

# Lowering Sentences for Illegal Immigrants? Why Judges Should Have Discretion to Vary from the Guidelines Based on Fast-Track Sentencing Disparities

ABE CHO\*

*“Fast-track” programs are selectively implemented programs that give illegal reentry defendants a reduced sentence in exchange for a quick guilty plea and broad waiver of procedural rights. Found predominately in southwest border districts overburdened with illegal immigrants, these programs cause grave sentencing disparities. A defendant in a fast-track district will receive a lower sentence than a similarly situated defendant in a non-fast-track district based simply on the geographical location of arrest. The circuit courts have split on whether a sentencing court in a non-fast-track district is permitted to give a defendant a lower sentence because of this disparity. This Note suggests that the circuit split results from a collision between an immigration policy that focuses on prosecutions and developments in federal sentencing law, including United States v. Booker and Kimbrough v. United States. This Note concludes that, under advisory Guidelines, district judges should have the discretion to grant lower sentences to avoid the disparity that fast-track programs create because the fast-track sentencing scheme falls short of a legislative mandate. Interpretation of Kimbrough provides the essential legal framework for allowing a district court to vary from the Sentencing Guidelines. The legal interpretation of Kimbrough and considerations of transparency, uniformity, and 18 U.S.C. § 3553(a) resolve the current circuit split.*

---

\* The author would like to thank Professors Dan Richman and Steve Statsinger, as well as the staff and editorial board of the *Journal of Law and Social Problems*.

## I. INTRODUCTION

The overall number of immigration offenders sentenced annually increased 664.9% between 1991 to 2007,<sup>1</sup> and in the first nine months of fiscal year 2008, immigration-related offenses accounted for 49.2% of the 111,874 new federal prosecutions.<sup>2</sup> So far, the Obama administration seems to be on the same course, as the rising trend of immigration prosecutions continued through fiscal year 2009.<sup>3</sup> Government “fast-track” programs were created to manage the administrative burden of these increased immigration cases.<sup>4</sup> These programs create a scheme whereby the government accepts a defendant’s broad waiver of procedural rights and quick guilty plea in exchange for a deep sentencing discount, allowing the case to be “fast-tracked” through the docket and thus conserving strained prosecutorial resources.<sup>5</sup> Since fast-track programs are most effective in areas with high immigration caseloads,<sup>6</sup> they have been implemented in only sixteen of

---

1. U.S. SENTENCING COMM’N, CHANGING FACE OF FEDERAL CRIMINAL SENTENCING: SEVENTEEN YEARS OF GROWTH IN THE FEDERAL SENTENCING CASELOAD 9 (2008), [http://www.ussc.gov/general/20081230\\_Changing\\_Face\\_Fed\\_Sent.pdf](http://www.ussc.gov/general/20081230_Changing_Face_Fed_Sent.pdf).

2. Transactional Records Access Clearinghouse Reports, Prosecutions Through June 2008, <http://trac.syr.edu/tracreports/crim/198/> (last visited Apr. 13, 2010).

3. Transactional Records Access Clearinghouse Reports, Immigration Prosecutions at Record Levels in FY 2009, <http://trac.syr.edu/immigration/reports/218/> (last visited Apr. 13, 2009).

4. Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on “Fast-Track” Sentences*, 38 ARIZ. ST. L.J. 517, 517, 523 (2006) (describing the prosecution’s development of fast-track programs in reaction to the “deluge of immigration cases”). Although the majority of fast-track programs are for immigration offenses, they are also available for other types of cases, including those involving certain drug offenses. *Id.* at 519.

5. See Rebecca Schendel Norris, Note, *Fast-Track Disparities in the Post-Booker World: Re-Examining Illegal Reentry Sentencing Policies*, 84 WASH. U. L. REV. 747, 750–51 (2006) (explaining how prosecutorial discretion made fast-track programs possible by offering a “powerful bargaining chip” to preserve resources).

6. *Id.* at 751; see Albert Llosas Barrueco, Comment, *Fast-Tracking United States v. Booker: Why Judges Should Not Fix Fast Track Disparities*, 6 CONN. PUB. INT. L.J. 65, 76 (2006) (“The purpose of [fast-track] programs has remained the same: saving prosecutorial and judicial resources while achieving an optimum number of felony immigration convictions.”).

the ninety-four federal districts,<sup>7</sup> typically those with the greatest numbers of immigration offenders.<sup>8</sup>

Since fast-track programs are selectively implemented, a defendant apprehended in one of these sixteen fast-track areas, like San Diego, receives a lower sentence than a defendant arrested in a non-fast-track district like Manhattan.<sup>9</sup> The sentencing disparity between the two districts is substantial: a sentence in a non-fast-track jurisdiction is potentially almost twice as long as a fast-track sentence and the difference for an offender can mean spending as many as fifty-one months or as few as twenty-seven months in prison.<sup>10</sup> Despite the fact that the sentencing differences were tied to little more than geography, *mandatory* United States Sentencing Guidelines (“Guidelines”) set these disparate sentences and district judges lacked sufficient discretion to correct these sentencing disparities.<sup>11</sup>

In 2005, the Supreme Court decided *United States v. Booker* and rendered the mandatory Guidelines “effectively advisory,” returning sentencing discretion to the judiciary and ushering in a new era in federal sentencing.<sup>12</sup> However, *Booker* alone cannot resolve the fast-track disparity issue because it never specifically addressed the extent to which judges may vary from the advisory Guidelines based on sentencing disparities. A few years later, in

---

7. U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 141 (2006) [hereinafter U.S. SENTENCING COMM’N, FINAL REPORT], [http://www.ussc.gov/booker\\_report/Booker\\_Report.pdf](http://www.ussc.gov/booker_report/Booker_Report.pdf).

8. Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723, 777 (2008) (discussing how certain border districts created fast-track programs to address the immigration burden). *But see infra* notes 216–17 and accompanying text (suggesting that the availability of fast-track programs is not always tied to high immigration caseloads).

9. U.S. SENTENCING COMM’N, FINAL REPORT, *supra* note 7, at 141, E-18; *see also* McClellan & Sands, *supra* note 4, at 525 (illustrating the differences in sentences between fast-track and non-fast-track defendants).

10. *See* *United States v. Perez-Chavez*, 422 F. Supp. 2d 1255, 1259 (D. Utah 2005) (recognizing that in a non-fast-track district, the defendants’ Guidelines sentence could be as low as ten months); *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 960, 963 (E.D. Wis. 2005) (recognizing that in a non-fast-track district the defendants’ Guidelines sentence could be up to fifty-one months long but in a fast-track district their sentence could be as low as twenty-seven months).

11. *See infra* note 35 and accompanying text (discussing the limited departure authority of judges under mandatory Guidelines).

12. 543 U.S. 220, 245 (2005).

*Kimbrough v. United States*,<sup>13</sup> the Supreme Court elucidated the broad sentencing discretion that *Booker* returned to the district judges. In *Kimbrough*, defendants convicted of crack cocaine offenses received harsher sentences than those convicted of powder cocaine offenses.<sup>14</sup> Under mandatory Guidelines, judges were required to impose harsher sentences based simply on the form of cocaine. However, *Kimbrough* held that, under advisory Guidelines, district judges may grant lower sentences to defendants convicted of crack cocaine offenses based on the disparity between crack cocaine and powder cocaine sentences under the Guidelines.<sup>15</sup>

The circuit courts differ on how *Kimbrough* applies to fast-track sentencing disparity cases. Specifically, they are split on whether a court in a non-fast-track district may consider the lower sentences in fast-track districts for granting a sentencing “variance.”<sup>16</sup> This is a critical issue because fast-track sentencing disparities threaten basic notions of fairness and uniformity in federal sentencing. More importantly, under *Booker*’s new advisory-Guidelines regime, a sentencing court’s discretionary scope remains unclear: judicial sentencing discretion lies somewhere between the era of almost “unfettered” discretion and the period marked by rigid mandatory Guidelines.<sup>17</sup> Therefore, resolving the

---

13. 552 U.S. 85 (2007)

14. *Id.*

15. *Id.* at 107–09 (2007); see also Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1484 (2008) (suggesting that the *Booker* court incompletely articulated the “precise legal weight” of the Guidelines).

16. Compare *United States v. Rodriguez*, 527 F.3d 221, 227 (1st Cir. 2008) (allowing sentencing courts to depart from the Guidelines based on fast-track disparity), with *United States v. Gomez-Herrera*, 523 F.3d 554, 563 n.4 (5th Cir. 2008) (stating that it would be an abuse of discretion for a sentencing courts to depart from the Guidelines based on fast-track disparity). The courts have sometimes used the terms “variance,” “non-Guidelines sentence,” and “downward departure” interchangeably because they all refer to sentences that are outside of the Guidelines range. However, the distinction is that a “downward departure” is a lower sentence that the Guidelines allow for based on a number of pre-approved reasons. U.S. SENTENCING COMM’N, GUIDELINES MANUAL 17 (2009) [hereinafter USSG], <http://www.ussc.gov/2009guid/GL2009.pdf>. A fast-track sentence is an example of a departure. In contrast, a “variance” or “non-Guidelines sentence” is a result of advisory Guidelines; it is granting a lower or higher sentence based on judicial discretion and § 3553(a) — for instance, varying from the Guidelines to grant a lower sentence in a non-fast-track district based on fast-track disparity. *United States v. Crosby*, 397 F.3d 103, 111 n.9 (2d Cir. 2005), *abrogated on other grounds by United States v. Lake*, 419 F.3d 111 (2d Cir. 2005).

17. See Douglas A. Berman, Rita, *Reasoned Sentencing, and Resistance to Change*, 85 DENV. U. L. REV. 7, 8 (2007) (describing the scope of judicial discretion as one of the issues

fast-track issue also helps define the new role of judicial sentencing discretion under advisory Guidelines.

This Note suggests that the circuit split arises out of a conflict between the government's immigration policy that uses fast-track programs to increase prosecutions and developments in federal sentencing law. While *Booker* opened the door for judges in non-fast-track districts to vary from the Guidelines based on fast-track disparity,<sup>18</sup> *Kimbrough* finally settles the issue. This Note argues that analyzing the *Kimbrough* framework allows district courts to vary from the Guidelines based on fast-track sentencing disparity because the fast-track sentencing scheme — like the crack-powder sentencing scheme — is not expressly set forth in a legislative mandate.<sup>19</sup> The current split is resolved by interpreting *Kimbrough* as distinguishing between what Congress clearly legislates and what it does not.<sup>20</sup> In this new system of advisory Guidelines, only sentencing practices expressly set forth can constrain judicial discretion in sentencing.<sup>21</sup> Thus, since a statute did not expressly set forth the sentencing practices involved in fast-track programs, judges should have discretion to grant lower sentences to defendants in non-fast-track districts. This Note also argues that the policy considerations of transparency, uniformity, and how the sentencing court applies 18 U.S.C. § 3553(a) support exercising judicial discretion to vary from the Guidelines based on fast-track disparity.

Part II of this Note provides background information on the mandatory Guidelines, and examines how *Booker* affects both the Guidelines and fast-track programs. Part III then examines the Supreme Court's opinion in *Kimbrough* and analyzes its treat-

---

raised, but not resolved, by making the Guidelines advisory); Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 796, 798 (2005) (characterizing the era before the Guidelines as giving sentencing judges "almost unfettered discretion").

18. See Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After Booker and Rita*, 85 DENV. U. L. REV. 79, 81 (2007) (discussing how the *Booker* constitutional opinion elevated the role of the jury, while the *Booker* remedial opinion elevated the role of judicial discretion in sentencing); Erin T. Middleton, Note, *Fast-Track to Disparity: How Federal Sentencing Policies Along the Southwest Border Are Undermining the Sentencing Guidelines and Violating Equal Protection*, 2004 UTAH L. REV. 827, 829–30, 836–38 (2004) (describing the mechanics of fast-track sentencing under mandatory Guidelines).

19. See *Kimbrough*, 552 U.S. at 102 (distinguishing between mandatory minimums and the Guidelines).

20. See *id.*

21. See *infra* Part IV.A (arguing that *Kimbrough* allows judicial variance from the Guidelines absent an explicit congressional directive).

ment of crack-powder sentencing disparities.<sup>22</sup> Part III also traces the ways circuit courts have interpreted *Kimbrough* and applied it to the fast-track disparity issue. Finally, in Part IV, this Note argues that judges in non-fast-track districts should be able to consider fast-track disparity as grounds to vary from the Guidelines because both the case law and policy considerations favor increased judicial discretion. Part IV proposes an analysis evaluating fast-track disparity through the legal framework of *Kimbrough*. Part IV also explores the relevant policy considerations of transparency, uniformity, and 18 U.S.C. § 3553(a), which support expanded judicial discretion.

## II. THE INTERSECTION OF FEDERAL SENTENCING AND FAST-TRACK PROGRAMS

Part II.A describes the creation of the mandatory Guidelines and discusses how fast-track programs operated under mandatory Guidelines. Part II.B then examines the developments in sentencing that made the Guidelines advisory and how this new advisory sentencing scheme affected fast-track programs.

### A. MANDATORY SENTENCING GUIDELINES AND FAST-TRACK PROGRAMS

#### 1. *The Federal Sentencing Guidelines*

Prior to the Guidelines, judges had almost full discretion in determining a defendant's sentence and their only limitation was that the sentence could not exceed the statutory maximum and minimums that Congress set.<sup>23</sup> Thus, federal sentences were "indeterminate,"<sup>24</sup> and judges could consider virtually any informa-

---

22. 552 U.S. at 95–96.

23. David Fisher, Note, *Fifth Amendment — Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not to File Substantial Assistance Motions*, 83 J. CRIM. L. & CRIMINOLOGY 744, 745 (1993) ("A judge could impose any sentence she thought was proper as long as it did not exceed the statutory maximum.").

24. *Koon v. United States*, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal."); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1321–22 (2005) (explaining that the length of federal sentences were heavily dependent on discretion of both the judge and the parole boards).

tion when imposing a sentence.<sup>25</sup> Such wide discretion caused concern over the highly subjective and arbitrary imposition of sentences and, in 1984, Congress passed the Sentencing Reform Act<sup>26</sup> to curtail this broad judicial discretion.<sup>27</sup> The Sentencing Reform Act established the U.S. Sentencing Commission (the “Commission”), which Congress directed to “provide certainty and fairness in meeting the purposes of sentencing” and avoid sentencing disparities between similarly situated defendants but allow some flexibility for individualized sentences by using sentencing enhancements.<sup>28</sup>

Under its directive, the Commission drafted the Guidelines, which became operative in 1987, requiring judges to sentence within a mandatory range.<sup>29</sup> While some commentators suggest that “the chief objective of the Guidelines regime is not national uniformity *per se*, but, rather, transparency in sentencing,” the Guidelines seek to achieve both uniformity and transparency by employing a predictable, objective grid system.<sup>30</sup> The Guidelines first calculate a defendant’s “offense level” (a numerical value determined by the seriousness of the offense) and then his “criminal history category” (a numerical value that quantifies the defendant’s past criminal behavior).<sup>31</sup> Applying the Guidelines re-

---

25. 18 U.S.C. § 3661 (2006) (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”).

26. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C. §§ 991–998 (2006)).

27. Christine DeMaso, Note, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker?*, 106 COLUM. L. REV. 2095, 2099–100 (2006) (describing how a system of wide judicial discretion in sentencing produced a more uniform sentencing system partly because critics were concerned over arbitrary sentences); see, e.g., S. REP. NO. 98-225, at 49, as reprinted in 1984 U.S.C.C.A.N. 3182, 3232 (“[S]entencing in the Federal courts is characterized by unwarranted disparity . . . . The lack of reasonable consistency in the sentences handed down by the courts is due in large part to the lack of a comprehensive Federal sentencing law.”).

28. 28 U.S.C. § 991(b)(1)(B) (2006).

29. Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 569 (1998) (describing the criticism of federal sentencing law before the Guidelines).

30. Michael M. O’Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 357, 359–60, 367–70 (2004) (analyzing the Sentencing Guidelines regarding both uniformity and transparency).

31. Middleton, *supra* note 18, at 836–37 (demonstrating how the Guidelines functioned).

quires a number of steps and operates like a grid: on the horizontal line is the defendant's past criminal history,<sup>32</sup> on a vertical line is the offense's seriousness,<sup>33</sup> and where these two intersect is a range of months.<sup>34</sup> As the amendments to the Guidelines accrued, so did the number of "aggravating" and "mitigating" factors that could support either increasing or decreasing the applicable Guidelines range.<sup>35</sup> The sentencing judge could exercise extremely limited discretion and determine the defendant's appropriate sentence within a narrow Guidelines range.<sup>36</sup>

Departures from these mandatory Guidelines ranges were granted only in rare circumstances.<sup>37</sup> By restricting judicial sentencing discretion and limiting sentencing departures to specifically enumerated exceptions, the Guidelines achieved objectivity, predictability, and uniformity in sentencing.<sup>38</sup> However, by limiting judicial sentencing discretion, the Guidelines also transferred

---

32. USSG, *supra* note 16, 401–02 (displaying the sentencing table).

33. *Id.* at 47 ("Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward.")

34. *Id.* at 402.

35. *Id.* at 345. Judges found these aggravating and mitigating factors by a preponderance of the evidence, assigning them a numerical value that was later combined with the defendant's criminal history score. Gregory & Kenner, *supra* note 17, at 798 (describing how the Guidelines worked).

36. Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 245 (1999) ("Judges are permitted to take into account factors not specified in the guidelines when deciding whether to depart, or where within the guideline range to sentence an offender.")

37. McClellan & Sands, *supra* note 4, at 520 ("Except for extraordinary reasons, the sentencing court had to sentence within the guideline range."). Judges could depart from the Guidelines under two main circumstances. First, departure could be granted if the Sentencing Guidelines inadequately considered "an aggravating or mitigating circumstance." Gilles R. Bissonnette, Comment, "Consulting" the Federal Sentencing Guidelines after Booker, 53 UCLA L. REV. 1497, 1508 (2006) (quoting 18 U.S.C. § 3553(b)(1) (2006)). The exception proved narrow because the Sentencing Commission claimed that it had taken every consideration into account. *Id.* Second, a departure could also be granted if the defendant rendered substantial assistance to law-enforcement authorities; however, this exception placed discretion in the hands of the prosecution rather than the judiciary because the prosecution had to file a motion requesting such a departure. Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 357 (2005). Judges could also make an unspecific departure based upon a "Koon analysis." See *infra* note 83 and accompanying text (describing the Koon test).

38. See Bowman, *supra* note 24, at 1334–35 ("[B]oth the congressional drafters of the [Sentencing Reform Act of 1984] and the original Sentencing Commission were determined to place substantial restraints on the departure power.")



power from judges to prosecutors.<sup>39</sup> The Guidelines did so by binding sentencing courts to the prosecutorial decisions of what facts to present and what crimes to charge.<sup>40</sup> It was this prosecutorial power to shape a defendant's sentence under mandatory Guidelines that made fast-track programs possible.<sup>41</sup>

## 2. *Mechanics of Fast-Track Programs*

In both fast-track and non-fast-track districts, most defendants are initially charged under 8 U.S.C. § 1326 for illegally reentering the country after being deported.<sup>42</sup> Afterwards, depending on the particular district, fast-track is employed through either “charge bargaining” or “departure-based” programs.<sup>43</sup> In charge bargaining programs, the prosecutor usually charges the defendant with 8 U.S.C. § 1325 instead of § 1326 because § 1325 is a lesser offense with a lower sentencing range.<sup>44</sup> The Central and Southern Districts of California, for instance, use charge bargaining programs.<sup>45</sup>

---

39. See AM. COLL. OF TRIAL LAWYERS, UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED 14–17 (2004), <http://www.actl.com/AM/Template.cfm?%20Section=ALLPublications&Template=/CM/ContentDisplay.cfm&ContentFileID=58>.

40. See DeMaso, *supra* note 27, at 2100.

41. See Barrueco, *supra* note 6, at 76, 85 (describing fast-track as “a byproduct of prosecutorial discretion”); *infra* Part I.B.1 (describing the rationales used to bar departures based on fast-track disparity under mandatory Guidelines).

42. 8 U.S.C. § 1326(a) (2006). This statute makes the reentry of a previously-deported alien illegal. Its most relevant portion provides:

Subject to subsection (b), any alien who —

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States. . . shall be fined under title 18, United States Code, or imprisoned not more than 2 years or both.

*Id.*

43. U.S. Sentencing Comm'n, Public Hearing on Implementing the Requirements of the PROTECT Act 10–12 (Sept. 23, 2003), *available at* [http://www.usc.gov/hearings/9\\_23\\_03/092303PH.pdf](http://www.usc.gov/hearings/9_23_03/092303PH.pdf) [hereinafter Fast-Track Hearings] (testimony of Judge Marilyn L. Huff of the U.S. District Court for the Southern District of California describing the use of charge bargaining fast-track programs).

44. *Id.*; McClellan & Sands, *supra* note 4, at 529.

45. *United States v. Perez-Chavez*, 422 F. Supp. 2d 1255, 1269 (D. Utah 2005) (providing a list of various fast-track programs in appendix A).

In departure-based programs, which are more common than charge bargaining programs,<sup>46</sup> the prosecutor seeks a downward departure of as many as four levels.<sup>47</sup> The Districts of New Mexico and Nebraska, for example, utilize downward departure programs.<sup>48</sup> The precise departure level depends on the district. The Eastern District of California offers departures of up to four levels, while the Western District of Texas offers only one-level departures.<sup>49</sup>

To participate in either type of fast-track program, the defendant must enter a guilty plea as well as give up many procedural rights.<sup>50</sup> Although the specifics vary by district, defendants are usually required to enter into a written plea agreement stipulating that the facts accurately reflect the offensive conduct, not to file any motions described in Federal Rule of Criminal Procedure 12(b)(3), waive appeal, and waive the opportunity to challenge their conviction under 28 U.S.C. § 2255<sup>51</sup> — except regarding ineffective assistance of counsel.<sup>52</sup>

The exact procedures in fast-track programs differ. In the District of Arizona, for instance, the defendant makes an initial appearance, is appointed counsel, and is notified of the right to both a preliminary hearing and a detention hearing.<sup>53</sup> Time is critical because the offer is valid only until the deadline for the preliminary hearings and detention hearings — which the defendant must waive to accept the fast-track deal.<sup>54</sup> Within an extremely short time after arrest, the defense counsel must inform

---

46. Government's Memorandum of Law in Opposition to the Defendant's Motion for a Non-Guideline Sentence Based on the Existence of Fast-Track Programs at app. A, United States v. Krukowski, No. 04 Cr. 1308 (S.D.N.Y. June 10, 2005), available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/61005\\_govt\\_opposition\\_to\\_sg\\_variance\\_due\\_to\\_fasttrack.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/61005_govt_opposition_to_sg_variance_due_to_fasttrack.pdf) (providing detailed descriptions of the nation's fast-track programs).

47. See USSG, *supra* note 16, at 473.

48. *Perez-Chavez*, 422 F. Supp. 2d at 1269.

49. *Id.* at 1264 (demonstrating the different ranges in departure levels among fast-track districts).

50. Memorandum from Attorney Gen. John Ashcroft to Fed. Prosecutors Setting Forth Justice Department's "Fast-Track" Policies 2–3 (Sept. 22, 2003), reprinted in 16 FED. SENT'G REP. 134, 135 (2003) [hereinafter Ashcroft Fast-Track Memo].

51. 28 U.S.C. § 2255 (2006) (providing various procedural rights for prisoners to challenge their imprisonment).

52. Ashcroft Fast-Track Memo, *supra* note 50, at 1; see also Fast-Track Hearings, *supra* note 43, at 9, 10–12, 22.

53. McClellan & Sands, *supra* note 4, at 532.

54. *Id.*

the defendant of the fast-track deal, assess any defenses, and advise the defendant whether to plead guilty to qualify for the fast-track plea offer.<sup>55</sup> Many critics of fast-track programs argue that this twenty-day timeframe leaves insufficient time for discovery or exploring defenses.<sup>56</sup> At least one federal defender testified before the Sentencing Commission that the time constraint on fast-track plea offers led her clients, to plead guilty to immigration offenses, only to discover later that they were actually U.S. citizens.<sup>57</sup>

If defendants accept the fast-track offer, they must enter a guilty plea and face sentencing.<sup>58</sup> After the sentencing hearing, defendants are sent to prison with no right to appeal, making the conviction final.<sup>59</sup> In exchange for their pre-indictment guilty plea and waiver of procedural rights, defendants receive a considerable sentencing reduction. For instance, illegal reentry defendants in Southern California with past convictions for illegal entry and possession of marijuana may serve a sentence of only thirty months instead of a possible six years.<sup>60</sup> After thirty months, they are likely to face deportation.<sup>61</sup>

In *non-fast-track* districts, once defendants are arrested and charged, they typically make an initial appearance, are appointed counsel, and are notified of the right to a preliminary and detention hearing.<sup>62</sup> Although not required, a defendant in a *non-fast-track* district typically enters a guilty plea because the elements of illegal reentry are easy to prove, making the charge function “very close to strict liability.”<sup>63</sup> Defendants in a *non-fast-track*

---

55. Fast-Track Hearings, *supra* note 43, at 75–77 (testimony of Paul Charlton, U.S. Attorney for District of Arizona, explaining that to qualify for a fast-track plea offer in the District of Arizona a defendant must plead guilty within twenty days of arrest).

56. *See e.g., id.* at 52–55.

57. *Id.* (testimony of Maria Stratton, Federal Public Defender, Central District of California).

58. *See* McClellan & Sands, *supra* note 4, at 532 (describing the procedure of fast-track programs in the Phoenix division of Arizona); *id.* at 74–76 (testimony of Paul Charlton, U.S. Attorney for District of Arizona, describing the procedures of fast-track programs in Arizona).

59. Fast-Track Hearings, *supra* note 43, at 75–77 (testimony of Paul Charlton, U.S. Attorney for the District of Arizona).

60. Middleton, *supra* note 18, at 827.

61. McClellan & Sands, *supra* note 4, at 532.

62. *See id.*

63. *Id.* at 521; *see* E-mail from Steven M. Statsinger, Assistant Federal Defender, Trials Division, Federal Defenders of New York, to author (Nov. 28, 2008, 09:19 EST)

district will likely also face deportation at the end of their sentencing, but they retain the right to appeal and as well as other procedural rights.<sup>64</sup> Defendants in non-fast-track districts can also more completely explore potential defenses because the proceedings take more time than those in fast-track districts.<sup>65</sup> In contrast to a fast-track sentence, a similarly situated illegal reentry defendant in a non-fast-track district — also with previous convictions for illegal entry and possession of marijuana — could receive six years of imprisonment, instead of just thirty months.<sup>66</sup> While districts initially adopted fast-track programs unofficially, Congress legislatively recognized them in 2003.

### 3. *The PROTECT Act*

Until 2003, when Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (“PROTECT Act”), districts implemented fast-track programs without formal congressional approval.<sup>67</sup> Among other things,<sup>68</sup> the PROTECT Act officially approved of fast-track programs and directed the Sentencing Commission to issue “a policy statement authorizing a downward departure of not more than 4 levels if

---

[hereinafter Statsinger E-mail] (on file with author); *see also supra* note 42 and accompanying text (listing the elements for the charge of illegal reentry).

64. These procedural rights may include the defendants’ right to file motions described in Federal Rule of Criminal Procedure 12(b)(3) and the opportunity to challenge their conviction under 28 U.S.C. § 2255. *See* Ashcroft Fast-Track Memo, *supra* note 50, at 2–3. In most cases, illegal reentry defendants in the Southern District of New York, a non-fast-track district, do not receive any particular benefits for waiving their procedural rights, but may waive certain procedures in specific situations. Statsinger E-mail, *supra* note 63. For instance, if a defendant is facing a relatively short sentence, indictment and discovery may be waived to expedite the case. *Id.*

65. *See* Fast-Track Hearings, *supra* note 43, at 53.

66. Middleton, *supra* note 18, at 827 (providing two hypothetical situations to highlight the disparity in fast-track and non-fast-track sentences).

67. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (“PROTECT Act”), Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.); *id.* at 838–41. Southwest border districts located in New Mexico, Arizona, and California, were the first to implement these unofficial fast-track programs. Middleton, *supra* note 18, at 831.

68. The PROTECT Act primarily focused on prosecutions involving child pornography and preventing child abductions. *Id.* at 839. However, appended to the Act was the “Feehey Amendment,” which was part of a larger congressional effort to reign in the discretion of federal judges and limit departures from the Guidelines. McClellan & Sands, *supra* note 4, at 525–26; *id.* at 839–40. *See generally* Douglas A. Berman, *Locating the Feehey Amendment in a Broader Sentencing Reform Landscape*, 16 FED. SENT’G REP. 249 (2004).

the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney.”<sup>69</sup>

The PROTECT Act bestowed Congress’s imprimatur on the program and required the Commission to incorporate the program (now called “early disposition programs”) into the Guidelines.<sup>70</sup> Additionally, it directed the Attorney General to set standards for implementing fast-track programs,<sup>71</sup> and then Attorney General John Ashcroft issued two memoranda: one regarding the departmental policy of charging offenses (“Ashcroft Plea Memo”),<sup>72</sup> and the other concerning the implementation of fast-track programs (“Ashcroft Fast-Track Memo”).<sup>73</sup>

First, the Ashcroft Plea Memo limits the discretion of line prosecutors, requiring them to “charge and pursue the most serious, readily provable offense or offenses . . . supported by the facts of the case.”<sup>74</sup> The memo emphasizes the importance of prosecutorial consistency, explaining that “[j]ust as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.”<sup>75</sup> One exception to this charging policy is charge bargaining under an authorized fast-track program.<sup>76</sup>

Second, the Ashcroft Fast-Track Memo sets forth the requirements necessary for a district to implement an official fast-track program.<sup>77</sup> Although the PROTECT Act did not restrict the availability of fast-track programs to particular districts, the

---

69. PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (codified as amended at 28 U.S.C. § 994 (2006)).

70. USSG, *supra* note 16, § 5K3.1. Specifically, the Commission amended section 5K3.1 of the Guidelines manual and officially accepted the early disposition programs, allowing downward departures in fast-track programs. *Id.*

71. PROTECT Act § 401(m)(2)(B).

72. Memorandum from Attorney Gen. John Ashcroft to All Fed. Prosecutors Setting Forth the Justice Department’s Charging and Plea Policies 1 (Sept. 22, 2003), *reprinted in* 16 FED. SENT’G REP. 129, 129 (2003) [hereinafter Ashcroft Plea Memo].

73. Ashcroft Fast-Track Memo, *supra* note 50, at 1.

74. Ashcroft Plea Memo, *supra* note 72, at 2.

75. *Id.*

76. *Id.* at 3. Furthermore, the Attorney General explained that, although Congress authorized only incorporation of downward departure-based fast-track programs in the Guidelines manual, programs employing charge bargaining would be authorized as a matter of departmental policy. *Id.*

77. Ashcroft Fast-Track Memo, *supra* note 50, at 1–2.

Ashcroft Fast-Track Memo limits the programs to districts where prosecutors face: (1) an exceptional amount of specific offenses — where the inability to resolve such crimes would strain resources — or some other exceptional local circumstance that justifies expedited handling of specific cases, (2) cases where state prosecution of the crime is unavailable or unwarranted, (3) highly repetitive cases with similar fact patterns, and (4) cases that do not involve violence.<sup>78</sup>

Thus, under mandatory Guidelines, prosecutors leveraged their control over sentencing to increase prosecutions of illegal reentry defendants, offering considerable sentencing reductions — but in only a handful of districts.<sup>79</sup> However, only two years after the PROTECT Act and the Ashcroft memos, the Supreme Court examined the mandatory Guidelines that made fast-track possible.<sup>80</sup>

B. *UNITED STATES V. BOOKER*: THE GOVERNMENT'S EFFORTS  
TO CONTROL FEDERAL SENTENCING COLLIDES WITH  
DEVELOPMENTS IN FEDERAL SENTENCING LAW

Part II.B.1 explains *Booker's* impact on federal sentencing. Part II.B.2 then discusses how this decision gave rise to the fast-track disparity issue and describes the reactions of the district courts.

1. *The Impact of Booker on Federal Sentencing*

Under mandatory Guidelines, departures in non-fast-track districts based on fast-track disparity were generally forbidden and courts rejected these sentencing departures based on a variety of rationales.<sup>81</sup> Some reasoned that because a Guidelines policy

---

78. *Id.*

79. See McClellan & Sands, *supra* note 4, at 535–37 (“The program can only function if the result of rejecting the fast-track is so severe that it is not in the defendant’s interests to force the government to trial.”).

80. See *id.* at 537.

81. See Norris, *supra* note 5, at 752–56 (describing the pre-*Booker* fast-track litigation that attempted to secure downward departures based on fast-track disparity as generally unsuccessful); see, e.g., *United States v. Bonnet-Grullon*, 212 F.3d 692, 710 (2d Cir. 2000) (barring departure based on fast-track disparity); *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 978 (9th Cir. 2000) (en banc) (same).

statement allowed for some prosecutorial discretion as in fast-track programs, departures based on differing policies of U.S. Attorneys were impermissible.<sup>82</sup> Other courts barred departures based on a separation of powers rationale, reasoning that to allow departures would impinge on prosecutorial discretion.<sup>83</sup>

But developments in federal sentencing law soon created a conflict between fast-track programs and judicial sentencing discretion. In 2005, when *Booker* made the Guidelines advisory and returned sentencing discretion to the judges, the issue of fast-track disparity arose.<sup>84</sup> Holding that compulsory application of the Guidelines violated the Sixth Amendment, the Supreme Court excised the sections of the Sentencing Reform Act that made the Guidelines mandatory.<sup>85</sup> But while district judges are

---

82. See *Banuelos-Rodriguez*, 215 F.3d at 975–76; *United States v. Armenta-Castro*, 227 F.3d 1255, 1258–59 (10th Cir. 2000) (“[T]he Sentencing Commission specifically contemplated the impact of plea bargaining and charging practices of federal prosecutors in drafting the Guidelines and declined to implement any major changes in the process . . . .”); see also USSG, *supra* note 16, at 479 (policy statement allowing courts to accept plea agreements).

83. See *United States v. Morales-Chaires*, 430 F.3d 1124, 1129 (10th Cir. 2005); *Banuelos-Rodriguez*, 215 F.3d at 976–77 (“Defendant’s argument that the Guidelines’ basic goal of uniform sentencing should be served by uniform charging practices must be made to the executive, not the judicial, branch.”). Courts also used a combination of the above rationales, in addition to a “*Koon* analysis,” which asks courts to specifically determine whether to grant an unspecific departure from the mandatory Guidelines. See *Koon v. United States*, 518 U.S. 81, 95 (1996); *Bonnet-Grullon*, 212 F.3d at 699–701, 706 (applying the *Koon* test to the fast-track departure issue). See generally Evan W. Bolla, Note, *An Unwarranted Disparity: Granting Fast-Track Departures in Non-Fast-Track Districts*, 28 CARDOZO L. REV. 895, 913 (2006) (describing the *Koon* test, which is used to determine if a sentence outside the Guidelines was appropriate).

84. 543 U.S. 220, 245 (2005) (“So modified, the [Sentencing Reform Act of 1984] . . . makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well.” (citations omitted)); DeMaso, *supra* note 27, at 2108–15.

85. *Booker*, 543 U.S. at 244–45 (“Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”); see *Bissonnette*, *supra* note 37, at 1522–29 (discussing the constitutional and remedial holdings of *Booker*). Specifically, the Supreme Court excised 18 U.S.C. § 3553(b)(1) and § 3742(e), which made the Guidelines mandatory and specified the standard of review for sentencing. *Booker*, 543 U.S. at 259–60. The mandatory Guidelines allowed a sentencing judge to find facts that increased the sentence of a defendant, and, in doing so, a constitutional violation arose. *Id.* at 233; DeMaso, *supra* note 27, at 2103. In light of this Sixth Amendment backdrop, which makes the jury the critical intermediary between the translation of legislative desire and sentencing consequences, the usual inquiry of what Congress might have intended is misguided here. See Thomas E. Gorman, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. CHI. L. REV. (forthcoming 2010).

no longer bound to follow the Guidelines, they must still “consider” them, starting by correctly calculating the applicable guideline range.<sup>86</sup>

More importantly, *Booker* requires sentencing courts to consider the objectives of punishment and emphasizes the critical significance of 18 U.S.C. § 3553(a), which contains an “overarching instruction to ‘impose a sentence sufficient, but not greater than necessary’ to accomplish the sentencing goals advanced in § 3553(a)(2)”:<sup>87</sup>

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>88</sup>

Also included in these factors is § 3553(a)(6), which highlights “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>89</sup> The Supreme Court made clear that, in this new era of advisory Guidelines, § 3553(a) would help guide courts in determining an appropriate sentence.<sup>90</sup>

---

86. *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”). The Supreme Court held that consulting the Guidelines was a starting point and not the only sentencing factor. *Gall v. United States*, 552 U.S. 38, 49–50, (2007).

87. *Kimbrough v. United States*, 552 U.S. 85, 111 (2007) (quoting 18 U.S.C. § 3553(a)(2) (2006)).

88. § 3553(a)(2).

89. § 3553(a)(6). “Unwarranted” can be defined in both legal and policy terms. *See Hofer et al.*, *supra* note 36, at 241–47 (discussing the myriad ways to define “unwarranted”). *Compare infra* Part III.B.2 (defining the meaning of “unwarranted” disparity in terms of whether Congress explicitly approved of such disparity through express legislation), *with Norris*, *supra* note 5, at 770 (suggesting that determining “unwarranted” disparities may actually be a normative matter and dependent on the personal views of individual judges).

90. *See Booker*, 543 U.S. at 261 (“Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts . . . in determining whether a sentence is unreasonable.”).



Furthermore, after *Booker*, a district court's sentencing decision is subject to appellate review under an abuse of discretion standard for both procedural and substantive reasonableness.<sup>91</sup> The question of substantive reasonableness is reached only if no procedural error has been committed.<sup>92</sup> First, in reviewing a sentence for procedural error, an appellate court must ensure that the district court: (1) starts with, and correctly calculates, the Guidelines range and uses the Guidelines as a starting point, (2) avoids treating the Guidelines as mandatory, (3) considers the § 3553(a) factors, (4) avoids determining a sentence based on erroneous facts, and (5) gives an adequately reasoned explanation.<sup>93</sup> Next, in determining substantive reasonableness, an appellate court must take into account the "totality of the circumstances" and the extent of the sentencing variance.<sup>94</sup> Additionally, while a Guidelines sentence may be "presumptively reasonable,"<sup>95</sup> a non-Guidelines sentence may not be presumptively unreasonable.<sup>96</sup> Although these particular questions concerning appellate review have been answered, considerable uncertainty remains regarding the full discretion of sentencing courts under advisory Guidelines.<sup>97</sup> For instance, there is little guidance for judges on how to determine the reasonableness of sentencing variances based on fast-track disparity. Thus, the question of how *Booker* impacts fast-track disparity is left unanswered.

---

91. *Gall*, 552 U.S. at 51.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Rita v. United States*, 551 U.S. 338, 345–47 (2007). It is an *appellate* presumption, meaning that the district court "does not enjoy the benefit" of making the presumption that a Guidelines sentence "should apply." *Id.* at 351. Further, while circuit courts may adopt a presumption of reasonableness for a Guidelines sentence, they are not required to adopt such a presumption. *Id.*; see also Bissonnette, *supra* note 37, at 1522–29 (discussing how much weight to give the Guidelines, comparing the "substantial-weight" approach to the "consultative" approach). The presumption of reasonableness for sentences within the Guidelines is nonetheless rebuttable. See, e.g., *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005) ("[R]eview is available when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal.").

96. *Gall*, 552 U.S. at 51 ("[I]f the sentence is outside the Guidelines range, the [appellate] court may not apply a presumption of unreasonableness."). Further, an appellate court may not substitute its judgment for the district court; reversal is unjustified simply because the appellate court arrived at a different sentence than the district court. *Id.*

97. See Sutton, *supra* note 18, at 89–90.

## 2. *Booker's Impact on Fast-Track Programs*

*Booker* does not directly affect the implementation of fast-track districts. Rather, *Booker* affects the sentencing of non-fast-track cases.<sup>98</sup> This raises the question of whether district judges can use the existence of fast-track districts as a basis (under their new post-*Booker* discretion) for reducing sentences in non-fast-track districts because of the disparity that would be created between the two districts. After *Booker*, some district courts in non-fast-track jurisdictions considered the lower sentences in fast-track districts while others did not. In *United States v. Galvez-Barríos*,<sup>99</sup> Judge Lynn Adelman of the Eastern District of Wisconsin granted a non-Guidelines sentence based on the disparity between sentences in fast-track and non-fast-track districts, explaining that “it is difficult to imagine a sentencing disparity less warranted than one which depends upon the accident of the judicial district in which the defendant happens to be arrested.”<sup>100</sup>

Conversely, in *United States v. Perez-Chavez*,<sup>101</sup> Judge (now Professor) Paul Cassell of the District of Utah, denied a non-Guidelines sentence to avoid intra-district disparity and “the unseemly spectacle that a defendant’s sentence will depend on which courtroom he happens to find himself.”<sup>102</sup> Specifically, his concern was with the effect sentencing variances would have within districts where some judges, no longer constrained by mandatory Guidelines, would grant variances based on fast-track disparity while others would not.<sup>103</sup> He concluded that such intra-district disparity could have a “pernicious” effect on sentencing.<sup>104</sup> This intra-district phenomenon occurred, for instance, in the

---

98. McClellan & Sands, *supra* note 4, at 537.

99. 355 F. Supp. 2d 958, 962 (E.D. Wis. 2005).

100. *United States v. Bonnet-Grullon*, 53 F. Supp. 2d 430, 435 (S.D.N.Y. 1999), *aff'd*, 212 F.3d 692 (2d Cir. 2000).

101. 422 F. Supp. 2d 1255, 1263–64 (D. Utah 2005).

102. *Id.*

103. *See id.*

104. *United States v. Duran*, 399 F. Supp. 2d 543, 545–46 (S.D.N.Y. 2005) (“The effects [of variations in sentences for illegal reentry cases] will be most pronounced, and potentially even pernicious, in districts where judges of the same court split conceptually into different camps . . . .”); Bolla, *supra* note 83, at 922 (arguing that intra-disparity was a “great concern” of Congress and thus creating intra-district disparity to prevent fast-track disparity does not warrant varying from the Guidelines).

Southern District of New York.<sup>105</sup> Referred to as the “wheel-of-fortune” effect because a defendant’s sentence might depend on the particular judge drawn,<sup>106</sup> Judges Sweet, Kaplan, and Wood have varied from the Guidelines based on fast-track disparity,<sup>107</sup> while Judges Marrero, Rakoff, Lynch, and Keenan have refused to do so.<sup>108</sup> Although the Supreme Court has yet to address directly fast-track disparity, its decision in *Kimbrough* offers critical guidance.

### III. *KIMBROUGH* V. *UNITED STATES* AND THE FEDERAL CIRCUIT SPLIT

The issue in Part III — whether a district court in a non-fast-track district may grant a non-Guidelines sentence based on the existence of fast-track programs — arises from the collision of fast-track programs, discussed in Part II.A, and developments in federal sentencing law, discussed in Part II.B. Although *Kimbrough* concerned the disparity resulting from the crack cocaine Sentencing Guidelines, the Court’s analysis also has implications for analyzing the disparity resulting from fast-track programs. Part III.A examines the Supreme Court’s treatment of the crack cocaine Guidelines. Part III.B then explores the nuances of the fast-track circuit split and categorizes the circuits’ interpretations of *Kimbrough*.

#### A. *KIMBROUGH*’S IMPACT ON INCREASING JUDICIAL SENTENCING DISCRETION

Part III.A.1 describes the background statutory scheme for the crack-to-powder sentencing ratio and how it shaped the issue in

---

105. Bolla, *supra* note 83, at 922 (describing the intra-district disparities in the Southern District of New York).

106. *Duran*, 399 F. Supp. 2d at 545–46 (“By dint of that discord, a form of wheel-of-fortune effect may be emerging in some districts . . . the length of particular illegal reentry offenders’ sentences will be determined, or even predetermined, by whether or not the judge randomly assigned the case conceptually recognizes the . . . fast-track consideration[] as [a] decisive ground[] for modifying the sentence produced by application of the Guidelines.”).

107. Bolla, *supra* note 83, at 922.

108. *Id.*

*Kimbrough*. Part III.A.2 then examines the Supreme Court's reasoning in that case.

### 1. *The Creation of the Crack Cocaine Guidelines*

Crack and powder cocaine, although chemically similar, are treated drastically differently for criminal sentencing purposes.<sup>109</sup> This crack-powder sentencing disparity results from the Anti-Drug Abuse Act of 1986 ("Anti-Drug Abuse Act").<sup>110</sup> Concerned that crack cocaine was more dangerous than powder cocaine, Congress created mandatory minimum sentences based on a 100:1 ratio.<sup>111</sup> As a result, a five-year mandatory minimum applies to defendants found with 5 grams of crack cocaine or 500 grams of powder cocaine and a ten-year mandatory minimum applies to defendants found with 50 grams of crack cocaine or 5,000 grams of powder cocaine.<sup>112</sup> This statutory scheme creates grave sentencing disparities: for the same amount of drugs, sentences involving crack cocaine offenses are three to six times longer than those involving powder cocaine offenses.<sup>113</sup>

As Congress debated the Anti-Drug Abuse Act, the Commission formulated the Guidelines mostly using an "empirical approach," where it examined previous sentences and thousands of pre-sentence investigation reports.<sup>114</sup> However, in developing the crack cocaine Guidelines — which would establish appropriate sentences *within* the statutory maximum and minimum range — the Commission abandoned its usual empirical approach.<sup>115</sup> Instead of employing its usual approach in setting guidelines, the Commission simply adopted the weight-driven scheme that Congress used to establish the mandatory minimums in the Anti-Drug Abuse Act.<sup>116</sup> In other words, the Commission deviated from its approach in setting the crack cocaine Guidelines, instead fol-

---

109. *Kimbrough v. United States*, 552 U.S. 85, 94 (2007).

110. *Id.*

111. *Id.* at 95–96.

112. *Id.* at 96.

113. *Id.*

114. *Id.* The Commission used current discretionary sentencing practices as a starting point for setting new sentencing levels. *Id.*

115. *Id.*

116. *Id.* at 96–97.

lowing Congress's decision to set the mandatory *minimums* and *maximums* at a 100:1 ratio.<sup>117</sup>

Although these crack cocaine Guidelines create severe sentencing disparities, most circuit courts held that because Congress intended these sentencing disparities in the crack cocaine *mandatory minimums* and *maximums*, Congress also intended these sentencing disparities in the crack cocaine *Guidelines*. Therefore, district courts could not consider this disparity when sentencing, as it was intended by Congress.<sup>118</sup> The Supreme Court held to the contrary and elucidated the extent of judicial discretion in sentencing. Specifically, the Supreme Court concluded that district judges were permitted to consider this sentencing disparity in the crack cocaine Guidelines because Congress did not explicitly intend for there to be a disparity.<sup>119</sup>

## 2. *The Supreme Court Resolution: Distinguishing Between the Disparities in the Mandatory Minimums and Crack Cocaine Guidelines*

At the Supreme Court, the government argued that Congress, through the Anti-Drug Abuse Act, forbade both the Sentencing Commission and sentencing courts from disagreeing with the 100:1 ratio in the crack cocaine Guidelines.<sup>120</sup> The government contended that even under advisory Guidelines, judges were still barred from varying from the crack cocaine Guidelines — just as they were also barred from varying from the mandatory minimums and maximums.<sup>121</sup> Sentencing judges were barred because while Congress did not “expressly” direct the Commission to incorporate the 100:1 ratio into the crack cocaine *Guidelines*, Congress nonetheless “implicitly” directed the Commission to do so when it set the *mandatory minimums* and *maximums* based on that ratio.<sup>122</sup>

---

117. *Id.*

118. *See, e.g.*, *United States v. Castillo*, 460 F.3d 337, 357, 361 (2d Cir. 2006), *abrogated by Kimbrough*, 552 U.S. 85.

119. *See Kimbrough*, 552 U.S. at 91, 102. *See generally* Droske, *supra* note 8, at 784 (detailing the Supreme Court's treatment of the Guidelines in *Kimbrough*).

120. *Kimbrough*, 552 U.S. at 102.

121. *See id.*

122. *Id.* at 105–06 (“The Government emphasizes that Congress required the Commission to propose changes to the 100-to-1 ratio in *both* the 1986 Act and the Guidelines. This

Dismissing this argument, the Supreme Court cited the plain text of the Anti-Drug Abuse Act, which mandated only maximum and minimum sentences and said nothing regarding the Guidelines (which would set sentences within the maximum and minimum range).<sup>123</sup> In doing so, the Court drew a critical distinction between the disparity found in: (1) mandatory minimums and maximums, that were created by explicit legislative mandates, and (2) the crack cocaine Guidelines that the Commission promulgated.<sup>124</sup> The Court cited an example of direct legislation supported by “express terms” in the Anti-Drug Abuse Act’s mandatory maximum and minimum sentences, which specifically commanded the creation of sentencing ranges based on the 100:1 ratio.<sup>125</sup> Even under advisory Guidelines, the mandatory minimums and maximums constrain district judges because the legislation’s “express terms” support them.<sup>126</sup>

In contrast to the express terms Congress used to support the mandatory maximum and minimum ranges, Congress was silent in setting the Guidelines sentences for drug quantities *within* those specified in the mandatory ranges.<sup>127</sup> The *Kimbrough* Court found it of no moment that, when the Commission addressed these intermediate quantities in the Guidelines, it consciously sought to mimic Congress’s ratio.<sup>128</sup> Therefore, *Kimbrough* held that a district judge may vary from the crack cocaine Guidelines because Congress never explicitly directed the Commission to incorporate the 100:1 ratio into the Guidelines.<sup>129</sup> Thus, while the disparity found in mandatory minimums and maximums prescribed in a legislative mandate still constrain a district court,<sup>130</sup> the disparity found in the crack cocaine Guidelines do not, be-

---

requirement, the Government contends, implicitly foreclosed any deviation from the 100-to-1 ratio in the Guidelines (or by sentencing courts) in the absence of a corresponding change in the statute.”).

123. *Id.* at 102–03.

124. *Id.* at 96 & n.7 (“Congress created the Sentencing Commission and charged it with promulgating the Guidelines in the Sentencing Reform Act of 1984.” (citation omitted)).

125. *See id.* at 95, 102.

126. *Id.* at 108.

127. *See id.* at 103.

128. *See id.* at 102–03, 109.

129. *See id.* at 571, 575.

130. *Id.* at 108.

cause the development of the 100:1 ratio in the Guidelines lacks support from the express legislative mandate.<sup>131</sup>

*Kimbrough* emphasizes the distinction between explicit congressional legislation (which was used to set the crack cocaine mandatory maximum and minimums) and implicit congressional signals (which were used to set the crack cocaine Guidelines). Not only did the Court “decline to read any *implicit* directive into . . . congressional silence,” but, more importantly, it noted that “[d]rawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms.”<sup>132</sup> If Congress wanted to set a particular sentencing practice, it must have done so explicitly with a legislative mandate.<sup>133</sup> Sentencing practices that result from legislative silence, policy preferences, and congressional signals sent to the Commission while promulgating certain Guidelines are insufficient to constrain judicial discretion post-*Booker*.<sup>134</sup> Finally, the *Kimbrough* Court noted that an appellate court’s “closer review” may be necessary when a district judge grants a variance because empirically-based Guidelines reflect an approximation that might accomplish the goals of § 3553(a) and may still fail to achieve its objectives.<sup>135</sup> However, “closer review” is unnecessary when a district court varied from the crack cocaine Guidelines because they were not empirically-based and thus did “not exemplify the Commission’s exercise of its characteristic institutional role.”<sup>136</sup>

In light of *Kimbrough*, Congress influences federal sentencing either through express legislative mandates to set binding sentencing practices<sup>137</sup> or, alternatively, through congressional “sig-

---

131. *Id.* at 91, 102–03.

132. *Id.* at 103 (emphasis added).

133. *Id.*; see also *United States v. Rodriguez*, 527 F.3d 221, 229 (1st Cir. 2008) (“The statute simply authorizes the Sentencing Commission to issue a policy statement and, in the wake of *Kimbrough*, such a directive, whether or not suggestive, is ‘not decisive as to what may constitute a permissible ground for a variant sentence.’” (quoting *United States v. Martin*, 520 F.3d 87, 93 (1st Cir. 2008))).

134. See *Kimbrough*, 552 U.S. 85 at 96 n.7, 102.

135. *Id.* at 109.

136. *Id.*

137. *Id.* at 102–03 (“The statute, by its terms, mandates only maximum and minimum sentences . . .”); *Neal v. United States*, 516 U.S. 284, 287, 292 (1996) (distinguishing between two different methods of calculating lysergic acid diethylamide (LSD) weights: one utilizes clear legislative mandates to determine the mandatory minimum sentences and the other delegates to the Commission to calculate the Guidelines ranges).

nals” that fall short of direct legislation to set only advisory sentencing practices.<sup>138</sup> Further, where Congress has not expressly set forth sentencing practices in a legislative mandate, not only may a district court vary from the Guidelines “on an individualized determination that they yield an excessive sentence in a *particular case*,”<sup>139</sup> but a court may also grant a variance based on categorical policy disagreements with the Guidelines “even in a *mine-run case*.”<sup>140</sup>

## B. THE CIRCUIT SPLIT

*Booker* alone cannot resolve the fast-track disparity issue because it does not specifically address the extent to which judges may vary from the advisory Guidelines based on sentencing disparities.<sup>141</sup> *Kimbrough* resolves the issue by distinguishing between the disparities resulting from crack cocaine Guidelines and those resulting from the mandatory minimums, allowing judges to vary based on the former but not the latter.<sup>142</sup> Thus, *Kimbrough* not only addresses the narrower fast-track disparity issue, but also helps to further clarify the full effect of *Booker* and the still-evolving role of judicial discretion under advisory Guidelines.

However, after *Kimbrough*, the circuits are split on whether sentencing courts should consider fast-track disparity because it results from the same binding “Congressional policy” that set the mandatory minimums and maximums.<sup>143</sup> The circuits can be categorized into three groups. The First Circuit holds that sentencing courts in non-fast-track jurisdictions may vary from the Guidelines based on fast-track disparity.<sup>144</sup> The Fifth, Ninth, and Eleventh Circuits hold the opposite and forbid sentencing courts in non-fast-track jurisdictions to vary from the Guidelines based

---

138. See *Kimbrough*, 552 U.S. at 102–03.

139. See *Spears v. United States*, 129 S. Ct. 840, 843 (2009) (per curiam) (emphasis added).

140. *Id.* (emphasis added).

141. See Stith, *supra* note 15, at 1484.

142. See 552 U.S. at 102–03, 108.

143. *United States v. Gomez-Herrera*, 523 F.3d 554, 559, 562 (5th Cir. 2008).

144. *United States v. Rodriguez*, 527 F.3d 221, 229 (1st Cir. 2008).



on fast-track disparity.<sup>145</sup> Finally, the remaining circuits have not yet explicitly addressed the issue.<sup>146</sup>

### 1. *The Circuit Allowing Variance*

Only the First Circuit holds that a sentencing court may grant a non-Guidelines sentence based on the non-availability of a fast-track program. *United States v. Rodriguez*<sup>147</sup> interprets *Kimbrough* as stating “that when Congress exercises its power to bar district courts from using a particular sentencing rationale, it does so by the use of unequivocal terminology.”<sup>148</sup> Therefore, the *Rodriguez* Court allowed a district court to impose a non-Guidelines sentence because Congress never explicitly barred considering fast-track disparity in the PROTECT Act.<sup>149</sup> The First Circuit also reasoned that a district court should focus on the full range of sentencing factors under § 3553(a) and not simply § 3553(a)(6) regarding unwarranted disparities.

### 2. *The Circuits Denying Variance*

Conversely, the second position bars district courts in non-fast-track jurisdictions from granting a variance based on the disparity that fast-track programs cause.<sup>150</sup> The Fifth, Ninth, and Eleventh Circuits agree that district courts may vary from guideline policy.<sup>151</sup> However, they reason that *Kimbrough*'s holding

---

145. *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 740 (9th Cir. 2009); *Gomez-Herrera*, 523 F.3d at 563 n.4 (denying district courts from granting variances based on fast-track disparity); *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir.) (per curiam), *reh'g en banc denied*, 548 F.3d 980 (11th Cir. 2008).

146. *See, e.g.*, *United States v. Hendry*, 522 F.3d 239, 241 (2d Cir. 2008) (“[Circuit precedent] held only that we would not find a sentence unreasonable for failing to compensate for such disparities; it said nothing as to whether a district judge *could* take such disparities into account.”); *United States v. Perez-Pena*, 453 F.3d 236, 244 (4th Cir. 2006) (finding that the fast-track disparity could not be unwarranted within the meaning of § 3553(a)(6) but never holding whether such disparity may be considered under § 3553(a), potentially leaving the fast-track question unanswered).

147. 527 F.3d at 229.

148. *Id.* at 230.

149. *Id.* at 229–30.

150. *Gomez-Herrera*, 523 F.3d at 554 n.4.

151. *See id.* at 558–559 (“As set forth below, *Kimbrough*, which concerned a district court’s ability to sentence in disagreement with *Guideline* policy, does not control this case, which concerns a district court’s ability to sentence in disagreement with *Congressional* policy.” (emphasis added)); *United States v. Vega-Castillo*, 540 F.3d 1235, 1239

limits a district court's discretion to granting a sentencing variance only when disparity results from *guideline* policy, and it does not apply to fast-track disparities that result from *congressional* policy.<sup>152</sup> Fast-track disparity is not "unwarranted" within the meaning of § 3553(a)(6) because the congressional policy behind the PROTECT Act approves of the fast-track program, and therefore Congress also approves of the disparity the program created.<sup>153</sup> In contrast to the First Circuit's emphasis on all of § 3553(a)'s factors, these circuits focus on the meaning of "unwarranted" and reason that § 3553(a)(6) only requires district courts to consider "unwarranted" sentencing disparities.<sup>154</sup>

### 3. *The Undecided Circuits*

The Second and Eighth Circuits have held that if the sentencing court does not consider fast-track disparity, it does not make the sentence unreasonable.<sup>155</sup> The issue of whether a sentence is unreasonable if a sentencing court decides to consider fast-track disparity remains unsettled.<sup>156</sup> The Seventh Circuit is also undecided, although at least one district court in that circuit has recognized that *Kimbrough* may have superseded the circuit precedent.<sup>157</sup> The D.C. Circuit has not addressed the issue,<sup>158</sup>

---

(11th Cir. 2008) (adopting the reasoning of the Fifth Circuit in denying a district court from varying from the Guidelines based on fast-track sentencing disparities). The Ninth Circuit most recently joined this category. See *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 740 (9th Cir. 2009) (holding that *Kimbrough* insufficiently abrogates the circuit's fast-track sentencing precedent barring sentencing courts from varying from the Guidelines based on fast-track disparity).

152. *Gomez-Herrera*, 523 F.3d at 559, 563 n.4; *Vega-Castillo*, 540 F.3d at 1239.

153. *Gomez-Herrera*, 523 F.3d at 563 ("We agree that any sentencing disparity resulting from fast track disposition programs is not unwarranted as the disparity was also intended by Congress.")

154. See *id.* at 562, 563 n.4.

155. *United States v. Hendry*, 522 F.3d 239, 241 (2d Cir. 2008); *United States v. Mejia*, 461 F.3d 158, 164 (2d Cir. 2006). The Eighth Circuit's stance after *Gall* and *Kimbrough* is uncertain because it is unclear whether the circuit denied departure based on fast-track disparity for reasons that the Supreme Court later abrogated. See *United States v. Gonzalez-Alvarado*, 477 F.3d 648, 651 (8th Cir. 2007), *abrogated by* *Gall v. United States*, 552 U.S. 38 (2007).

156. *Hendry*, 522 F.3d at 241; *United States v. Sebastian*, 436 F.3d 913, 916 (8th Cir. 2006).

157. *United States v. Macias-Prado*, No. 08-CR-30, 2008 WL 2337088, at \*4 n.5 (E.D. Wis. June 6, 2008) (citing *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 462–63 (7th Cir. 2006)) (noting that circuit precedent barred granting sentencing variances based on fast-track disparity, but recognizing that *Kimbrough* may have superseded circuit

while the Third,<sup>159</sup> Fourth,<sup>160</sup> Sixth,<sup>161</sup> and Tenth<sup>162</sup> Circuits all held, pre-*Kimbrough*, that a district court may not vary from the Guidelines based on fast-track disparity. However these circuits have not yet issued decisions concerning whether a district court may vary from the Guidelines based on fast-track disparity after *Kimbrough*.<sup>163</sup>

#### IV. SENTENCING VARIANCES BASED ON FAST-TRACK DISPARITY SHOULD BE ALLOWED

This Part argues that judges should be able to vary from the Guidelines based on fast-track disparity. Specifically, Part IV.A argues that because fast-track's statutory scheme is not set forth in clear legislation, judges may vary from the Guidelines based on fast-track disparity as a matter of law. This Note then discusses how policy compellingly supports this reading of the statutory framework. Part IV.B recognizes the further disparity that may arise in non-fast-track districts where some judges may grant a variance based on fast-track disparity while others may not. It compares the disparity from fast-track programs with the

---

precedent); *see also* United States v. Sanchez-Gonzalez, No. 08 CR 609, 2009 WL 310901, at \*2 (N.D. Ill. Feb. 9, 2009).

158. United States v. Simpson, 430 F.3d 1177, 1189 (D.C. Cir. 2005) (denying defendant's request for resentencing after *Booker*, but never addressing the substance of the fast-track disparity argument).

159. United States v. Vargas, 477 F.3d 94, 98 (3d Cir. 2007) (“[T]he disparity between sentences in fast-track and non-fast-track districts is authorized by Congress and, hence, warranted” under § 3553(a)(6)).

160. United States v. Perez-Pena, 453 F.3d 236, 241–42, 244 (4th Cir. 2006) (“In short, there is no reason to believe that Congress intended that sentencing disparities between defendants who benefitted [sic] from prosecutorial discretion and those who did not could be ‘unwarranted’ within the meaning of § 3553(a)(6).”).

161. United States v. Hernandez-Fierros, 453 F.3d 309, 314 (6th Cir. 2006) (“[Fast-track] disparity does not run counter to § 3553(a)'s instruction to avoid unnecessary sentencing disparities.”). *But see* United States v. Ossa-Gallegos, 453 F.3d 371, 375–76 (6th Cir. 2006) (affirming a non-Guidelines sentence partly based on fast-track disparity grounds), *vacated en banc on other grounds*, 491 F.3d 537 (6th Cir. 2007).

162. United States v. Martinez-Trujillo, 468 F.3d 1266, 1269 (10th Cir. 2006).

163. Although these circuits may have issued opinions after *Kimbrough* regarding variances based on fast-track disparity, none of those opinions explicitly mention *Kimbrough* and are issued in non-binding, unpublished opinions. *See, e.g.*, United States v. Martinez-Bahena, 290 F. App'x 836, 841 (6th Cir. 2008) (“We also find that the absence of a fast-track program in the Middle District of Tennessee does not create an unwarranted sentencing disparity.”). In these circuits, unpublished opinions are not binding circuit precedent. *See, e.g.*, United States v. Lyons, 510 F.3d 1225, 1233 n.2 (10th Cir. 2007).

disparity from judges varying from the Guidelines, concluding that varying from the Guidelines better conforms to the goals of transparency and uniformity. Part IV.B also discusses the Attorney General's role in implementing fast-track programs and argues that the underlying enforcement rationales supporting fast-track disparity should not bar judicial application of § 3553(a).

A. THE LEGAL ARGUMENT: SENTENCING PRACTICES RESULTING FROM LEGISLATIVE SILENCE OR POLICY PREFERENCES CANNOT CONSTRAIN JUDICIAL DISCRETION IN A POST-*BOOKER* WORLD

Some appellate courts have held that sentencing disparities between defendants receiving discounted sentences through fast-track programs and those not receiving such reductions are “warranted” as a matter of law.<sup>164</sup> These disparities are “warranted” because the PROTECT Act authorizes them, and, therefore, district courts cannot vary from the Guidelines on this basis.<sup>165</sup> Part IV.A.1 argues that sentencing courts in non-fast-track districts should be able to vary from the Guidelines based on fast-track disparity because the statutory scheme establishing fast-track falls short of a binding legislative mandate and thus is not “warranted” as a matter of law.<sup>166</sup> Further, as Part IV.A.2 demonstrates, barring judges from exercising their full discretion based solely on one sentencing factor — whether fast-track programs cause “unwarranted” disparities within the meaning of § 3553(a)(6) — too narrowly constricts the sentencing datum, which must be based on all the sentencing factors in § 3553(a).

1. *Fast-Track's Statutory Scheme Falls Short of an Express Legislative Mandate*

The significance of *Kimbrough* is that, under advisory Guidelines, judicial discretion in sentencing trumps legislative silence, even where congressional policy clearly prefers certain sentencing

---

164. See, e.g., *Perez-Pena*, 453 F.3d at 243 (“Sentencing disparities between defendants receiving fast-track downward departures under the PROTECT Act and those not receiving such departures are ‘warranted’ as a matter of law . . . [because] Congress and the Sentencing Commission *explicitly* sanctioned such disparities.”).

165. *Id.*

166. *Id.*

practices.<sup>167</sup> Specifically, by distinguishing between the (1) crack cocaine mandatory *minimums/maximums* and (2) the crack cocaine *Guidelines*, *Kimbrough* demonstrates how courts may treat sentencing disparities arising from Guidelines that lack the support of a legislative mandate set in “express terms.”<sup>168</sup>

Central to the Supreme Court’s reasoning in *Kimbrough* is its determination that Congress had declined to explicitly legislate the 100:1 crack-to-powder ratio into the Guidelines.<sup>169</sup> Similarly, with fast-track, Congress declined to explicitly legislate fast-track programs directly into the Guidelines.<sup>170</sup> Instead, when Congress passed the PROTECT Act, it merely charged the Commission with promulgating “a policy statement authorizing a downward departure . . . pursuant to an early disposition program.”<sup>171</sup> In response, the Commission issued the fast-track Guidelines in a new section, 5K3.1, of the Guidelines Manual,<sup>172</sup> which, like the crack cocaine Guidelines, were not empirically-based.<sup>173</sup>

However, the *Gomez-Herrera* panel concluded that because Congress “necessarily” approved of fast-track programs in the PROTECT Act, it intended the disparity.<sup>174</sup> The panel reasoned

---

167. See *Kimbrough v. United States*, 552 U.S. 85, 102–03 (2007). While Congress may have preferred the 100:1 ratio for the crack cocaine Guidelines based on its use of that ratio for the mandatory minimums, it failed to articulate that preference in binding legislation. See *id.* at 96, 102.

168. See *id.* at 103; *United States v. Rodriguez*, 527 F.3d 221, 229 (1st Cir. 2008).

169. See *Kimbrough*, 552 U.S. at 103.

170. See *id.* at 102–03.

171. PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (codified as amended at 28 U.S.C. § 994 (2006)); cf. *Kimbrough*, 552 U.S. at 96 n.7, 96–97 (describing how Congress charged the Commission with promulgating the Guidelines — including the crack cocaine Guidelines — as per the SRA). Compare PROTECT Act § 401(m)(2)(B) (charging the Commission to promulgate fast-track Guidelines), with Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.) (charging the Commission to promulgate other Guidelines).

172. See USSG, *supra* note 16, at 473 (implementing fast-track programs into the Guidelines).

173. Steven G. Kalar & Jon M. Sands, An Object All Sublime — Let the Punishment Fit the Crime: Federal Sentencing After Gall and *Kimbrough*, *Champion*, March 2008, at 20, 28 (comparing the fast-track and crack cocaine Guidelines); see *Kimbrough*, 552 U.S. at 96 (“The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses.”).

174. See *United States v. Gomez-Herrera*, 523 F.3d 554, 559–60, 562 (5th Cir. 2008). Specifically, the Fifth Circuit points out that Congress intended the fast-track disparity because the PROTECT Act requires the Attorney General to approve fast-track programs. *Id.* at 560–61. The Fifth Circuit reasoned that, by “plainly limit[ing] fast-track departures

that fast-track disparity was not unwarranted under § 3553(a)(6) because the PROTECT Act “specifically” legislated the disparity. Thus *Kimbrough* does not apply because it controls only sentencing practices that Guidelines policy sets, not congressional policies like the PROTECT Act.<sup>175</sup>

This reasoning misapplies *Kimbrough*. In charging the Commission to promulgate a policy statement authorizing downward departures for fast-track programs, not only did Congress decline to specifically legislate fast-track *programs* directly into the Guidelines, it also remained silent regarding fast-track *disparity*. Nothing in the PROTECT Act bars using any particular sentencing rationales, and the Act includes nothing regarding a sentencing court’s discretion to grant departures based on fast-track disparity.<sup>176</sup> For this reason, the First Circuit correctly rejected the position that Congress, in the PROTECT Act, directly legislated a ban on considering fast-track disparity in sentencing because the statute merely directed the Commission to issue a policy statement.<sup>177</sup>

The key issue here is whether fast-track disparity was “expressly” or “implicitly” authorized. If fast-track disparity is implicitly authorized, it is not a binding legislative mandate and a district court may grant a variance based on a disagreement that the Guidelines sentences fail to accurately reflect § 3553(a).<sup>178</sup> For this reason, *Kimbrough* held that a district court may grant a sentencing variance based on disparities resulting from the crack powder Guidelines because congressional legislation does not directly establish those Guidelines.<sup>179</sup>

Conversely, if fast-track disparity is expressly authorized, it is binding legislation and a district court may not grant a variance based on this disparity.<sup>180</sup> *Kimbrough* requires that when Congress wants to bind judges to certain sentencing practices, it must act unambiguously, as the Supreme Court will decline to

---

to early disposition programs authorized by the Attorney General,” Congress implicitly approved of the disparity. *Id.* at 561.

175. *Id.* at 559.

176. *United States v. Rodriguez*, 527 F.3d 221, 229 (1st Cir. 2008).

177. *See id.*

178. *See Kimbrough*, 552 U.S. at 109.

179. *See id.* at 102, 108–09.

180. *See id.* at 108.

infer implicit sentencing directives from congressional silence.<sup>181</sup> For this reason, *United States v. Vazquez*<sup>182</sup> held that a district court could not vary from the Guidelines based on a disagreement with the congressionally directed policy of severely punishing career offenders because the career offender Guidelines clearly “encapsulate[] the congressional policy” to punish repeat offenders near the statutory maximum.<sup>183</sup>

The pre-*Kimbrough* precedents that the Fifth Circuit cited in *Gomez-Herrera* demonstrate the confusion of the other circuits. They characterize fast-track disparity in a variety of ways, describing the disparity as being “implicitly” authorized,<sup>184</sup> that Congress “was necessarily providing,”<sup>185</sup> “must have thought,”<sup>186</sup> or “necessarily decided”<sup>187</sup> that the disparity was warranted. None of these descriptions rise to the level of what the Supreme Court required in *Kimbrough* to bar sentencing courts from varying from the crack cocaine Guidelines.<sup>188</sup> The imprecise language demonstrates the difficulty the circuit courts have had in interpreting the PROTECT Act. However, examining the plain text leads to the conclusion that sentencing courts may vary from the Guidelines based on fast-track disparity because nothing in the statute explicitly mandates the disparity that fast-track programs create. Therefore, a binding legislative directive does not cause such disparity because the “express terms” of the Act do not support it.<sup>189</sup> The pertinent portion states:

---

181. See *id.* at 102–03.

182. 558 F.3d 1224, 1227–28 (11th Cir. 2009).

183. *Id.* at 1227–28; see also *Kimbrough*, 552 U.S. at 103 (discussing 28 U.S.C. § 994(h), where Congress explicitly required the Sentencing Commission to set the sentencing ranges for recidivist offenders “at or near” the mandatory maximum).

184. *United States v. Castro*, 455 F.3d 1249, 1252 (11th Cir. 2006) (“Congress *implicitly* determined that the disparity was warranted.” (emphasis added)).

185. *United States v. Marcial-Santiago*, 447 F.3d 715, 718 (9th Cir. 2006) (“Congress was *necessarily providing* that the sentencing disparities that result from these programs are warranted . . . .” (emphasis added)).

186. *United States v. Aguirre-Villa*, 460 F.3d 681, 683 (5th Cir. 2006) (“Congress *must have thought* the disparity warranted when it authorized early disposition programs . . . .” (emphasis added)).

187. *United States v. Mejia*, 461 F.3d 158, 163 (2d Cir. 2006) (“Congress thus *necessarily decided* that they do not create the unwarranted sentencing disparities . . . .” (emphasis added)).

188. See 552 U.S. at 102–03.

189. See *id.*

(m) REFORM OF EXISTING PERMISSIBLE GROUNDS OF DOWNWARD DEPARTURES — Not later than 180 days after the enactment of this Act, the United States Sentencing Commission shall —

....

(2) promulgate, pursuant to section 994 of title 28, United States Code —

....

(B) a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney; . . . .<sup>190</sup>

The PROTECT Act merely delegates the promulgation of fast-track Guidelines to the Sentencing Commission. It remains silent on the disparities resulting from the fast-track Guidelines — similar to the Anti-Drug Abuse Act’s silence on the disparities resulting from the crack cocaine Guidelines.<sup>191</sup> Judges in non-fast-track districts cannot be barred from granting sentencing variances because the *creation* of fast-track programs (charging the Commission to promulgate fast-track Guidelines instead of directly legislating the programs) and the *silence* as to the program’s subsequent disparities share a critical similarity: Both lack the support of express terms set forth in a binding legislative mandate, like the one that directly created mandatory maximum and minimum sentences in *Kimbrough*.<sup>192</sup> The fast-track Guidelines, like the crack cocaine Guidelines, fall short of a legislative mandate and so sentencing courts should be free to vary from

---

190. PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (codified as amended at 28 U.S.C. § 994 (2006)).

191. *Compare id.*, with 21 U.S.C. § 841(b)(1) (2006). *See also* United States v. Rodriguez, 527 F.3d 221, 229–230 (1st Cir. 2008).

192. *See* 552 U.S. at 102–03; *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . . .”); *Rodriguez*, 527 F.3d at 229 (“[T]he PROTECT Act’s authorization for the selective deployment of fast-track programs bears scant resemblance to a congressional directive instituting statutory minimum and maximum sentences. Although the latter directive necessarily cabins a sentencing court’s discretion, the former authorization says nothing about the court’s capacity to craft a variant sentence within the maximum and minimum limits.”).



them based on policy disagreements.<sup>193</sup> “Closer review” of a sentencing court’s variance from the Guidelines is unnecessary because the fast-track Guidelines, like the crack cocaine Guidelines, are not based on empirical data and the exercise of the Commission’s “characteristic institutional role.”<sup>194</sup>

More than a matter of semantics, the distinction between how the legislature sets forth implicit and explicit sentencing practices prompted the *Booker* project: an effort to elucidate the legislature’s role in setting sentencing practices and require the legislature to clarify its actions.<sup>195</sup> If the Court infers too much from legislative signals or silence, it would remove the legislature’s incentive to revise unwise or unclear statutes.<sup>196</sup> Absent a clear legislative directive, mere congressional signals to adopt a 100:1 sentencing ratio or to employ a binding fast-track program are insufficient to constrain judicial sentencing discretion.<sup>197</sup> If Congress wants to bar sentencing courts in non-fast-track districts from granting variances based on fast-track disparities, it must do so with explicit legislation, not charge the Commission this respon-

---

193. See *Spears v. United States*, 129 S. Ct. 840, 843 (2009) (per curiam) (recognizing that district courts are entitled to reject the crack-cocaine Guidelines based on a policy disagreement with them); *Kimbrough*, 552 U.S. at 89 (“[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.”).

194. *Id.* at 109; *supra* note 167 and accompanying text (noting that both the fast-track and the crack cocaine Guidelines are not empirically-based).

195. See *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004); *Appendi v. New Jersey*, 530 U.S. 466, 468–69, 471 (2000) (describing and holding unconstitutional the lack of legislative clarity that caused a sentencing scheme requiring courts to make findings of fact that enhanced a defendant’s sentence, but which labeled the findings of fact “sentencing factors” instead of “elements” of the crime); *cf.* *United States v. Houlihan*, 871 F. Supp. 1495, 1501 (D. Mass. 1994) (“Thus, had Congress intended to [perform an act through legislation], it presumably would have done so. This Court will not venture to graft a limitation where none exists.”).

196. See *Neal v. United States*, 516 U.S. 284, 296 (1996) (“Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.”). *But cf.* *Bolla*, *supra* note 83, at 922 (“The whole point of the remedial solution in *Booker* was a solution that would comply with congressional intent without violating the Constitution. The intent of Congress should be followed since fast-track does not violate the Constitution.” (citations omitted)).

197. See *Kimbrough*, 552 U.S. at 102–103.

sibility. In the meantime, “[l]et the trial judges be judges . . . and let them exercise the judgment entrusted to them.”<sup>198</sup>

## 2. *Sentencing is Not Based on One Factor*

Circuit courts reason that, because Congress intended the disparity resulting from fast-track programs, such disparity is not “unwarranted” within the meaning of § 3553(a)(6).<sup>199</sup> Therefore, fast-track disparity is an inappropriate basis for a sentencing variance because, while fast-track programs create some inconsistent sentences, these disparities are “‘warranted’ as a matter of law.”<sup>200</sup> Moreover, these circuits reason that fast-track programs “may prevent the even greater disparity that occurs when an offender goes *unprosecuted* because of the lack of prosecutorial resources in a district.”<sup>201</sup> Unprosecuted offenders create greater sentencing disparities than fast-track programs,<sup>202</sup> and, therefore, in consideration of § 3553(a)(6), fast-track disparity could hardly be “unwarranted.”<sup>203</sup>

However, after *Kimbrough* one critical point is apparent: the need to avoid unwarranted sentencing disparities is not an end in itself, nor is it the sole sentencing factor.<sup>204</sup> *Kimbrough* clarifies that § 3553(a) is more than just a “laundry list” of sentencing fac-

198. Sutton, *supra* note 18, at 79 (arguing that Congress, the Sentencing Commission, and the appellate courts should respect the individualized sentencing judgments of district judges).

199. See, e.g., United States v. Gomez-Herrera, 523 F.3d 554, 562–63 n.4 (5th Cir. 2008) (“[B]ecause any disparity that results from fast-track programs is intended by Congress, it is not ‘unwarranted’ within the meaning of § 3553(a)(6).”).

200. United States v. Perez-Pena, 453 F.3d 236, 243 (4th Cir. 2006).

201. United States v. Perez-Chavez, 422 F. Supp. 2d 1255, 1263 (D. Utah 2005); see also Bolla, *supra* note 83, at 914–916 (“The disparity that judges are relying on to grant these downward departures is based on figures that only include prosecuted offenders. . . . [B]y considering unprosecuted offenders the disparity created by fast-track declines.” (footnote omitted)).

202. *Perez-Chavez*, 422 F. Supp. 2d at 1263. In other words, fast-track programs reduce disparities because they increase illegal reentry prosecutions. See, e.g., Alan D. Bersin, *Reinventing Immigration Law Enforcement in the Southern District of California*, 8 FED. SENT’G REP. 254, 256 (1996).

203. See Bolla, *supra* note 83, at 914. But see *supra* note 89 and accompanying text (noting the different ways to characterize the meaning of “unwarranted”).

204. *Kimbrough v. United States*, 552 U.S. 85, 108 (2007) (“[D]isparities must be weighed against the other § 3553(a) factors . . .” (emphasis added)); United States v. Rodriguez, 527 F.3d 221, 228 (1st Cir. 2008) (“This overarching principle necessarily informs a sentencing court’s consideration of the entire constellation of section 3553(a) factors, including the need to avoid unwarranted disparity.”).

tors.<sup>205</sup> Rather, in fashioning an appropriate sentence, a court “should consider a number of factors,” keeping in mind the overarching provision to “‘impose a sentence sufficient, but not greater than necessary’ to accomplish the goals of sentencing.”<sup>206</sup> The Fifth Circuit’s over-reliance on one sentencing factor — avoiding unwarranted sentencing disparities under § 3553(a)(6) — causes an excessively singular focus on the meaning of unwarranted sentencing disparities.<sup>207</sup> District judges must holistically examine all of § 3553(a)’s factors and craft a sentence “minimally sufficient” to meet the goals of sentencing.<sup>208</sup> Therefore, a court in a non-fast-track district should have discretion to grant a non-Guidelines sentence because the variance is not based exclusively on § 3553(a)(6).

#### B. THE POLICY ARGUMENT: COMPARING JUDICIALLY-CREATED DISPARITY AND FAST-TRACK DISPARITY

As discussed above, powerful arguments exist in favor of allowing courts the discretion to give lower sentences in non-fast-track districts to offset the lower sentences in fast-track districts. However, allowing judges in non-fast-track jurisdictions to vary from the Guidelines based on fast-track disparity may lead to another type of disparity: “judicially-created disparity.” Judicially-created disparity occurs when some, but not all, judges or districts grant a non-Guidelines sentence to a defendant to mitigate inconsistencies that selective implementation of fast-track programs cause.<sup>209</sup> This section argues that judges should be able to

---

205. *Rodriguez*, 527 F.3d at 228 (“The [*Kimbrough*] Court emphasized that section 3553(a) is more than a laundry list of discrete sentencing factors; it is, rather, a tapestry of factors, through which runs the thread of an overarching principle.”).

206. *Kimbrough*, 552 U.S. at 101 (quoting 18 U.S.C. § 3553(a) (2006)); *Rodriguez*, 527 F.3d at 228.

207. *United States v. Gomez-Herrera*, 523 F.3d 554, 562–63 (5th Cir. 2008) (focusing on the meaning of “unwarranted” disparities in the context of § 3553(a)(6) to prevent district judges from varying from the Guidelines based on fast-track sentencing disparities).

208. *Rodriguez*, 527 F.3d at 228; *United States v. Fernandez*, 443 F.3d 19, 32 (2d Cir. 2006) (“[E]ven if § 3553(a)(6) were a lawful basis for leniency here, the requirement that a sentencing judge consider an 18 U.S.C. § 3553(a) factor is *not* synonymous with a requirement that the factor be given determinative or dispositive weight in the particular case . . .”).

209. David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV. 645, 667–70 (2004) (describing the difference between judicially-created disparities and non-judicially-created disparities).

vary from the Guidelines as a matter of policy because, while the ambition to maximize prosecutorial efficiency and conserve resources in a particular district is laudable, it must also be considered in light of transparency, uniformity, and judicial application of § 3553(a).

Part IV.B.1 compares judicially-created disparity and fast-track disparity, arguing that judicially-created disparity results from a more transparent process. Part IV.B.2 argues that, while both judicially-created and fast-track disparity may cause discontinuity, only judicially-created disparity is a necessary consequence of advisory Guidelines. Part IV.B.3 then explores the source of both fast-track disparity and judicially-created disparity, suggesting that fast-track disparity results from the prosecution's local enforcement strategy and is insufficient to bar judicial application of § 3553(a), which is the source of judicially-created disparities.

### 1. *Judicially-Created Disparity and Transparency*

Judge Marvin E. Frankel, the “father of sentencing reform,” called transparency an essential component of the law and an integral notion of justice.<sup>210</sup> Judicial variance based on fast-track disparity better meets the goal of transparency — while fast-track programs fall short of such transparency — because the opaque bureaucracy of the Department of Justice (“Main Justice”) controls most fast-track administration.<sup>211</sup> First, there is little transparency concerning how the program works. Defendants have no right to be heard on how fast-track will be applied to their case, no right to an explanation if the prosecutor refuses to make a motion for fast-track treatment, and no right to judicial review of the prosecution's decision.<sup>212</sup> For example, in fast-track programs utilizing charge bargaining, sentencing discounts are not reported for statistical purposes, leaving little room for over-

---

210. O'Hear, *supra* note 30, at 366 (quoting Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (1993)).

211. *See id.* at 376, 378–380 (suggesting improvements on fast-track programs to increase transparency).

212. *Id.* at 376.

sight.<sup>213</sup> Similarly, in downward departure programs, the Commission noted the difficulty in monitoring the impact of the programs because only one judicial district explicitly cites fast-track as a reason for departure on its sentencing report to the Commission.<sup>214</sup>

Second, similar transparency concerns arise at the “programmatic level.”<sup>215</sup> Main Justice is neither required to give a public explanation nor hold a public hearing, and its decision where to implement fast-track programs is not subject to outside review.<sup>216</sup> For instance, the Ashcroft Fast-Track Memo lays out readily satisfied criteria for adopting a fast-track program, making it unclear why districts that ostensibly qualify for fast-track still do not have it.<sup>217</sup> Although districts in Texas, Arizona, California, New Mexico, Florida, Nevada, and Utah handle 75% of immigration convictions, they do not utilize fast-track programs.<sup>218</sup> However, districts in Nebraska and North Dakota oddly have fast-track programs even though they handle substantially fewer immigration cases.<sup>219</sup> The process by which districts set the degree of departure is also far from transparent, since the PROTECT Act

---

213. McClellan & Sands, *supra* note 4, at 530. These sentencing discounts go unreported because defendants are not receiving a reduction from the Guidelines: rather, they are only pleading to a lesser charge with a shorter sentence. *Id.*

214. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 62 (2003), <http://www.usc.gov/depart03/depart03.pdf> (“Courts in only one judicial district, the Southern District of California, typically cite ‘Fast Track’ as a reason for downward departure on the Statement of Reasons.”).

215. O’Hear, *supra* note 30, at 372, 376.

216. *Id.*

217. See U.S. SENTENCING COMM’N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2002), <http://www.usc.gov/ANNRPT/2002/SBTOC02.htm> (listing of selected sentencing statistics by judicial district).

218. Compare *id.* (listing selected sentencing statistics of certain districts in Texas, Arizona, California, New Mexico, Florida, Nevada, and Utah that handle 75% of immigration convictions), with U.S. SENTENCING COMM’N, FINAL REPORT, *supra* note 7, at E-25 (listing the districts with illegal reentry fast-track programs and indicating that fast-track programs are not found in all districts with high immigration rates); see also McClellan & Sands, *supra* note 4, at 528–29 (discussing the state of fast-track programs and their current availability).

219. *United States v. Perez-Chavez*, 422 F. Supp. 2d 1255, 1259, 1267 (D. Utah 2005) (noting that Utah has a relatively high immigration rate but does not have a fast-track program, while North Dakota has a relatively low immigration rate and will likely not need a fast-track program unless it faces an “unheralded flood of illegal Canadian immigrants”).

only provides guidance for creating a program that allows downward departure of “not more than 4 levels.”<sup>220</sup>

Furthermore, any transparency works “asymmetrically.”<sup>221</sup> While the general criteria for implementing fast-track programs may be clear, no public information exists regarding why certain districts fail to implement such programs.<sup>222</sup> For instance, in *United States v. Perez-Chavez*, then-Judge Cassell noted that the U.S. Attorney for the District of Utah applied for fast-track authorization but the Attorney General denied the request. Neither the request’s nature nor the basis for denial is in the public record.<sup>223</sup>

Although fast-track programs have become more transparent after the Ashcroft Fast-Track Memo,<sup>224</sup> they still do not even remotely approach a sentencing court’s transparency. A judge’s decision to vary from the Guidelines based on fast-track disparity involves a public explanation, a sentencing hearing, and is subject to appellate review.<sup>225</sup> Before determining a defendant’s sentence, trial judges “hear from the defendants, and they sometimes hear from their families . . . , after which the judges must explain on the record why they sentenced the defendant the way they did.”<sup>226</sup> In other words, while exercising judicial discretion affords many procedural safeguards to ensure honesty and transparency in sentencing, the Attorney General’s discretion offers comparatively fewer safeguards.<sup>227</sup>

---

220. PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (codified as amended at 28 U.S.C. § 994 (2006)).

221. O’Hear, *supra* note 30, at 377.

222. *Id.*

223. 422 F. Supp. 2d at 1259. This lack of transparency also hinders a sentencing court from making its own assessment under § 3553(a)(6) and whether such disparity is “warranted.” See 18 U.S.C. § 3553(a)(6) (2006).

224. O’Hear, *supra* note 30, at 376 (noting that both the PROTECT Act and the Ashcroft Fast-Track Memo bring some transparency to fast-track programs, but that fast-track still falls short of transparency ideals).

225. *Id.* at 379–80 (“Judicial decision-making is preferable to prosecutorial decision-making because of the established requirements of due process in the courtroom, explanation of the sentence, and appellate review.”).

226. See Sutton, *supra* note 18, at 79.

227. O’Hear, *supra* note 30, at 377.

## 2. *Judicially-Created Disparity and Uniformity*

One of the “theoretical underpinnings” of the Guidelines is the goal of national uniformity in federal court sentencing.<sup>228</sup> Fast-track supporters argue that judicially-created disparities contravene the uniformity goal because a defendant’s sentence should not vary by judge.<sup>229</sup> They point out that both inter- and intra-district disparities might be created when only some districts or individual judges grant variances. They further contend that judges who grant these variances will create a judge-made disparity, which causes “the same sorts of disparities that they purport to eliminate.”<sup>230</sup>

To be fair, an advisory system that returns discretion to judges will cause some judge-made disparity in sentencing.<sup>231</sup> But these arguments premised solely on uniformity and sentencing disparities prove too much because disparity will inevitably occur in any system with advisory guidelines. If close analysis and application of § 3553(a) leads to judicially-created sentencing disparities, the Supreme Court has already succinctly responded to such arguments in *Kimbrough*.<sup>232</sup> In reply to the government’s argument that different judges will give different sentences for identical conduct, the Court essentially gave a “judicial shrug.”<sup>233</sup> “[O]ur opinion in *Booker* recognized that some departures from

---

228. See *United States v. Snyder*, 136 F.3d 65, 69 (1st Cir. 1998).

229. *United States v. Duran*, 399 F. Supp. 2d 543, 545–46 (S.D.N.Y. 2005) (noting the potential sentencing disparities that may occur from the conceptual split among judges).

230. *United States v. Perez-Chavez*, 422 F. Supp. 2d 1255, 1264 (D. Utah 2005); see *United States v. Perez-Pena*, 453 F.3d 236, 243 n.3 (4th Cir. 2006) (“In fact, allowing sentencing courts to determine whether they should sentence non-fast-track defendants as if they had been fast-tracked would produce ‘unwarranted sentence disparities’ between similarly situated non-fast-track defendants . . .” (quoting *United States v. Eura*, 440 F.3d 625, 633 (4th Cir. 2006), *abrogated by* *Kimrough v. United States*, 552 U.S. 85, 101 (2007))). Similar reasoning also barred sentencing courts from varying from the Guidelines based on crack-powder disparities. *E.g.*, *Eura*, 440 F.3d at 633 (“[G]iving a sentencing court the authority to sentence a defendant based on its view of an appropriate ratio between crack cocaine and powder cocaine would inevitably result in an unwarranted disparity between similarly situated defendants in direct contradiction to the specific mandate of 18 U.S.C. § 3553(a)(6).”).

231. *United States v. Gardellini*, 545 F.3d 1089, 1096 (D.C. Cir. 2008) (“This new sentencing regime inevitably will lead to sentencing disparities and inequities that can be explained by little more than the identities of the sentencing judges. . . . [But] it is not our role to fight a rear-guard action to preserve quasi-mandatory Guidelines.” (citations omitted)).

232. 552 U.S. at 102–03.

233. *Kalar & Sands*, *supra* note 173, at 28.

uniformity were a necessary cost of the remedy we adopted” — conceding that advisory Guidelines and appellate review would not eliminate all variations between districts.<sup>234</sup>

Even if district courts could not grant variances based on fast-track disparity, criminal sentencing would still never achieve perfect uniformity.<sup>235</sup> Sentencing has never been a science because no one “right” answer in fashioning a sentence exists.<sup>236</sup> The only right answer is to trust district judges, informed by advisory Guidelines and held to appellate review, to do their jobs.<sup>237</sup> The Supreme Court agrees, noting that “advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’”<sup>238</sup> Judicially-created disparity should be favored over fast-track disparity, not only because it better meets the vital transparency goal,<sup>239</sup> but also because its effect on uniformity is recognized by the Supreme Court, rooted in § 3553(a), and a necessary foundation of advisory Guidelines.

### 3. *Comparing Disparities that Result from Local Enforcement Strategies and 18 U.S.C. § 3553(a)*

Fast-track programs are part of a local enforcement strategy that seeks to increase prosecutions.<sup>240</sup> Therefore, while fast-track

---

234. *Kimbrough*, 552 U.S. at 107–08.

235. Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. POCKET PART 142, 144 (2006) (describing uniformity in sentencing as an “illusory goal”); cf. Hofer et al., *supra* note 36, at 253 (describing how different philosophies, political climates, or courtroom cultures can affect a judge’s sentencing).

236. Lynn Adelman & Jon Deitrich, *Disparity: Not a Reason to “Fix” Booker*, 18 FED. SENT’G REP. 160, 161 (2006) (describing the function of judicial discretion after the Sentencing Guidelines); see *Gardellini*, 545 F.3d at 1096 (“[D]ifferent district courts can and will sentence differently — differently from the Sentencing Guidelines range, differently from the sentence an appellate court might have imposed, and differently from how other district courts might have sentenced that defendant.”).

237. See Adelman & Deitrich, *supra* note 236, at 161.

238. *Kimbrough*, 552 U.S. at 107–08 (quoting *United States v. Booker*, 543 U.S. 220, 264 (2005)).

239. See O’Hear, *supra* note 30, at 369–370 (arguing that transparency, not uniformity, should be the overall purpose of the Guidelines).

240. This local enforcement strategy is based on the rationale that increases in immigration prosecutions that fast-track makes possible, correspondingly increase the effectiveness of deterrence and promote respect for the law — thereby preventing other offenders from committing immigration crimes near the border because of the improved certain-



disparities result from local enforcement strategies, judicial sentencing disparities result from differing applications of § 3553(a). Striving to meet a local enforcement strategy should not eliminate a court's discretion to vary from the Guidelines based on fast-track disparity. Unlike local enforcement strategies, differing judicial applications of § 3553(a) are part of *Booker's* advisory Guidelines.<sup>241</sup>

Supporters of fast-track programs argue that localized enforcement strategies are necessary because different districts have different local conditions.<sup>242</sup> They contend that fast-track programs are essential for the efficient administration of justice in areas of high immigration because they increase prosecutions.<sup>243</sup> Further, they argue that local conditions justify fast-track programs only in specific districts and that judicial variance from the Guidelines would result in ad hoc, judicially-created fast-track programs.<sup>244</sup> This means that with judicially-created ad hoc fast-track districts, defendants in non-fast-track jurisdictions could allege fast-track disparity and benefit from a judicially-conferred sentencing discount, without relinquishing the same procedural rights that their counterparts in fast-track districts are required to relinquish. Thus, fast-track supporters reason that allowing judicial variances could eliminate fast-track pro-

---

ty of prosecution. Bolla, *supra* note 83, at 925–26; *see also* Fast-Track Hearings, *supra* note 43, at 75–77 (testimony of Paul Charlton, U.S. Attorney for District of Arizona, justifying increased prosecutions based on, among other things, its general deterrent effect).

241. Whether local circumstances should ever be considered for sentencing is outside the scope of this Note. This Note only argues that, to the extent that local conditions may permissibly affect federal sentences, the *prosecution's* consideration of these conditions should not bar judicial sentencing discretion based on § 3553(a). *See* United States v. Rodriguez, 527 F.3d 221, 230 (1st Cir. 2008) (“While the decision to institute a fast-track program in a particular judicial district is the Attorney General’s, the ultimate authority to grant a fast-track departure lies with the sentencing court.”). *See generally* O’Hear, *supra* note 30, at 360–64 (arguing federal sentences should be tailored “to take into account local circumstances”).

242. *See* Bolla, *supra* note 83, at 917–18 (“Since different communities have different values, conditions, needs and personalities, any group of legal rules will be applied somewhat differently from community to community.”).

243. *See* Barrueco, *supra* note 6, at 96–98 (describing fast-track programs as an essential prosecutorial tool).

244. *See* United States v. Perez-Chavez, 422 F. Supp. 2d 1255, 1263–64 (D. Utah 2005) (noting that courts in non-fast-track districts that grant variances based on fast-track disparity “create fast-track programs by judicial fiat, circumventing the PROTECT Act requirement that the decision to approve a fast-track program rests in the hands of the Attorney General”).

grams and perhaps even cause an across-the-board reduction in sentences for illegal reentry defendants.<sup>245</sup>

The ad hoc judicial creation of fast-track programs is troubling, especially when defendants in both fast-track districts and non-fast-track districts try to gain a windfall by securing fast-track benefits without meeting the program's minimum requirements. But these cases make judicial discretion based on § 3553(a) even more crucial in determining when to grant sentencing variances.<sup>246</sup> Categorically denying defendants in non-fast-track jurisdictions a variant sentence based simply on their failure to waive their right to an appeal and other procedural rights produces unfair results. Defendants in non-fast-track districts cannot be expected to relinquish their right to appeal without knowing whether a sentencing court will grant them a variance from the Guidelines.<sup>247</sup> No perfect solution exists except to depend on district judges to distinguish between non-fast-track defendants who might warrant a variance based on § 3553(a) from those who do not — helping to prevent across-the-board sentencing reductions.

Admittedly, recurring variances from Guidelines ranges in non-fast-track districts might establish ad hoc fast-track programs created by the judiciary. Practically, even if a defendant in a non-fast-track district requests a lower sentence based on fast-track disparity under § 3553(a)(6), it is uncertain whether judges would grant variances en masse.<sup>248</sup> Indeed, ad hoc judicial creation of fast-track programs has not occurred in districts

---

245. Barrueco, *supra* note 6, at 102–03 (“Judges who adopt this invitation would essentially be creating Fast Track districts in places which did not have it. As a result, it would require that all defendants be sentenced as if they had been prosecuted in a Fast Track system.”).

246. See *Rodriguez*, 527 F.3d at 230 (“While the decision to institute a fast-track program in a particular judicial district is the Attorney General’s, the ultimate authority to grant a fast-track departure lies with the sentencing court.”); see also 18 U.S.C. § 3553(a) (2006).

247. See *Rodriguez*, 527 F.3d at 231 (“Lacking the benefit of the bargain inherent in fast-track programs, a defendant cannot be expected to renounce his right to mount a defense.”). But see *United States v. Vega-Castillo*, 548 F.3d 980, 982 (11th Cir. 2008) (Carnes, J., concurring) (“[I]t might well be reasonable to require the defendant to offer to file an appeal waiver covering every issue except fast track disparity in order to align himself as closely as possible with [fast-track] defendants . . .”).

248. See *Rodriguez*, 527 F.3d at 228 (warning district courts against swallowing an allegation of fast-track disparity “hook, line, and sinker”); *supra* Part III.A.2 (arguing that judges should be able to vary from the Guidelines based on the § 3553(a) factors);

where courts granted sentencing variances based on fast-track disparity.<sup>249</sup> A court must thoroughly analyze *all* the § 3553(a) factors and determine whether the Guidelines sentence fails to accomplish sentencing goals.<sup>250</sup>

Finally, even if judicial discretion proves insufficient in distinguishing the highly similar immigration cases and a mass exodus from the Guidelines ranges occurs based on fast-track disparity, the advisory Guidelines and judicial application of § 3553(a) produced these sentencing variances. In sum, using fast-track programs as part of a local enforcement strategy to save resources and maximize prosecutions, while commendable, does not also bar judicial discretion because the advisory Guidelines and § 3553(a) allow for judge-made disparities.<sup>251</sup>

## V. CONCLUSION

Fast-track programs, when selectively implemented, create a glaring sentencing disparity in the name of maximizing administrative resources. By allowing only a handful of districts to grant fast-track discounts, the programs create a sentencing scheme that changes a defendant's sentence based solely on geography. Interpreting *Kimbrough* as distinguishing between what Congress clearly sets forth in legislative mandates and what it does not, provides the final gloss needed to resolve the fast-track disparity issue. Sentencing courts in non-fast-track jurisdictions should be able to vary from the Guidelines based on fast-track disparity because the fast-track Guidelines fall short of a legislative mandate. If Congress wants to employ fast-track programs as binding sentencing practices, then it must do so directly in "express terms," like it did with the mandatory minimums in the

---

249. See U.S. SENTENCING COMM'N, FINAL REPORT, *supra* note 7, at 141 (providing data to support the claim that the concern over judicial sentencing variances based on fast-track disparity "has not been realized generally"); Norris, *supra* note 5, at 770 n.137 ("Neither the Eastern District of Wisconsin, nor the Eastern District of Virginia, nor the Middle District of Florida nor the Northern District of Illinois have made moves to implement fast-track programs in the wake of decisions rendering [fast-track] sentencing disparities 'unwarranted.'" (citations omitted)).

250. See *supra* Part IV.A.2 (discussing how sentencing is based on the confluence of § 3553(a)'s factors).

251. *Kimbrough v. United States*, 552 U.S. 85, 107–08 (2007) ("[O]ur opinion in *Booker* recognized that some departures from uniformity were a necessary cost of the remedy we adopted.").

Anti-Drug Abuse Act.<sup>252</sup> Until then, judges may vary from the fast-track Guidelines based on policy disagreements.<sup>253</sup>

Further, allowing judges to vary from the Guidelines based on fast-track disparity creates a more transparent form of judge-made disparity. In this era of advisory Guidelines, judicially-created disparities, although potentially detrimental to perfect uniformity, are a necessary part of applying the factors in § 3553(a). Judicial application of § 3553(a) distinguishes judge-made disparity from fast-track disparities created by Main Justice, which are justified by little more than an enforcement strategy focused on increasing immigration prosecutions.

As programs enabled by the once-mandatory Guidelines, fast-track programs represented an institutional power shift, where the authority to influence sentencing migrated away from the hands of the judges on the frontlines.<sup>254</sup> However, advisory Guidelines expose fast-track programs as a vestigial manifestation of the power imbalance that the mandatory Guidelines left in place. It is an imbalance that is finally shifting back where it belongs: the judiciary.

---

252. See *id.* at 102–03.

253. See *Spears v. United States*, 129 S. Ct. 840, 842 (2009); *Kimbrough*, 552 U.S. at 108–09.

254. *Bowman*, *supra* note 24, at 1319–20 (criticizing the Guidelines because of their effect of transferring power away from common-sense actors who apply the rules and into the hands of political actors in Congress and in the Department of Justice).