

Reducing Unjustified Sentencing Disparity

United States v. Meza, 127 F.3d 545 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1103 (1998).

The Federal Sentencing Guidelines¹ allow a judge to depart from the Guideline sentence range in certain extraordinary cases.² Until recently, every circuit to consider the issue had agreed that the departure authority does not allow a judge to depart in order to remedy disparities in the sentences received by codefendants in the same case.³ That is, even if application of the Guidelines produced a much higher sentence for one defendant than for a codefendant of seemingly identical culpability, the judge was not permitted to depart—either by raising the low sentence, or by lowering the high sentence—to equalize the two penalties.

In *United States v. Meza*,⁴ the Seventh Circuit reconsidered this position. Applying the departure analysis developed by the Supreme Court in *Koon v. United States*,⁵ the Seventh Circuit held that a district court now must inquire whether the disparity is justified or unjustified. If it is unjustified, then the court may depart to remedy the disparity. The *Meza* court did not discuss the policy implications of its decision; it simply deduced the result from *Koon*.⁶

This Case Note argues that, from a policy perspective, *Meza*'s approach is a significant improvement over the current ban on disparity-based departures. Widespread adoption of *Meza* not only would produce fairer sentences in multidefendant cases, but also would have the larger virtue of

1. U.S. SENTENCING GUIDELINES MANUAL (1997).

2. See 18 U.S.C. § 3553(b) (1994) (permitting the sentencing court to depart if it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission").

3. See, e.g., *United States v. Wogan*, 938 F.2d 1446, 1448-49 (1st Cir. 1991); *United States v. Joyner*, 924 F.2d 454, 459-61 (2d Cir. 1991); *United States v. Higgins*, 967 F.2d 841, 845 (3d Cir. 1992); *United States v. Fonville*, 5 F.3d 781, 783-84 (4th Cir. 1993); *United States v. Ives*, 984 F.2d 649, 650 (5th Cir. 1993); *United States v. Parker*, 912 F.2d 156, 158 (6th Cir. 1990); *United States v. Mejia*, 953 F.2d 461, 467 (9th Cir. 1992); *United States v. Garza*, 1 F.3d 1098, 1100-01 (10th Cir. 1993); *United States v. Chotas*, 968 F.2d 1193, 1198 (11th Cir. 1992); *United States v. Williams*, 980 F.2d 1463, 1467 (D.C. Cir. 1992). The Seventh and Eighth Circuits had not addressed directly the issue of whether sentencing disparity is a proper basis for departure, but both had held that it is not an appropriate basis for resentencing. See *United States v. Edwards*, 945 F.2d 1387, 1398 (7th Cir. 1991); *United States v. Granados*, 962 F.2d 767, 774 (8th Cir. 1992).

4. 127 F.3d 545 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1103 (1998).

5. 116 S. Ct. 2035 (1996).

6. See *Meza*, 127 F.3d at 549-50 (citing *Koon*, 116 S. Ct. at 2045, 2050-51, 2053).

reintroducing explicit discussion of proportionality into the federal sentencing process.

I

In March 1994, Antonio Meza was indicted for his role as middleman in a marijuana trafficking conspiracy. Some ten months later, long after his coconspirators had cooperated with the government, Meza pleaded guilty to a single count of conspiring to possess with intent to distribute over 100 kilograms of marijuana.⁷ At the sentencing hearing, the district court determined that the applicable Guideline range was forty-six to fifty-seven months.⁸ Meza's lawyer then moved for the court to depart downward in order to "equalize or regularize" Meza's sentence with those imposed on Meza's coconspirators.⁹ The district court denied the motion, stating that it had no authority to depart on such a basis. The court then sentenced Meza to the minimum term of forty-six months.¹⁰

The Seventh Circuit initially upheld this decision and declined to revisit the "well-settled rule that disparity among coconspirators' sentences does not justify departure."¹¹ Its ruling was vacated and remanded by the Supreme Court¹² for reconsideration in light of *United States v. Koon*,¹³ in which the Court had established an analytical framework for determining the circumstances under which a district court may depart. *Koon* requires the sentencing court to determine whether the sentencing factor relied upon for the proposed departure is forbidden, encouraged, discouraged, or unmentioned in the Guidelines.¹⁴ If the factor is forbidden, then a court may not depart on that basis.¹⁵ If it is encouraged, then the court may depart to the extent that the applicable Guideline does not already take it into account.¹⁶ If it is discouraged, then the court should depart only if the factor is present to such

7. Meza was charged under 21 U.S.C. §§ 841, 846 (1994). See *United States v. Meza*, 76 F.3d 117, 119 (7th Cir.), vacated, 117 S. Ct. 478 (1996).

8. Meza's base offense level was 26, from which three points were deducted for his timely acceptance of responsibility. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (1997). For an offender with little or no criminal history, the resulting offense level of 23 corresponds to a prison sentence of 46 to 57 months. See *id.* § 5A.

9. *Meza*, 76 F.3d at 119. Neither of the two *Meza* opinions indicates the sentences received by Meza's coconspirators, but apparently they received downward departures for providing substantial assistance to the prosecutors. See *Meza*, 127 F.3d at 550; see also U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (allowing the district court to depart upon a motion by the prosecutor that the defendant provided "substantial assistance" to authorities).

10. See *Meza*, 76 F.3d at 119.

11. *Id.* at 122.

12. See *Meza v. United States*, 117 S. Ct. 478 (1996).

13. 116 S. Ct. 2035 (1996) (evaluating the validity of downward departures granted to the four police officers convicted of violating Rodney King's constitutional rights).

14. See *id.* at 2045.

15. See *id.*

16. See *id.*

an extraordinary degree that it “makes the case different from the ordinary case where the factor is present.”¹⁷ Finally, if the factor is unmentioned, then the court must look to the “structure and theory of both relevant individual guidelines and the Guidelines taken as a whole”¹⁸ to determine whether the factor removes the case from the “heartland” of typical Guidelines cases.¹⁹

Applying this analysis, the Seventh Circuit once again evaluated whether the district court had the authority to depart in Meza’s case. Although both Meza and the government agreed that disparity in sentences among coconspirators is a factor unmentioned in the Guidelines, the court rejected this view.²⁰ Instead, the court distinguished between “justified” disparities, which are mentioned—indeed required—by the Guidelines, and “unjustified” disparities, which are unmentioned.²¹ A justified disparity, the court held, is one that the Sentencing Commission intentionally created, such as the disparity that results when one defendant cooperates with authorities but the other does not.²² Such a disparity can never be the basis for a departure because “it is the application of the Guidelines that created the disparity in the first place.”²³ An unjustified disparity, on the other hand, “is one that cannot be explained by a comparison of each defendant against the Guidelines as a set of rules.”²⁴ The court concluded that unjustified disparity *is* a potential basis for departure, because “the goal of the sentencing guidelines is, of course, to reduce unjustified disparities.”²⁵

17. *Id.*

18. *Id.* (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993) (Breyer, J.)).

19. *Id.*

20. *See Meza*, 127 F.3d at 549 (“We reject both arguments because they stem from the erroneous assumption that a disparity in sentences between co-conspirators . . . is an unmentioned sentencing factor in the Guidelines.”).

21. *Id.* at 549-50.

22. *See id.* at 549.

23. *Id.*

24. *Id.* at 550. The court also observed that an unjustified disparity “does not result from a proper application of the Guidelines.” *Id.* Although this statement seems to imply that the question of whether a particular disparity is justified or unjustified is simply a matter of whether the Guidelines were properly applied, this cannot be the meaning of the court’s distinction. Misapplication of the Guidelines is itself a reversible error, for which the remedy would be not a departure from the Guideline sentence, but resentencing in accordance with the Guidelines. *See* 18 U.S.C. § 3742(a)(2) (1994) (providing for appellate review of sentences “imposed as a result of an incorrect application of the sentencing guidelines”). Yet the court made it clear that unjustified disparity may give rise to a departure by the trial judge: “For unjustified disparities, the sentencing court should apply the three step process described [in *Koon*] to determine whether a defendant merits a departure downward in his sentence . . .” *Meza*, 127 F.3d at 550. This three-step process involves: (1) determining whether anything about the case removes it from the “heartland” of typical offenses; (2) assuring that the Sentencing Commission has not categorically proscribed consideration of the factor; and (3) determining whether the factor is of a kind, or to a degree, not adequately considered by the Sentencing Commission in formulating the Guidelines. *See id.* at 549 (citing *Koon*, 116 S. Ct. at 2045, 2051). Plainly, a district court would not need to engage in this process if unjustified disparity amounted merely to an improperly calculated sentence. Implicitly, then, the court assumed that even a technically correct application of the Guidelines can produce unjustifiably disparate sentences, in which case a departure would be necessary to address the problem.

25. *Meza*, 127 F.3d at 550 (quoting *Koon*, 116 S. Ct. at 2053); *see also* U.S. SENTENCING GUIDELINES MANUAL ch. I, pt. A, § 3 (1997) (identifying “uniformity” as one of the goals of the Sentencing Guidelines). The court found that the disparity between Meza’s sentence and those of his coconspirators

II

Ideally, a proper application of the Sentencing Guidelines would never produce unjustifiably disparate sentences, and *Meza's* distinction between justified and unjustified disparity would therefore be unnecessary. In practice, however, it is impossible to design a set of mandatory guidelines that will produce a fair sentence in every case, because the range of potential criminal conduct is simply too great. Congress recognized as much when it established the judge's departure authority in the Sentencing Reform Act of 1984.²⁶ The departure mechanism is premised on the notion that some cases inevitably will fall outside the "heartland" of typical offenses to which the Guidelines are meant to apply.²⁷ In such cases, the judge must have some discretion to impose a sentence above or below the normal Guideline range.

The question, then, is how generously to allocate this discretion. It is essential to keep in mind the Guidelines' goals of honesty, uniformity, and proportionality.²⁸ If a judge can depart at will, then the goal of uniformity is undermined. Conversely, if the judge's discretion is restricted too severely, then proportionality will suffer, since the judge will be forced to treat extraordinary cases the same as ordinary ones. The enforcement of an absolute ban on departures based on disparity risks exalting uniformity at the cost of proportionality. Unless one believes that application of the Guidelines *never* results in unjustified disparity among codefendants, then it makes no sense to impose an *ex ante*, categorical prohibition on disparity-based departures.

The problem of unjustified disparity is not illusory. Commentators have identified numerous sources of disparity in Guidelines sentencing, such as inconsistent charging practices,²⁹ conflicting judicial interpretations of key provisions,³⁰ prosecutorial and judicial circumvention of the Guidelines,³¹

was justified, because it resulted from the Guidelines provision for downward departures to reward substantial assistance to the authorities. *See Meza*, 127 F.3d at 549.

26. Pub. L. No. 98-473, § 3553(b), 98 Stat. 1987, 1989 (codified as amended at 18 U.S.C. § 3553(b)).

27. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, § 4(b) ("The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes.").

28. *See id.* ch. 1, pt. A, § 3.

29. *See, e.g., Daniel J. Freed, Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1723-24 (1992) (observing that differing prosecutorial practices are a source of hidden and unreviewable disparity); Eric Lotke, *Sentencing Disparity Among Co-Defendants: The Equalization Debate*, 6 FED. SENTENCING REP. 116, 119 (1993) (discussing the use of charge bargaining to elicit cooperation from defendants).

30. For example, courts apply conflicting definitions of the monetary "loss" that is the main determinant of sentences for economic crimes such as fraud, larceny, and robbery. *See Frank O. Bowman III, Back to Basics: Helping the Commission Solve the "Loss" Mess with Old Familiar Tools*, 10 FED. SENTENCING REP. 115, 116 (1997) (noting the existence of circuit splits on 11 distinct issues concerning the definition and measurement of loss). *See generally* U.S. SENTENCING COMM'N, LOSS ISSUES (1997) (discussing circuit conflicts over the proper measurement of loss).

31. The problem of judicial and prosecutorial circumvention of the Guidelines has been documented in an extensive empirical study by Ilene Nagel and Stephen Schulhofer. *See Ilene H. Nagel & Stephen J. Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the*

an undue emphasis on drug and monetary quantities,³² and pre-arrest sentence manipulation by police officers and government investigators.³³ Moreover, judges appear to have grown frustrated by the Guidelines' inability to resolve these problems.³⁴ Under these circumstances, there can be little doubt that the problem of unwarranted disparity continues to persist in a substantial number of cases. Thus, a blanket rule against departures to remedy this problem appears, on its face, to be inappropriate.

Critics might respond that even though a blanket rule may preclude some departures that are warranted, it is necessary because judges cannot be trusted to identify these cases. This concern is overstated, for several reasons. First, multidefendant cases are particularly well-suited for judgments about relative culpability because all of the codefendants were involved in the same general course of conduct. The judge therefore has a concrete frame of reference from which to evaluate the culpability of each defendant.³⁵ Second, the Guidelines themselves already acknowledge a judge's ability to differentiate between levels of culpability in the same criminal enterprise.³⁶ Thus, it is incongruous to forbid judges from departing on this basis where such differences are present to an extraordinary degree. Third, as the Supreme Court noted in *Koon*, district court judges handle so many Guidelines cases that they have an institutional advantage in determining whether a case is truly unusual or not.³⁷

Federal Sentencing Guidelines, 66 S. CAL. L. REV. 501 (1992); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231 (1989); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284 (1997).

32. Critics point out that the Guidelines' overreliance on drug quantities sometimes produces blatantly unjust results, such as identical sentences for a drug kingpin and his couriers. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 921 (1991) (arguing that the weight of drugs possessed is an unreliable indicator of culpability); Catherine M. Goodwin, *Sentencing Narcotics Cases Where Drug Amount Is a Poor Indicator of Relative Culpability*, 4 FED. SENTENCING REP. 226 (1992) (arguing that the current drug guidelines contribute to unwarranted sentencing disparity).

Similarly, monetary loss in economic crimes may be a poor proxy for culpability because the loss figure does not adequately reflect either the amount of harm caused by the crime or the defendant's state of mind. See, e.g., Russell M. Coombs, *Perfecting a Blunder: Redefining Loss as the Main Gauge of Federal Sentences for Theft and Fraud*, 10 FED. SENTENCING REP. 152, 153-54 (1997). These inherent limitations on the "loss" concept are exacerbated by inconsistent application by courts. See *supra* note 30.

33. See Jeffrey L. Fisher, Note, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims Under the Federal Sentencing Guidelines*, 94 MICH. L. REV. 2385, 2396-97 (1996) (describing methods by which government agents manipulate quantity-based drug sentences).

34. See FEDERAL JUDICIAL CTR., THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 117 (1997) (showing that 72.8% of district court judges and 68.8% of appellate court judges favor abolishing the current system of mandatory guidelines).

35. See Lotke, *supra* note 29, at 118 ("Many traditional difficulties of defining fairness and proportionality disappear in codefendant cases. It is relatively easy to compare the culpability of people engaged in the same enterprise.").

36. Indeed, the Guidelines instruct the judge to adjust the offense level to reflect this factor, although the adjustment is too small to eliminate the disparity problem in every case. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 to .2 (1997) (providing for adjustments to the offense level based on the defendant's role in the offense).

37. See *Koon v. United States*, 116 S. Ct. 2035, 2047 (1996).

Finally, the decision to depart would, as always, be subject to appellate review, thus mitigating the danger that judges would depart too aggressively.³⁸

Meza provides a sensible measure of discretion for judges to depart when unjustified disparity arises in its most recognizable context: multidefendant cases. It has the additional virtue of inducing judges to engage in explicit consideration of proportionality as a sentencing objective. In order to avoid appellate reversal, a judge must state on the record her reasons for departing; in the *Meza* situation, the judge would have to explain why a particular defendant is more or less culpable than his codefendants. The appellate court, in turn, would have occasion to comment publicly on the district court's rationale for departing. Such exchanges could help transform the sentencing of multiple defendants from a mechanical computation of offense levels into a rational consideration of each codefendant's culpability. Moreover, in a system marked increasingly by prosecutorial and judicial circumvention of the Guidelines,³⁹ the availability of a departure to address unjustified disparity among codefendants would lessen the need to engage in Guideline manipulation. These systemic benefits are lost whenever district courts are categorically forbidden from considering a sentencing factor as a possible ground for departure.

III

Permitting judges to depart on the basis of unjustified disparity among codefendants could have salutary consequences beyond improving the fairness of the sentences at hand. It could lead to a richer and more honest discussion of the underlying purposes of sentences and how they are—or are not—served by the current structure of the Guidelines. Ultimately, the causes of unjustified sentencing disparity are best addressed through revision of the Guidelines themselves.⁴⁰ In the meantime, though, departures can reduce such disparity and draw attention to the areas of the Guidelines that judges find especially problematic. *Meza* encourages judges to inquire into the causes of disparity, rather than simply declare the issue off-limits. Adoption of *Meza*'s approach by other circuits would represent an encouraging first step toward restoring thoughtfulness and discretion to federal sentencing.

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38. A district court's decision to depart is reviewable under an abuse-of-discretion standard. *See id.* at 2050. The decision *not* to depart is unreviewable, unless it is based on the judge's erroneous belief that he lacks authority to depart in that case. *See, e.g.,* United States v. Sammoury, 74 F.3d 1341, 1343 (D.C. Cir. 1996) (noting that "[o]n this point, the courts of appeals are unanimous"). This asymmetry provides additional incentive for judges to depart only in truly extraordinary cases.

39. *See supra* note 31 and accompanying text.

40. The Sentencing Commission is responsible for reviewing the operation of the Guidelines and submitting proposed amendments to Congress. *See* 28 U.S.C. § 994(o)-(p) (1994).