COMMENT

REJECTING CONSIDERATION OF THE "FAST-TRACK DISPARITY" IN A POST-*KIMBROUGH* WORLD

INTRODUCTION

In 1995, Rogelio Banuelos-Rodriguez was arrested for illegally reentering the United States after having been deported.[1] He was arrested in the Central District of California and sentenced to almost six years in prison.[2] If Banuelos-Rodriguez had been caught in any other judicial district in the State of California, his sentence would have been no more than two years due to the existence of "fast-track" programs for illegal reentry cases.[3] Clearly, this is no small difference. The issue this Comment addresses is as follows: given the increased discretion district courts now have to craft individualized sentences, should a judge confronting a case like Banuelos-Rodriguez's be permitted to consider the fact that if the defendant had been out for a drive in San Diego, San Francisco, or Sacramento[4] when the police arrested him, his sentence would have been less than half of what he was given in the Central District of California? The instinctual reaction may be that judges should be allowed to consider such seemingly irrational geographical discrepancies, especially in light of the enhanced discretion recently given to sentencing courts by the United States Supreme Court.[5] This Comment, though, will argue not only that Congress has forbidden such consideration, but also that the results of allowing such consideration are actually more harmful than forbidding it.

I. HISTORY OF FAST-TRACK PROGRAMS

Fast-track programs started out in the early 1990s as a regionalized and unofficial response to the overwhelming number of immigration cases that federal judicial districts along the southwest

1. United States v. Banuelos-Rodriguez, 215 F.3d 969, 971 (9th Cir. 2000).
2. *Id.* at 972.
3. *See id.* at 971–72.
4. San Diego is in the Southern District of California, San Francisco is in the Northern District of California, and Sacramento is in the Eastern District of California.
5. *See* Kimbrough v. United States, 552 U.S. 85, 108–10 (2007).

border had to process.[6] The caseload had suddenly become unmanageable, and the situation was ripe for the creation of fast-track programs due to the combination of two factors. First, and perhaps most importantly, there was a significant increase in resources expended on the enforcement of immigration laws.[7] Second, the Violent Crime Control and Law Enforcement Act of 1994 increased the sentence for illegal reentry defendants.[8] The combination of federal law enforcement agencies cracking down on border security along with legislation that increased the consequences of illegal reentry meant that prosecutors in southwestern districts suddenly had many more immigration defendants to prosecute as well as more leeway to shape plea bargain agreements.[9] The solution to this sudden onslaught of immigration cases was the creation of early-disposition, or "fast-track," programs. These programs allowed prosecutors to offer an illegal reentry defendant a sentence below the Federal Sentencing Guidelines ("Guidelines") in exchange for the defendant's immediate guilty plea and waiver of appellate rights.[10] The end result was mutually beneficial; defendants obtained shorter sentences but the district's judiciary now had a manageable caseload and was able to prosecute and convict many more defendants than was possible without fast-track programs.

Fast-track programs did not obtain official recognition or regulation until 2003, when Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act").[11] This Act was primarily focused on crimes against children, but also contained the so-called Feeney Amendment.[12] The fundamental goal of both the PROTECT Act and the Feeney Amendment was to strictly limit the number of downward departures from the Guidelines that district courts

6. *See* Thomas E. Gorman, *A History of Fast-Track Sentencing*, 21 FED. SENT'G REP. 311, 311 (2009).

7. *See id.* (noting the growth in size and budget of the Border Patrol forces, and highlighting the federal government's initiation of several "high-profile operations to interdict illegal immigration").

8. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001, 108 Stat. 1796, 2023 (codified as amended at 8 U.S.C. § 1326(b) (2006)); *see also* James P. Fleissner & James A. Shapiro, *Federal Sentences for Aliens Convicted of Illegal Reentry Following Deportation: Who Needs the Aggravation?*, 9 GEO. IMMIGR. L.J. 451, 467 (1995) ("Included in the Crime Bill was a doubling of the statutory maximum under 8 U.S.C. § 1326(b)(1) (reentry by a nonaggravated felon) from five to ten years.").

9. Gorman, *supra* note 6, at 311.

10. *See id.* at 312.

11. Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 and 28 U.S.C.).

12. *Id.* § 401, 117 Stat. at 667–76.

granted.[13] One of the exceptions that the amendment provided was downward departures pursuant to an early-disposition program sanctioned by the Attorney General.[14] The Feeney Amendment, with its goal of strictly limiting the use of downward departures, may seem a strange place for Congress to place its first stamp of approval on the use of fast-track programs, which result in the widespread use of downward departures in districts that prosecute numerous illegal reentry cases. But, it is important to note that the authorization of fast-track programs arose as a narrow exception within the context of Congress's larger goal of limiting the number of sentences issued below the Guidelines' range.

Following Congress's authorization in the PROTECT Act, Attorney General John Ashcroft issued memoranda that stated the criteria for, and the manner in which, districts could request authorization for a fast-track program.[15] The Attorney General stated that the early-disposition "programs are intended to be exceptional and [would] be authorized only when clearly warranted by local conditions within a district."[16] Once in operation, a program's major requirements were that (1) the defendant plead guilty within a reasonable amount of time; (2) the plea agreement be written, include an accurate description of the offense, and contain a waiver of the defendant's right to file any 12(b)(3) motions, as well as a waiver of appellate rights; and (3) the prosecutor would request a sentence reduction of no more than four levels under the Guidelines.[17] As the Attorney General stated, the programs were based "on the premise that a defendant who promptly agrees to participate in such a program has saved the government significant and scarce resources that can be used in prosecuting other defendants."[18]

The use of fast-track programs was not strictly limited to districts inundated with illegal reentry cases, as the criteria left room for any district overwhelmed by a large number of the same types of cases to apply for certification to become a fast-track district.[19] As long as the cases did not involve violent crimes and

13. *See* U.S. SENTENCING COMM'N, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 56–57, app. at B-30 (2003), *available at* http://www.ussc.gov/departrpt03/departrpt03.pdf.

14. § 401(m)(2)(B), 117 Stat. at 675.

15. *See, e.g.*, Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors (Sept. 22, 2003), *available at* http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

16. *Id.*

17. Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to All United States Attorneys (Sept. 22, 2003), *available at* http://www.justice.gov/ag/readingroom/ag-092203.pdf.

18. *Id.*

19. John Ashcroft's memorandum on fast-track programs also states:

> In order to obtain Attorney General Authorization to implement a "fast track" program, the United States Attorney must submit a

presented factually similar scenarios, any district that found itself overcome by one particular type of case could apply.[20] The majority of the fast-track programs were enacted, however, to allow for quick prosecution of illegal reentry violations.[21] It is with these particular fast-track programs, and the discrepancy in sentencing created by them, that this Comment concerns itself.

The controversy surrounding fast-track programs and the difference they create between the sentences given to illegal-reentry defendants in jurisdictions that have the programs compared to those given to defendants in districts without the programs did not begin until 2005. In that year, the Supreme Court announced, in *United States v. Booker*, that the Guidelines (which hitherto had been mandatory) were now only advisory.[22] The Court stated that while a sentencing judge should still take the Guidelines into account, the judge should not regard the Guidelines as compulsory.[23] Thus, after *Booker*, courts still had to consider the Guidelines, but were then free to depart from those Guidelines based on the court's own assessment of the statutory factors set forth in 18 U.S.C. § 3553(a).[24] The sixth factor under § 3553(a) states that sentencing

proposal that demonstrates that—

> (A)(1) the district confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited or "fast-track" basis would significantly strain prosecutorial and judicial resources available in the district; or
>
> (2) the district confronts some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition of such cases;
>
> (B) declination of such case in favor of state prosecution is either unavailable or clearly unwarranted;
>
> (C) the specific class of cases consists of ones that are highly repetitive and present substantially similar fact scenarios; and
>
> (D) these cases do not involve an offense that has been designated by the Attorney General as a "crime of violence."

Id.

20. *Id.*

21. *See* Gorman, *supra* note 6, at 314 (stating that, as of 2009, fourteen of the twenty-seven early-disposition programs that have been enacted were for illegal-reentry cases).

22. *See* United States v. Booker, 543 U.S. 220, 245 (2005).

23. *Id.*

24. *See id.* The factors in § 3553(a) are as follows:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> > (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

courts should consider "the need to avoid *unwarranted sentence disparities* among defendants with similar records who have been found guilty of similar conduct."[25] Defendants sentenced in non-fast-track jurisdictions seized upon this opportunity to claim that the discrepancy between their sentences for illegal reentry and the sentences of defendants convicted of the same crime in fast-track jurisdictions constituted an "unwarranted disparity" within the meaning of § 3553(a)(6).[26]

At first, the circuits were consistent in holding that the fast-track disparity was not unwarranted, and thus that the difference was an improper factor for sentencing courts to consider.[27]

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in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for—
(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
(5) any pertinent policy statement—
(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2006).

25. *Id.* § 3553(a)(6) (emphasis added).

26. *See infra* notes 45–53, 65–67, 75–78, 89–95, 107–11 and accompanying text.

27. *See, e.g.*, United States v. Andújar-Arias, 507 F.3d 734, 741 (1st Cir. 2007) (noting that every circuit but the D.C. Circuit had considered the issue, and that each of them had held the disparity to be warranted), *abrogated by* United States v. Rodríguez, 527 F.3d 221 (1st Cir. 2008).

However, a series of Supreme Court cases decided in 2007—*Rita v. United States*,[28] *Gall v. United States*,[29] and *Kimbrough v. United States*[30]—expanded the discretion of sentencing courts in the post-*Booker* age of advisory Guidelines and emphasized the deference that appellate courts must grant to district courts on sentencing decisions.[31] This line of cases, particularly *Kimbrough*, caused several of the circuits to reconsider their initial holdings on the issue and ultimately resulted in two circuits permitting consideration of the fast-track disparity by sentencing courts.

In *Rita*, the Supreme Court clarified that *appellate* courts are permitted to extend the presumption of reasonableness to sentences within the Guidelines.[32] However, the Court held that *sentencing* courts are not allowed to extend that presumption of reasonableness to the Guidelines' sentencing range and must engage in their own inquiries as to the reasonableness of a sentence in a particular case.[33] Later the same year, the Supreme Court announced its decision in *Gall*. In that case, the Supreme Court stated that appellate courts were to review the sentencing decisions of the lower courts for abuse of discretion only.[34] *Gall* also set forth a three-step process for sentencing courts to use when determining an appropriate sentence. The Court stated that the sentencing court should first determine the applicable Guidelines range.[35] Second, the court should consider both parties' arguments for the sentence they believe to be suitable.[36] Then finally, the court should consider all the § 3553(a) factors and determine, in its discretion, the proper sentence.[37] The Supreme Court's decisions in *Rita* and *Gall* are both significant, as they exemplify the trend toward increased discretion at the sentencing court level, and increased appellate-court deference to the decision of those lower courts. However, the Court's decision in *Kimbrough* was the real impetus behind the circuits' reconsideration of the issue, and this Comment will focus on that case.

28. 551 U.S. 338 (2007).

29. 552 U.S. 38 (2007).

30. 552 U.S. 85 (2007).

31. *See generally* Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—the Center Doesn't*, 117 YALE L.J. 1374 (2008) (discussing the impact of *Rita*, *Gall*, and *Kimbrough* on the discretion of district court judges).

32. *Rita*, 551 U.S. at 347.

33. *Id.* at 351.

34. *Gall*, 552 U.S. at 46. The Court went on to state that any requirement by an appellate court that there be extraordinary circumstances for deviations from the Guidelines range was impermissible. *Id.* at 47.

35. *Id.* at 49.

36. *Id.*

37. *Id.* at 49–50.

II. *KIMBROUGH V. UNITED STATES*

In 2004, Derrick Kimbrough was convicted in federal district court of several drug-related offenses, mainly involving possession with intent to distribute both crack and powder cocaine.[38] The Guidelines' relevant provisions stated that a defendant convicted of dealing crack cocaine was subject to a punishment equivalent to that of a defendant dealing one hundred times more cocaine in powder form—the so called 100-to-1 ratio.[39] Based on this ratio, the Guidelines indicated that a sentence in the range of nineteen to twenty-two-and-a-half years would be appropriate for Kimbrough.[40] After comparing this range with the range suggested by the Guidelines for the same amount of powder cocaine (approximately eight years), the district court judge sentenced Kimbrough to only fifteen years in prison—well below the range of sentences suggested by the Guidelines for Kimbrough's offense.[41] The district court noted that Kimbrough's case illustrated the lopsided and unjust effect that crack-cocaine guidelines have on sentence determinations.[42] The Fourth Circuit, however, vacated the sentence imposed by the district court, stating that the sentence was unreasonable because it was based on the sentencing judge's disagreement with the crack/powder cocaine ratio and the sentencing disparity created by that ratio.[43]

The Supreme Court granted certiorari to consider whether the crack/powder cocaine discrepancy was merely advisory in light of *Booker*, and thus whether the district court could properly deviate from the applicable Guidelines based on a disagreement with the policy behind the Guidelines.[44] After considering the history of the crack/powder cocaine ratio, both in Congress and in the Sentencing Commission[45] ("Commission"), the Court ultimately concluded that the ratio and the Guidelines that followed from it were merely advisory.[46] In doing so, the Court made several findings that are particularly relevant to the fast-track disparity issue that this

38. Kimbrough v. United States, 552 U.S. 85, 91 (2007). Kimbrough was also convicted of a firearms charge, but the drug offenses were the most serious crimes for which he was convicted and on which this Comment focuses. *See id.*

39. *Id.* at 91.

40. *Id.* at 92.

41. *Id.* at 93.

42. *Id.*

43. *Id.*

44. *Id.*

45. The 100-to-1 ratio traces its origins to the Anti-Drug Abuse Act of 1986. *Id.* at 95. The Commission then adopted the ratio and incorporated it into its procedures for calculating the appropriate sentence for drug defendants. *Id.* at 96–97. After the ratio was incorporated into the Guidelines, the Commission subsequently determined that the 100-to-1 ratio was unjustified and suggested several times that Congress ought to amend its policy. *Id.* at 97–99. Congress, however, declined to modify its position. *Id.* at 99.

46. *See id.* at 101–10.

Comment confronts. First, the Court addressed the government's argument that Congress required the imposition of a 100-to-1 ratio in the Anti-Drug Abuse Act of 1986 and, as such, prevented the Commission and federal courts from deviating from that ratio.[47] The Court found this argument unpersuasive because it could not be substantiated by the text of the statute. As the Court saw it, the statute, "by its terms, mandates only maximum and minimum sentences" and not the ratio itself.[48] Therefore, Congress failed to directly address how sentences should be imposed in between the outer limits set forth in the 1986 Anti-Drug Abuse Act. The Court refused to infer that Congress intended to impose a firm 100-to-1 ratio for all sentences based simply on the imposition of an upper and lower limit on the length of sentences.[49]

Next, and only after concluding that Congress had not directly spoken on the issue, the Court went on to discuss the Commission's failure to act within its "institutional role." The Court emphasized that the usual means by which the Commission promulgated a particular guideline was for its professional and experienced staff to engage in a thorough examination of empirical data and accumulated national experience.[50] The Court hearkened back to its holding in *Rita* and reiterated that because the Commission's Guidelines are generally supported by this sort of research and experience, they serve as the starting point for a court's determination of an appropriate sentence.[51] When, however, the Commission did not act in its traditional role, the Court noted that a sentencing court is in a superior position to make determinations on a case-by-case basis as the entity most familiar with the individual and the particular situation.[52] The clear inference from the Court's reasoning is that the Guidelines created by the Commission, while acting outside its institutional role, are entitled to less deference than the rest of the Guidelines created by the Commission acting *within* its institutional role. The Supreme Court found that in the drafting of the crack-cocaine Guidelines, the Commission had not fulfilled its institutional role because the Commission had neither undertaken research based on empirical data nor inquired into the accumulated national experience.[53]

47. *Id.* at 102.

48. *Id.*

49. *See id.* at 102–03.

50. *See id.* at 108–10 (citing United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

51. *Id.*; *see also* Gall v. United States, 552 U.S. 38, 49–50 (2007) (articulating the three-step process by which a court should determine an appropriate sentence).

52. *Kimbrough*, 552 U.S. at 109 (quoting *Gall*, 552 U.S. at 51–52).

53. *Id.* Furthermore, the Court noted that since the promulgation of the Guidelines, the Commission itself had found the 100-to-1 ratio to be unsupported by the evidence. *Id.* at 110.

III. THE CIRCUITS' APPROACHES

Before the Supreme Court's decision in *Kimbrough*, the circuits were unanimous in holding that the fast-track disparity was not unwarranted, and thus was not an appropriate factor for sentencing courts to consider.[54] However, based on their understanding of the Supreme Court's holding in *Kimbrough*, two circuit courts of appeals—the First and the Third—abrogated their earlier precedents and allowed district courts to consider the fast-track disparity as a factor during sentencing.[55] To understand the reasoning behind the decisions, both of the circuits that stood fast in their pre-*Kimbrough* holdings and of those circuits who altered their holdings in light of *Kimbrough*, the following Subpart will give a brief description of each circuit's pre-*Kimbrough* case law (in those circuits to have addressed the issue), and will then examine the same circuits' post-*Kimbrough* cases.

A. The First and Third Circuits: Sentencing Courts Should Consider the Fast-Track Disparity

1. The First Circuit

In 2007, the First Circuit considered the issue of fast-track disparities in *United States v. Andújar-Arias*.[56] In that case, the defendant, Falcón Diómedes Andújar-Arias, had been convicted of illegal reentry after deportation, and was sentenced in accordance with the range suggested by the Guidelines.[57] The sentencing judge refused to grant a downward departure from the Guidelines despite Andújar-Arias's contention that his sentence should be lessened in order to avoid an unwarranted sentencing disparity resulting from the District of Massachusetts's lack of a fast-track program for illegal reentry cases.[58] On appeal to the First Circuit, Andújar-Arias argued that the sentencing judge erred in finding that the fast-track disparity was not unwarranted and, because the judge failed to consider that disparity, the sentence was per se unreasonable.[59]

54. *See, e.g.*, United States v. Andújar-Arias, 507 F.3d 734, 741 (1st Cir. 2007) (noting that every circuit but the D.C. Circuit had considered the issue, and that each of them had held that this disparity was warranted), *abrogated by* United States v. Rodriguez, 527 F.3d 221 (1st Cir. 2008).

55. *See Andújar-Arias*, 507 F.3d 734; United States v. Vargas, 477 F.3d 94 (3d Cir. 2007), *abrogated by* United States v. Arrelucea-Zamudio, 581 F.3d 142 (3d Cir. 2009).

56. 507 F.3d 734.

57. *See id.* at 736–37.

58. *See id.* at 737. The defendant also argued that the sentencing disparity created by fast-track programs violated his right to equal protection under the Fifth and Fourteenth Amendments. *Id.* at 748–49. However, the court found that this claim lacked merit, as he was not a member of a suspect class and the programs were rationally related to a legitimate congressional goal. *Id.*

59. *See id.* at 737–38.

In considering the issue, the First Circuit noted that, to date, every circuit to confront the issue had decided that the disparity was warranted and, consequently, that sentences handed down in non-fast-track jurisdictions were not unreasonable when the judge refused to consider the fast-track disparity.[60] The First Circuit agreed with its fellow circuits, finding the disparity to be warranted and refusing to require sentencing judges to consider the existence of fast-track programs in other jurisdictions.[61] The court insisted that the imposition of fast-track programs, and the disparities in sentencing that naturally followed from these programs, were the product of a legislative choice that the courts were "not in a position to second guess" and, as such, these disparities fell outside the realm of "unwarranted disparit[ies]" under § 3553(a)(6).[62] Furthermore, the First Circuit noted that if it held the sentence to be unreasonable in this case because of a failure to consider the fast-track disparity, the result would likely be a requirement that, for a sentence in an illegal reentry case to be held reasonable, the sentencing judge *must* account for the fast-track disparity.[63] The court was unwilling to take such a step, especially in light of the strong legislative mandate for fast-track programs and the clear acknowledgement of the sentencing disparities that resulted from those programs.[64]

After *Kimbrough* was decided, the First Circuit reconsidered the issue of fast-track disparities in *United States v. Rodríguez*, an appeal from a conviction for illegal reentry in the District of Puerto Rico.[65] In *Rodríguez* the defendant, Yonathan Rodríguez, had been convicted in district court of illegal reentry after having been removed from the country following a felony conviction, and the sentencing judge issued a sentence within the Guidelines.[66] The defendant had asked the sentencing judge to consider the fast-track disparity, but the judge refused to grant a downward departure, claiming a lack of authority to depart from the advisory Guidelines because such a disparity was not unwarranted.[67] The sentencing judge stated that any challenge as to whether or not the disparity qualified as unwarranted was "a battle that must be fought with the Attorney General, and not in the courts."[68] On appeal, the defendant sought review of the sentencing judge's conclusion that the fast-track disparity was not a permissible factor to support a

60. *Id.* at 741.
61. *See id.* at 741–43.
62. *Id.* at 742.
63. *Id.* at 738.
64. *See id.* at 738–41.
65. United States v. Rodríguez, 527 F.3d 221 (1st Cir. 2008).
66. *See id.* at 222–24.
67. *Id.* at 223.
68. United States v. Rodríguez, No. 06-0157CCC, 2006 WL 3020040, at *1 (D.P.R. Oct. 19, 2006), *vacated*, 527 F.3d 221 (1st Cir. 2009).

downward departure from the sentencing range suggested by the Guidelines.[69] The First Circuit took *Rodríguez* as an opportunity to reconsider its *Andújar-Arias* analysis in light of the Supreme Court's recent decisions in *Kimbrough* and *Gall*.

The First Circuit began its analysis by emphasizing the enhanced discretion granted to sentencing judges by the Supreme Court in *Kimbrough* and *Gall*.[70] The court explained that, in *Gall,* the Supreme Court granted "wide latitude [to sentencing judges] in making individualized sentencing determinations."[71] The court also focused on, and generalized to some degree, language in *Kimbrough* that it understood as allowing a sentencing court to "deviate from the guidelines based on general policy considerations" and permitting an "enlargement of a sentencing court's capacity to factor into the sentencing calculus its policy disagreements with the guidelines."[72] Based on the court's understanding of those two cases, it overruled its prior holding in *Andújar-Arias* and stated that sentencing judges were now permitted, though not required, to consider the fast-track disparity and the goal of avoiding unwarranted disparities as a part of the "entire constellation of section 3553(a) factors."[73] The court found arguments that the disparity was warranted to be unconvincing. While the court recognized language in *Kimbrough* that acknowledged that sentencing courts' discretion could be limited by congressional instruction, it clung to the Supreme Court's requirement that such pronouncements be "express" and thus denied that the PROTECT Act included any such explicit restriction on sentencing courts' authority.[74]

2. The Third Circuit

In *United States v. Vargas*, the Third Circuit considered an appeal by Sandro Antonio Vargas, who had been convicted of illegal reentry.[75] The district court had sentenced Vargas within the Guidelines, over his objections that the sentence ought to be reduced in order to mitigate the fast-track disparity.[76] On appeal, Vargas complained that his significantly higher sentence was attributed only "to the arbitrary fact of the location of his arrest [in a non-fast-track jurisdiction]" and that the sentencing court's failure to consider fast-track differences made his sentence unreasonable.[77]

69. *Rodríguez*, 527 F.3d at 224.
70. *See id.* at 225–28.
71. *Id.* at 225.
72. *Id.* at 227.
73. *See id.* at 227–29.
74. *Id.* at 229.
75. United States v. Vargas, 477 F.3d 94, 96 (3d Cir. 2007), *abrogated by* United States v. Arrelucea-Zamudio, 581 F.3d 142 (3d Cir. 2009).
76. *Id.*
77. *Id.* at 98.

The Third Circuit repudiated the defendant's arguments, finding that the discrepancy was warranted because it was sanctioned by Congress.[78] Significantly, the court relied on Congress's "*express* approval of fast-track programs in section 401(m) of the [PROTECT Act]" in finding the disparity to be warranted.[79] The court went on to emphasize that "the establishment of fast-track programs is a matter left to Congress and the Attorney General, and the review of national sentencing practices and formulation of advisory sentencing guidelines is a matter left to the Commission. A court should not create its own fast-track program . . . ."[80]

The Third Circuit took up the issue again in *United States v. Arrelucea-Zamudio* in 2009.[81] At trial in district court the defendant was convicted of illegal reentry and sentenced within the Guidelines despite his argument that, post-*Kimbrough*, sentencing courts were permitted to consider downward departures from the Guidelines based on the fast-track disparity.[82] The Third Circuit took the opportunity to abrogate *Vargas* "to the extent that it has been read—as the District Court did here—as prohibiting a sentencing court's discretion to consider a fast-track disparity argument because such a disparity is warranted by Congress under § 3553(a)(6)."[83] The court's initial reasoning mirrored the First Circuit's, focusing intently on the PROTECT Act's failure to expressly limit the discretion of sentencing courts with respect to fast-track discrepancies.[84] The Third Circuit, though, went on to inquire into the Commission's "institutional role" and ultimately found the comparison between the Commission's role in creating fast-track Guidelines and its role in promulgating the crack/powder cocaine ratio in *Kimbrough* compelling and conclusive.[85] The court found that, as in *Kimbrough*, the Commission was not acting in its characteristic role[86] because "[i]n authorizing a departure for

78. *Id.*

79. *Id.* (emphasis added). The court went on to cite precedent from every circuit except the D.C. Circuit (which had not confronted the issue), holding that Congress had expressly endorsed the creation of fast-track jurisdictions and concluding that, as a result, the disparity was warranted. *Id.* at 98–99.

80. *Id.* at 100.

81. United States v. Arrelucea-Zamudio, 581 F.3d 142 (3d Cir. 2009).

82. *Id.* at 143.

83. *Id.* at 149.

84. *Id.* at 151.

85. *Id.* at 153. For a discussion of the work the Commission does before promulgating a Guidelines provision, and how the Commission attempts to fulfill Congress's sentencing policy goals, see *Rita v. United States*, 551 U.S. 338, 347–51 (2007).

86. The court stated that the Commission's proper "institutional role" was "to formulate the Guidelines through a detailed empirical approach by surveying national sentencing practices, pre-Guidelines sentencing practices, judicial decisions, other data, or comments from participants and experts in the field." *Arrelucea-Zamudio*, 581 F.3d at 153.

defendants in fast-track districts only, the Commission did not systematically evaluate the issue before implementing the fast-track Guideline."[87] Thus, while the Third Circuit recognized that the Guidelines still act as the "initial benchmark" for appropriate sentences, it found that in situations in which the Commission was not acting in its customary role, the Guidelines were owed even less deference and courts were free to deviate from them.[88]

B. The Fifth, Ninth, and Eleventh Circuits: Sentencing Courts Should Not Consider Fast-Track Disparity

1. The Fifth Circuit

The Fifth Circuit first took up the issue of whether to allow district courts to grant downward departures to mitigate the fast-track disparity in *United States v. Aguirre-Villa*.[89] The defendant, after being convicted of illegal reentry, had been sentenced within the Guidelines. The defendant argued for a lesser sentence so that the sentences handed down in his district, the Western District of Texas, would be more commensurate with those handed down in neighboring districts where early-disposition programs had been enacted.[90] The district court, though, rejected those arguments.[91] On appeal, the Fifth Circuit upheld the district court, concluding that "[t]he refusal to factor in, when sentencing a defendant, the sentencing disparity caused by early-disposition programs does not render a sentence unreasonable."[92] The court also stated its assumption that Congress's failure to alter the language of § 3553(a)(6), in conjunction with its approval of fast-track programs, indicated that Congress did not consider such a disparity to be unwarranted.[93] The court then quoted extensively from an Eighth Circuit case, which stated that requiring consideration of the fast-track disparity "would conflict with the decision of Congress to limit the availability of such sentence reductions to select geographical areas, and with the Attorney General's exercise of prosecutorial discretion to refrain from authorizing early-disposition agreements in [the district in question]."[94]

In 2008, the Fifth Circuit reconsidered the issue of fast-track disparities post-*Kimbrough* in *United States v. Gomez-Herrera*.[95] After the defendant, Pedro Gomez-Herrera, was convicted of illegal

87. *Id.* at 155.
88. *Id.* at 153 (quoting Gall v. United States, 552 U.S. 38, 49 (2007)).
89. 460 F.3d 681 (5th Cir. 2006) (per curiam).
90. *Id.* at 682.
91. *Id.*
92. *Id.* at 683.
93. *Id.*
94. *Id.* (alteration in original) (quoting United States v. Sebastian, 436 F.3d 913, 916 (8th Cir. 2006)) (internal quotation marks omitted).
95. 523 F.3d 554, 556 (5th Cir. 2008).

reentry in a non-fast-track jurisdiction, the sentencing court refused to grant his request for a downward departure based on the fast-track disparity.[96] The Supreme Court decided *Kimbrough*, *Gall*, and *Rita* between the time of Gomez-Herrera's sentencing and his appeal.[97] Gomez-Herrera argued that this line of cases, particularly *Kimbrough*, abrogated Fifth Circuit precedent constricting the district court's ability to consider the fast-track disparity.[98] Thus, Gomez-Herrera asked the Fifth Circuit to vacate his sentence and remand his case so that the sentencing court could consider his argument for a downward departure based on the district's lack of an early-disposition program.[99] The Fifth Circuit found Gomez-Herrera's arguments unconvincing, determining that none of the Supreme Court's holdings had overruled the circuit's prior holding on the issue. The court stated that *Kimbrough* did not control Gomez-Herrera's case because, despite district courts being permitted after *Kimbrough* to issue sentences based on a disagreement with *Guidelines policy*, the Supreme Court had not permitted district courts to issue sentences that contravened *congressional policy*.[100] Gomez-Herrera alleged that "while Congress has authorized the Attorney General to establish fast-track programs, it has not compelled the district courts to restrict fast-track departures to districts in which such programs have been established."[101] The court quickly dismissed that argument, however, stating that the text of the statute clearly restricted fast-track downward departures to those districts selected by the Attorney General,[102] highlighting the text of the PROTECT Act that allowed for departures only when "pursuant to an early-disposition program authorized by the Attorney General and the United States Attorney."[103] Therefore, the court went on to explain that, because the disparities created by early-disposition programs were sanctioned by Congress, they were not unwarranted and were not a permissible reason for granting a downward departure from the Guidelines.[104]

2. The Ninth Circuit

The Ninth Circuit confronted the issue of fast-track disparities

96. *Id.* at 556–57.
97. *See id.* at 558.
98. *Id.* at 559.
99. *Id.*
100. *Id.*
101. *Id.* at 560.
102. *Id.* at 560–61.
103. Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (codified at 18 U.S.C. § 3553 (2006)).
104. *Gomez-Herrera*, 523 F.3d at 562.

initially in *United States v. Marcial-Santiago*.[105] There, three defendants, after convictions for illegal reentry in a district without an early-disposition program, implored the court to mitigate the "unwarranted" fast-track disparity, primarily claiming that a failure to do so would violate the congressional goal of uniform sentencing.[106] The district court disregarded their arguments and sentenced all three defendants within the Guidelines.[107] On appeal, the defendants asked the Ninth Circuit to reconsider their argument that the disparity created between sentences for defendants in districts that had early-disposition programs and for those in districts that did not have the programs was unwarranted, and thus that sentences that failed to take that disparity into account were unreasonable.[108] The Ninth Circuit, though, agreed with the district court, and found the disparity to be unambiguously sanctioned by Congress through the PROTECT Act.[109] The court focused on the fact that Congress enacted the PROTECT Act with a full understanding that § 3553(a)(6) instructed courts to consider unwarranted disparities, and as such, "Congress was necessarily providing that the sentencing disparities that result from these [fast-track] programs are warranted."[110] The court explained that the inconsistency in sentencing caused by fast-track programs was acceptable because Congress had decided that the benefits gained by the government through the use of the programs outweighed concerns about the differences in the resulting sentences.[111]

In 2009, the Ninth Circuit reassessed the fast-track disparity issue in *United States v. Gonzalez-Zotelo*.[112] Interestingly, the defendant in the case, Juan Gonzalez-Zotelo, was convicted of illegal reentry and sentenced in a district that *did* have an early-disposition program.[113] The U.S. Attorney's Office did not offer Gonzalez-Zotelo the opportunity to participate in the fast-track program because he had previously been convicted of committing a lewd act with a child.[114] However, the sentencing judge granted Gonzalez-Zotelo a downward departure anyway, so that he ultimately was given a sentence consistent with a defendant who had participated in the fast-track program.[115] The sentencing judge

105. 447 F.3d 715 (9th Cir. 2006).
106. *Id.* at 716–17.
107. *Id.* at 717.
108. *See id.* 717–18.
109. *Id.* at 718.
110. *Id.*
111. *See id.* at 718–19.
112. 556 F.3d 736 (9th Cir. 2009).
113. *Id.* at 738.
114. *Id.* For a discussion of the relationship between sex crimes and illegal reentry cases, see generally Abby Pringle, *Enhancing Sentences for Past Crimes of Violence: The Unlikely Intersection of Illegal Reentry and Sex Crimes*, 99 J. CRIM. L. & CRIMINOLOGY 1195 (2009).
115. *Gonzalez-Zotelo*, 556 F.3d at 738.

reasoned that not decreasing the sentence for Gonzalez-Zotelo would have resulted in an unwarranted disparity between defendants who were and were not permitted to take advantage of the early-disposition program, which, in his words, just "[d]oesn't seem fair."[116] The government appealed, claiming that the sentencing judge had erred in interpreting the fast-track disparity to be unwarranted and granting the defendant a downward departure.[117]

On appeal, the Ninth Circuit held that "*Marcial-Santiago*'s justification of disparities [between districts that have fast-track programs and those districts that do not] based on the benefits gained by the government applies equally to disparities between defendants within the same district."[118] Therefore, unless *Kimbrough* abrogated the holding in *Marcial-Santiago*, the district court's granting of a downward departure based on the fast-track disparity was improper.[119] The Ninth Circuit then vacated and remanded the case because it found that *Kimbrough* had not overruled the holding in *Marcial-Santiago*.[120] The court held that the disparity attributed to early-disposition programs was still warranted and the district court's reliance on that disparity was not a proper factor for consideration under § 3553(a)(6).[121] Similar to the Fifth Circuit's reasoning in *Gomez-Herrera*, the Ninth Circuit distinguished *Kimbrough* as a case that permitted a district court to reduce sentences based on a disagreement with the Guidelines' policy, but that had no bearing on a case in which, as in *Gonzalez-Zotelo*, the district court had lessened the defendant's sentence based on its disagreement with congressional policy.[122] The court stated that "[w]hile *Kimbrough* permits a district court to consider its policy disagreements with the Guidelines, it does not authorize a district judge to take into account his disagreements with congressional policy."[123]

3. The Eleventh Circuit

The Eleventh Circuit's initial encounter with the fast-track-disparity occurred in *United States v. Castro*.[124] At trial, the defendant pled guilty to illegal reentry and beseeched the court to

116. *Id.* The same day as Gonzalez-Zotelo's sentencing, the sentencing judge had sentenced other illegal-reentry defendants with prior felony convictions to thirty months in prison because they had participated in the district's fast-track program. The judge stated that he felt obliged to sentence Gonzalez-Zotelo to thirty months as well in order to ensure "consistency." *Id.*

117. *Id.* at 739.

118. *Id.*

119. *Id.*

120. *See id.* at 741–42.

121. *Id.* at 740.

122. *Id.*

123. *Id.* at 741.

124. 455 F.3d 1249 (11th Cir. 2006).

mitigate the fast-track disparity by decreasing his sentence.[125] After the district court refused to grant a downward departure, the defendant appealed, arguing that his sentence was unreasonable because the existence of an unwarranted disparity was not considered at sentencing.[126] The Eleventh Circuit held that the disparity caused by fast-track programs was warranted, and thus was not a factor that sentencing courts were permitted to consider under § 3553(a)(6).[127] Furthermore, the court found that Congress had made a specific decision to limit downward departures from the Guidelines to those districts that actually participated in early-disposition programs.[128]

The Eleventh Circuit reassessed the post-*Kimbrough* fast-track disparity in *United States v. Vega-Castillo*.[129] The district court convicted Vega-Castillo of illegally reentering the country after deportation.[130] At sentencing, the defendant requested that the judge impose a sentence lower than that provided by the Guidelines, but the court refused.[131] On appeal, Vega-Castillo asked the court to remand the case for resentencing because (he claimed) *Kimbrough* abrogated Eleventh Circuit precedent constraining the ability of the sentencing court to consider sentence disparity based on the existence of early-disposition programs in other districts.[132] The Eleventh Circuit refused to overrule its precedent of not allowing sentencing courts to consider fast-track disparities.[133] The court's first line of reasoning was a somewhat flimsy factual distinction between fast-track cases and *Kimbrough*. The court rather simplistically stated that "*Kimbrough* dealt with the court's ability, post-*Booker*, to take into consideration the disparity caused by the crack/powder cocaine guideline . . . in imposing sentence, while *Castro* and its progeny dealt with the court's ability to take into account a sentencing disparity resulting from an entirely different guideline involving fast-track programs."[134] The court then added a second, stronger, line of reasoning that focused on the difference between the crack/powder cocaine ratio in *Kimbrough* as an expression of Guideline policy, and the fast-track disparity as an expression of congressional policy to which much greater deference was owed.[135]

125. *See id.* at 1251–52.
126. *Id.* at 1252.
127. *Id.*
128. *See id.* at 1252–53.
129. 540 F.3d 1235 (11th Cir. 2008).
130. *Id.* at 1236.
131. *Id.*
132. *Id.*
133. *See id.* at 1236–39.
134. *Id.* at 1239.
135. *Id.*

IV. WHY THE FIRST AND THIRD CIRCUITS HAVE IT WRONG

When the First and Third Circuits overturned their fast-track disparity precedents based on their understanding of *Kimbrough*, they overextended the Supreme Court's true holding in that case. The First Circuit stated in 2007 that the language of the PROTECT Act indicated that "Congress intended to authorize a narrow departure scheme for fast-track programs while otherwise restricting the use of downward departures."[136] Similarly, in 2007, the Third Circuit noted Congress's "express approval of fast-track programs in section 401(m) of [the PROTECT Act]."[137] The *Kimbrough* decision, rendered only a couple of months later, did nothing to change these fundamental conclusions. Indeed, the conclusion in *Kimbrough* in no way undermined the reasoning set forth in the either the First or Third Circuit's pre-*Kimbrough* cases.

The First Circuit misunderstood the meaning of *Kimbrough* when, in *United States v. Rodríguez*, it abrogated its precedent. The First Circuit seemed to understand *Kimbrough* as a grant of unfettered discretion to the sentencing judge to deviate from the Guidelines based on a court's policy preferences.[138] But the Supreme Court's holding was not so broad as the First Circuit understood it to be. The Court did not announce in *Kimbrough* that sentencing courts were now free to deviate haphazardly from the Guidelines based on any policy notions that individual judges might have. Rather, the majority in *Kimbrough* spent much of its opinion attempting to circumscribe and limit its holding.[139]

The Supreme Court emphasized two distinctive features of the guideline at issue in *Kimbrough* that made deviation from it based on a policy disagreement acceptable. First, the Court emphasized Congress's silence on the issue of the 100-to-1 ratio. The Court stated that "Congress knows how to direct sentencing practices in express terms," but had not done so in this case with respect to setting any particular ratio for determining sentences between the statutorily prescribed maximum and minimum.[140] Second, the Court focused on the fact that the Commission had not operated in

136. United States v. Andújar-Arias, 507 F.3d 734, 739–40 (1st Cir. 2007), *abrogated by* United States v. Rodríguez, 527 F.3d 221 (1st Cir. 2008).

137. United States v. Vargas, 477 F.3d 94, 98 (3d Cir. 2007), *abrogated by* United States v. Arrelucea-Zamudio, 581 F.3d 142 (3d Cir. 2009).

138. *See* United States v. Rodríguez, 527 F.3d 221, 227 (1st Cir. 2008) (stating that *Kimbrough* "makes plain that a sentencing court can deviate from the guidelines based on general policy considerations").

139. *See* Kimbrough v. United States, 552 U.S. 85, 108–09 (2007); Leading Case, *Deviation Based on Policy Disagreements*: Kimbrough v. United States, 122 HARV. L. REV. 326, 331 (2007) (noting that while the Court on one hand emphasized the status of the Guidelines as purely advisory, on the other hand it also suggested limitations on variations from the Guidelines based on policy disagreements).

140. *Kimbrough*, 552 U.S. at 103.

its traditional, institutional function with regards to the crack/powder cocaine guideline at issue.[141]

Both the First and Third Circuits attempted to parallel the fast-track issue to the crack/powder cocaine guideline as a second example of the Commission acting "outside its institutional role" because the Commission's fast-track guideline was not based on the usual sort of empirical research.[142] But this comparison is irrelevant. What those circuits have missed is that when the Supreme Court discussed the Commission's failure to fulfill its traditional institutional role, it did so only after it concluded that Congress had not spoken on the issue.[143] The Court, in effect, established a two-part test, the first step of which must be satisfied in order to move on to the second step. The Guideline policy at issue must first be one about which Congress is silent, and second—and only if congressional silence has been established—the policy must have been promulgated in a Guideline that the Commission issued without collecting empirical data or researching national experience (i.e., the Commission must have acted outside its institutional role).

The Court in *Kimbrough* first found that Congress was silent on the issue of the 100-to-1 ratio, and only after doing so did the Court go on to discuss the nature of the particular Guideline as an example of the Commission acting outside its customary and institutional role.[144] Thus, it did not confront the issue of whether sentencing courts were permitted to deviate from the Guidelines based on a disagreement with an express congressional policy. In the case of the fast-track programs, Congress has spoken directly to the issue and has clearly established a policy choice. Therefore the fast-track disparity fails the first part of the *Kimbrough* two-part test, making the issue of whether or not the Commission acted outside its proper institutional role immaterial.

The First and Third Circuits missed the crux of the distinction when they failed to recognize the pertinent limiting language Congress used in the PROTECT Act. In the Act, Congress stated that downward departures were permitted "*pursuant to* an early-disposition program *authorized by* the Attorney General and the

141. *See id.* at 109; Leading Case, *supra* note 139, at 332–33 (characterizing the Court's treatment of the Commission's institutional role as a factor used to restrict *Kimbrough*'s applicability).

142. *See* United States v. Arrelucea-Zamudio, 581 F.3d 142, 153 (3d Cir. 2009) (noting that in *Kimbrough* the Court "concluded that the Commission did not act in its institutional capacity in the crack cocaine context, and we believe that it similarly did not do so in the fast-track context"); *Rodríguez*, 527 F.3d at 227 ("Like the crack/powder ratio, the fast-track departure scheme does not 'exemplify the [Sentencing] Commission's exercise of its characteristic institutional role.'" (alteration in original) (quoting *Kimbrough*, 552 U.S. at 109)).

143. *See supra* notes 139–41 and accompanying text.

144. *See Kimbrough*, 552 U.S. at 103–09.

United States Attorney."[145] Congress was carving out a very narrow category in which downward departures would be permitted, the obvious corollary being that other such departures (i.e., those not pursuant to an Attorney-General-sanctioned early-disposition program) did not have congressional authorization. To claim, as the First Circuit did, that the PROTECT Act "says nothing about a district court's discretion to deviate from the guidelines based on fast-track disparity"[146] or, as the Third Circuit did, that the "PROTECT Act contains no express congressional fast-track directive that would constrain a sentencing judge's discretion to vary from the Guidelines"[147] is to ignore the plain meaning of the statute. Such a claim also ignores the legislative history behind the statute, which indicates that "[t]his section does not confer authority to depart downward on an ad hoc basis in individual cases."[148] Perhaps Congress could have been even more obvious if it had included the word "only" in the text of § 404(m)(2)(B), but the intended restriction is made plain enough through the use of other limiting language.[149]

Professor Thomas Gorman has recently criticized this approach, which focuses on the text of the PROTECT Act, arguing instead that *Kimbrough* should be considered in light of the larger context of Congress's overall goals in sentencing policies.[150] Professor Gorman emphasizes that "[f]or the last thirty years, Congress has consistently prioritized two goals: promoting harsh sentences and reducing unwarranted sentencing disparities."[151] Allowing sentencing courts to consider the fast-track disparity and issue downward departures in response to it, Gorman argues, is the approach most in line with furthering these two goals.[152] The problem with this argument, however, is that although those two goals may have been Congress's primary objectives in the past, that does not constrain its authority to make exceptions to them or to prioritize other goals when Congress, as the legislative body, deems it necessary.

Congress was undoubtedly aware of the disparity created by the existence of early-disposition programs in some U.S. districts

145. Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (codified at 18 U.S.C. § 3553 (2006) (emphasis added)).

146. *Rodríguez*, 527 F.3d at 229.

147. *Arrelucea-Zamudio*, 581 F.3d at 151.

148. 149 Cong. Rec. 7697 (2003) (statement of Rep. Feeney).

149. *See* Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, § 401(m)(2)(B), 117 Stat. at 675.

150. *See* Thomas E. Gorman, *Fast-Track Sentencing Disparity: Rereading Congressional Intent To Resolve the Circuit Split*, 77 U. CHI. L. REV. 479, 480 (2010).

151. *Id.*

152. *See id.* 508–19.

because unofficial fast-track programs had been in place for years before they were sanctioned by Congress.[153] Furthermore, after the fact it was certainly brought to Congress's attention in the Commission's congressional report following implementation of the PROTECT Act. That report stated that the "type of geographical disparity [created by the existence of early-disposition programs in some districts] appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted sentencing disparity among similarly-situated offenders."[154] Thus, Congress was making a conscious choice in the PROTECT Act. It determined that, due to the extraordinary circumstances created by the overwhelming amount of immigration violation cases in certain districts and the resulting scarcity of judicial resources in those districts, the goal of prosecuting as many immigration violators as possible through fast-track programs should be prioritized over the goal of nationwide sentence uniformity. It is Congress's prerogative as the legislative body to make such determinations. And while Congress has authorized an exception to its goal of promoting strict sentences by sanctioning the creation of early-disposition programs, allowing non-fast-track jurisdictions to consider the disparity created by these programs would undermine Congress's broader goal in a manner not consistent with the narrow exception Congress intended to create.[155]

Other scholars have argued that the disparity created by the existence of early-disposition programs is unwarranted because "the defendant's location, rather than his criminal conduct, determines the length of his sentence."[156] These scholars maintain that fast-track programs make it such that a sentence does not reflect the defendant's conduct but rather the circumstances of the district in which that defendant was arrested and that "extralegal" factors should not enter into the sentencing consideration.[157] Because the defendant's sentence is no longer based on his crime, the argument goes, fast-track programs undermine "truth in sentencing."[158] This argument misses the essential point, however, which is that the choice to implement fast-track programs is ultimately a legislative one. While "extralegal" factors are not appropriate for judges

153. *See supra* notes 4–11 and accompanying text.

154. *See* U.S. SENTENCING COMM'N, *supra* note 13, at 67.

155. *See* United States v. Gomez-Herrera, 523 F.3d 554, 562 (5th Cir. 2008) (noting that "the Congressional goal of limiting downward departures might be undermined if courts in districts that have no fast-track program try to compensate for the lack [thereof]").

156. *See, e.g.*, 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, 844.

157. *Id.*

158. *Id.* at 845. Middleton's note also argues that the implementation of early-disposition programs violates equal protection. *See id.* at 847–49.

themselves to take into account, it is part of Congress's job to consider such factors when setting sentencing policies, and courts must abide by the choice that Congress has made.

V. POLICY IMPLICATIONS OF ALLOWING JUDGES TO CONSIDER THE FAST-TRACK DISPARITY

Allowing sentencing judges to consider the fast-track disparity, despite Congress's authorization in the PROTECT Act, would permit unelected judges to substitute their personal policy preferences for the policy choices made by the people's elected representatives in Congress. In doing so, fundamental notions of separation of powers would be undermined. As the Eighth Circuit stated, it is fundamentally "within the province of the policymaking branches of government to determine that certain disparities are warranted, and thus need not be avoided."[159] This is not to say that sentencing courts should not be allowed to make their own determinations about the necessary level of sentence to be imposed. Rather, sentencing courts are permitted—indeed, required—to enter into case-by-case inquiries as to whether or not a particular defendant's sentence is greater than necessary.[160] As the Supreme Court noted in *Kimbrough*, the district court has "discrete institutional strengths" that place it in the best position to consider the particularities of each individual case.[161]

What the district courts are *not* in the best position to do, however, is to question the policy choices made by Congress.[162] Nor is such a usurpation authorized in *Kimbrough*, because, as the Fifth, Ninth, and Eleventh Circuits realized, that case dealt with a sentencing court's disagreement with a policy set forth by the Commission, and not a congressional policy.[163] Courts have the proper resources and correct disposition to view each case on its individual merits and make determinations based on the facts and circumstances of each individual's situation. However, when a court considers the fast-track disparity, it is deviating from its role as adjudicator of the individual case and making a more generalized and much broader determination that the existence of fast-track

159. United States v. Sebastian, 436 F.3d 913, 916 (8th Cir. 2006).

160. *See* 18 U.S.C. § 3553(a) (2006) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the statute].").

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

162. *See* United States v. Andújar-Arias, 507 F.3d 734, 742 (1st Cir. 2007) (stating that, as a court, it was not in a position to second-guess determinations made by Congress), *abrogated by* United States v. Rodríguez, 527 F.3d 221 (1st Cir. 2008).

163. *See, e.g.*, United States v. Gomez-Herrera, 523 F.3d 554, 563 (5th Cir. 2008) ("*Kimbrough* addressed only a district court's discretion to vary from the Guidelines based on a disagreement with *Guideline*, not Congressional, policy."); Gorman, *supra* note 150, at 503.

programs in other jurisdictions makes the sentences of *all* illegal reentry defendants in non-fast-track jurisdictions greater than necessary. Although courts are authorized under § 3553 to consider the existence of unwarranted disparities in deciding whether a specific defendant's sentence is greater than necessary in each particular case,[164] the sentencing court should not be permitted to broaden its holding beyond the individual case.

If the circuits deem the fast-track disparity unwarranted, and allow its consideration during sentencing, there are two possible resulting scenarios. A circuit could either (1) require that fast-track disparities be considered in each illegal reentry case tried in a non-fast-track jurisdiction or (2) permit, but not require, that fast-track disparities be considered. Every circuit that has adopted one of these two approaches after *Kimbrough* has carefully explained that the second, seemingly less extreme, option is being selected.[165] The problem, though, is that the results are equally harmful in either scenario.

The first option would effectively mandate a downward departure in every illegal reentry case, in every non-fast-track jurisdiction. By requiring sentencing courts to account for the fast-track disparity, the circuit court would essentially reduce the inquiry under § 3553 to a single factor, despite the fact that, as the First Circuit said of *Kimbrough*, courts should engage in a "more holistic inquiry" and consider the "entire constellation of section 3553(a) factors."[166] By requiring consideration of the fast-track disparity, the circuit court is signaling to the lower courts that the sixth factor—avoiding unwarranted disparities—is paramount over the other factors that a sentencing court may or may not consider in each case, and is indicating that any sentences that do not account for the fast-track disparity will be held unreasonable on appeal. The likely result in most, if not every, illegal reentry case would thus be a downward departure reducing the defendant's sentence to what it would have been in a fast-track jurisdiction. It is understandable, then, that no circuit to consider the issue has adopted this first option.

What is surprising, though, is that some circuits have adopted the second approach, which arguably has more negative implications than does compulsory consideration of the fast-track disparity. First, it seems likely that if more circuits allow

164. § 3553(a).

165. *See* United States v. Arrelucea-Zamudio, 581 F.3d 142, 149 (3d Cir. 2009) (holding that a sentencing court "has the discretion to consider" the fast-track disparity, but not requiring such a consideration); United States v. Rodríguez, 527 F.3d 221, 231 (1st Cir. 2008) (noting that its holding was "carefully circumscribed [and that] although sentencing courts can consider items such as fast-track disparity, they are not obligated to deviate from the guidelines based on those items"); *cf.* Gorman, *supra* note 150, at 499–508.

166. *Rodríguez*, 527 F.3d at 228.

consideration of the fast-track disparity, the result would actually be the creation of a greater disparity on the local level. This disparity would arise because inevitably not all judges would accept the fast-track argument. Some judges would consider it as a factor and decide to mitigate the difference based on their instinctual notions of equity, like the district court judge did in *Gonzalez-Zotelo*.[167] Other judges either would not consider the disparity or would find it unpersuasive and choose not to mitigate the difference.[168] As one author noted, this would result in a situation in which "the length of a sentence for an illegal reentry offender depends on what judge he or she is assigned, and whether or not that judge recognizes a fast-track disparity."[169] Unless the circuit, or the Supreme Court, affirmatively prohibits or requires district courts to consider the fast-track disparity, this would remain the case.

Another negative implication of allowing consideration of the fast-track disparity in non-fast-track jurisdictions is that the programs that have been enacted would be undermined and likely would become less effective. If district courts in non-fast-track jurisdictions are permitted to consider the fact that defendants in other jurisdictions could have obtained a lesser sentence through an early-disposition program, the logical extension is for defendants in jurisdictions that *do* have early-disposition programs to make the same argument. Thus, defendants in fast-track jurisdictions who have either declined to participate in the program or were not permitted to participate would be able to argue for a sentence reduction based on the disparity created by other defendants in the same jurisdictions who had made the choice to participate in the program.[170] Indeed defendants have done just that, and the Ninth Circuit case, *Gonzalez-Zotelo*, provides a good example of this situation.[171] The judge in that case was persuaded by the fact that the defendant, whom the prosecutor did not allow to participate in the district's early-disposition program, was similarly situated to

167. United States v. Gonzalez-Zotelo 556 F.3d 736, 738 (9th Cir. 2009).

168. *See, e.g.*, *Gomez-Herrera*, 523 F.3d at 557 (noting that the district court judge considered the defendant's argument for a downward departure based on the fast-track disparity but decided to sentence the defendant within the Guidelines range anyway).

169. Evan W. Bolla, Note, *An Unwarranted Disparity: Granting Fast-Track Departures in Non-Fast-Track Districts*, 28 CARDOZO L. REV. 895, 921–22. Bolla's note also cites one judge from the Southern District of New York who referred to this situation as the "wheel-of-fortune effect." *Id.* at 921 (citing United States v. Duran, 399 F. Supp. 543, 545–46 (S.D.N.Y. 2005)).

170. *See Gomez-Herrera*, 523 F.3d at 561 (discussing an argument made by a defendant in a fast-track district in another case who declined to participate in the program at the outset but then later argued that his sentence should be reduced to compensate for the reduced sentence that would have been granted if he had participated in the program (citing United States v. Zapata-Parra, No. 06-2349, 2008 WL 193210, at *1 (10th Cir. Jan. 23, 2008)).

171. *See Gonzalez-Zotelo*, 556 F.3d at 737–39.

defendants who had committed the same crime and participated in the fast-track program.[172] The defendant, in fact, had not raised the issue himself, but the judge reasoned that the defendant in *Gonzalez-Zotelo* was similarly situated to defendants sentenced earlier the same day via the fast-track program (who had been given much lighter sentences).[173] This is essentially the same argument made for mitigation of the fast-track disparity by defendants in non-fast-track jurisdictions.

If these types of arguments are successful, the result will be to completely undermine the fast-track programs in existence, since there will be no incentive for defendants to participate if, instead of taking a plea bargain, they can fully litigate their case and ultimately get the same reduced sentence by making the fast-track disparity argument. The goal of implementing fast-track programs was to allow districts overwhelmed by immigration cases to allocate their judicial resources more efficiently by streamlining the process of convicting certain immigration law violators.[174] Fast-track programs have been very successful in achieving this goal.[175] However, if there is no incentive for defendants to participate in the program and plead guilty at the outset, the success of the programs will disappear.

Furthermore, as long as arguments for downward departures based on the fast-track disparity can be made, they will be made. Until a circuit or the Supreme Court makes it clear that the fast-track disparity is warranted, and thus an inappropriate factor for consideration during sentencing, a great deal of needless litigation will surround the issue. This is not a matter that requires an individualized approach, as there is nothing that makes the fast-track disparity any more prejudicial to one defendant in a non-fast-track jurisdiction than it is to any other defendant in a jurisdiction without such a program. Thus, this is a matter that is best solved by a general and firm rule, not an individualized approach.

Interestingly, the First Circuit contended, in its pre-*Kimbrough* case confronting the issue, that a circuit announcing that district courts *could* consider the fast-track disparity, would find that when taken to its "logical conclusion" the reasoning behind such an allowance would effectively compel sentencing judges to consider the disparity.[176] While that allegation by the First Circuit may or may

172. *Id.* at 738.

173. *Id.*

174. *See* Memorandum from John Ashcroft to All United States Attorneys, s*upra* note 17.

175. *See* Bolla, *supra* note 169, at 914–15 (describing the success of fast-track programs by comparing the pre-fast-track "rate of prosecution" to the post-fast-track "rate of prosecution").

176. United States v. Andújar-Arias, 507 F.3d 734, 738 (1st Cir. 2007), *abrogated by* United States v. Rodriguez, 527 F.3d 221 (1st Cir. 2008).

not be accurate, and the First Circuit has since changed its mind,[177] the many other harmful policy implications of permitting sentencing judges to consider the fast-track disparity are reason enough for circuits to make it clear that sentencing courts should not consider the fast-track disparity when determining the appropriate sentence for a defendant.

CONCLUSION

Based on Congress's recognition of the fast-track disparity in the PROTECT Act and the context in which the authorization of early-disposition programs arose—as a narrow exception to Congress's larger goal of limiting the number of downward departures—the Fifth, Ninth, and Eleventh Circuits have gotten it right. The approach taken by the First and Third Circuits is not only based on a mistaken interpretation of *Kimbrough*, but also has harmful implications for sentencing nationwide. This circuit split should be remedied, and there are two main ways in which this could occur. First, the Supreme Court could grant certiorari to a case to clarify that the fast-track disparity is not "unwarranted," and thus is not a factor permissible for the district courts to consider during sentencing. The second, and ideal, option would be for Congress to simply amend the statutory language of the PROTECT Act and make it even clearer that the effect of fast-track programs should not enter into the sentencing calculus in non-fast-track jurisdictions. One of these institutions should take it upon itself to clarify the issue so that all district courts in non-fast-track jurisdictions can provide a consistent answer when the issue is raised.

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177. *See Rodriguez*, 527 F.3d at 222, 229.

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