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Policy Disagreements with the United States Sentencing Guidelines: A Welcome Expansion of Judicial Discretion or the Beginning of the End of the Sentencing Guidelines?

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I. INTRODUCTION

Article III of the Constitution confers upon federal judges the duty to decide cases and controversies.[1] The "case or controversy" requirement distinguishes the judiciary from the legislative and executive branches of government, which make and enforce laws of general application for the benefit of the entire Republic. As Alexander Hamilton declared in Federalist No. 78, the judiciary "may truly be said to have neither FORCE nor WILL, but merely

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1. U.S. Const. art. III, § 2, cl. 1.

judgment."[2] For that reason, Hamilton argued that the judiciary would be the "least dangerous" branch of the federal government.[3] Hamilton's argument depended, of course, on the caveat that "[t]he courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."[4]

The duty to make individualized judgments is a categorical imperative when it comes to criminal sentencing. Sentences must be imposed based on the facts and circumstances of each case, rather than to "make a statement" about crime and punishment generally.[5] Congress codified such an approach by requiring judges to consider "the nature and circumstances of the offense and the history and characteristics of the defendant,"[6] as well as the time-honored concepts of retribution, deterrence, incapacitation, and rehabilitation.[7] Courts also must evaluate "the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the [United States Sentencing] [G]uidelines" ("Sentencing Guidelines" or "Guidelines"),[8] and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[9]

To insist that each sentence must be determined on an individualized basis is not to deny that patterns develop and some cases resemble one another in significant ways. Indeed, these patterns and categories generally are well described in the Sentencing Guidelines.[10] But as much as the Guidelines serve as a valid starting point and useful frame of reference, they do not have all the answers. For that reason, most district judges are pleased that

2. THE FEDERALIST NO. 78, at 496 (Alexander Hamilton) (Robert Scigliano ed., 2000).
3. *Id.*
4. *Id.* at 500.
5. *See, e.g.*, Koon v. United States, 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."), *superseded by statute*, Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(d)(2), 117 Stat. 650, 670.
6. 18 U.S.C. § 3553(a)(1) (2010).
7. *Id.* § 3553(a)(2).
8. *Id.* § 3553(a)(4).
9. *Id.* § 3553(a)(6).
10. *See Rita v. United States*, 551 U.S. 338, 350 (2007) ("[I]t is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.").

United States v. Booker[11]—which rendered the Sentencing Guidelines advisory after holding their mandatory nature violative of the Sixth Amendment[12]—restored much of the discretion judges had lost during the era of mandatory guidelines.

In the wake of *Booker*, federal district courts have wrestled with the scope of their discretion to vary from the applicable advisory Guidelines ranges.[13] Many of the initial difficulties related to the 100–to–1 crack/powder ratio found in section 2D1.1(c) of the Guidelines.[14] For two years, sentencing judges expressed uncertainty regarding the extent of their power to vary from the crack/powder ratio, until the Court in *Kimbrough v. United States*[15] held that the "parsimony provision" of 18 U.S.C. § 3553(a) allowed judges to conclude that the 100–to–1 ratio was inappropriate in certain cases.[16] Once judges were unencumbered by the crack/powder disparity of the Guidelines, they struggled with what ratio to apply and when and how to apply a different ratio.[17] One term after *Kimbrough*, the Court made a significant clarification in *Spears v. United States*,[18] holding that judges were not only free to determine that the crack/powder disparity was unfair in individual cases, but that they were empowered to declare, *based on a policy disagreement*, that the disparity is unfair in all cases.[19] Not surprisingly, the decisions in *Kimbrough* and *Spears* have re-

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11. 543 U.S. 220 (2005).

12. *Booker*, 543 U.S. at 245.

13. *Compare* Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker: *A First Look*, 63 STAN. L. REV. 1, 34 (2010) ("For sentences not governed by a mandatory minimum, in the Pre-Booker period the rate of variance in sentence length explained by the identity of the judge was very small, just 1.4%, and the relationship was not statistically significant. After Booker, however, the rate more than doubled to 3.1% and the identity of the judge became a statistically significant predictor of sentence length.") *with* Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 346-47 & n.251 (2009) ("Instead of a revolution, Booker represents a modest rollback of the sentencing reforms of the past twenty years. The now-advisory Guidelines are still central to sentencing determinations and, indeed, most sentences remain within the advisory range.").

14. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2010).

15. 552 U.S. 85 (2007).

16. *Kimbrough*, 552 U.S. at 91.

17. *See, e.g.*, William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & Pol. 305, 327-31 (2011); Scott, *supra* note 13, at 1 ("Since Booker, Kimbrough, and Gall, the effect of the judge on sentence length has doubled in strength."); Michael B. Cassidy, *Examining Crack Cocaine Sentencing in a Post-*Kimbrough *World*, 42 AKRON L. REV. 105, 128-32 (2009).

18. 555 U.S. 261 (2009).

19. *Spears*, 555 U.S. at 265-66.

sulted in wide disparities in sentences for defendants accused of drug crimes involving crack cocaine.[20]

This article does not discuss the disparities occasioned by crack/powder ratios.[21] Instead, we address the broader question of whether *Kimbrough* and *Spears* mean that judges may disregard any Sentencing Guidelines with which they have a policy disagreement. The article focuses on three aspects of the Guidelines that have been the source of much debate in this regard: (1) the career offender Guideline (section 4B1.1), the policy statement regarding "fast-track" authorization (section 5K3.1), and the child pornography Guideline (section 2G2.2).[22] The article predicts that these disputes soon will be resolved by the Supreme Court. And the manner in which the Court resolves them may determine whether *Booker* heralded the death knell of the Sentencing Guidelines, even as an advisory matter.

II. BACKGROUND

The Supreme Court's landmark decision in *Booker* has been the subject of extensive commentary.[23] Accordingly, we offer only a brief synopsis of the relevant background.

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20. *See* Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 34 (2010) ("For cases not subject to a mandatory minimum, the trend is unmistakable. The distribution of average sentences among judges [in the District Court of Massachusetts, the only District Court with judge-specific data available,] has grown substantially wider since *Booker*: from a total spread of fifteen months before *Booker*, to almost thirty months after *Booker*, to almost forty months in the wake of *Kimbrough* and *Gall*."). *Compare* United States v. House, 551 F.3d 694, 701 (7th Cir. 2008) (upholding 188 month sentence—within the 188 to 235-month Guidelines range, based on an offense level of 36 and a criminal history category of I—for a defendant convicted of two counts of distribution of crack cocaine, including a two-level enhancement for obstruction of justice), *with* United States v. Whigham, 754 F. Supp. 2d 239, 244 (D. Mass. 2010) (imposing sixty month sentence—a downward departure from the 188 to 235-month Guidelines range, based on an offense level of 31 and a criminal history category of VI—for a defendant convicted of three counts of distribution of crack cocaine and sentenced as a career offender).

21. For examples of articles doing so, see Steven L. Chanenson, Booker *on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL'Y 551 (2006); Ryan S. King & Marc Mauer, *Sentencing with Discretion: Crack Cocaine Sentencing After* Booker, 18 FED. SENT'G REP. 134 (2005); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L REV. 1233 (1996); Maxwell Arlie Halpern Kosman, Note, *Falling Through the Crack: How Courts Have Struggled to Apply the Crack Amendment to "Nominal Career" and "Plea Bargain" Defendants*, 109 MICH. L. REV. 785 (2011).

22. U.S. SENTENCING GUIDELINES MANUAL §§ 2G2.2, 4B1.1, & 5K3.1 (2010).

23. *See, e.g.*, Robert J. Anello & Jodi Misher Peikin, *Evolving Roles in Federal Sentencing: The Post-*Booker/Fanfan *World*, 2005 FED. CTS. L. REV. 9 (2005); D. Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65 (2007); Craig Green, Booker *and* Fanfan*: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO.

Prior to the nineteenth century, criminal laws typically provided for fixed statutory sentences.[24] During the 1800s, those laws began to give way to statutes that allowed judges to exercise discretion within certain ranges.[25] As judges exercised this discretion, the Supreme Court ensured that sentences were imposed consistent with due process (*Townsend v. Burke*[26]) and the right to counsel (*Mempa v. Rhay*[27]), and were not based on impermissible considerations such as race, religion, or political affiliation (*Zant v. Stephens*[28]).

The appellate oversight exemplified by *Townsend*, *Mempa*, and *Zant* was quite limited. As long as nothing particularly unusual was said or done at the sentencing hearing, sentences within the statutory range were essentially immune from appellate review.[29] This system produced great variations in sentences depending upon geography, race, age, and type of criminal offense.[30] Sometimes these variations occurred even within one courthouse, depending upon which judge a defendant had the good fortune (or misfortune) of appearing before.[31] These variations were the impetus for more uniformity that resulted in the creation of the United States Sentencing Commission by the Sentencing Reform Act of 1984,[32] and the promulgation of the United States Sentencing Guidelines in 1987.[33] From 1987 until 2005, when the Supreme

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L.J. 395 (2005); Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155 (2005); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008).

24. *See* Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. CHI. L. REV. 715 (1942).

25. *See* Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (citations omitted).

26. 334 U.S. 736, 741 (1948).

27. 389 U.S. 128, 137 (1967).

28. 462 U.S. 862, 885 (1983).

29. *See, e.g.*, James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Inter-Judge Sentencing Disparity Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 275 (April, 1999) ("Prior to the promulgation of the Sentencing Guidelines a federal judge's sentencing discretion was enormous and virtually unreviewable.").

30. *See* S. REP. NO. 225, at 78 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235 (Reducing unwarranted sentencing disparities was "the major premise of the sentencing guidelines.").

31. *See, e.g.*, ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO JUDGES 1-3, 9 (1974); William Austin & Thomas A. Williams III, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. CRIM. L. & CRIMINOLOGY 306, 306-10 (1977) (Forty-seven district court judges reviewed five hypothetical cases and recommended widely disparate sentences.).

32. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1937 (codified as amended in 18 U.S.C. §§ 3551-3586 (2010) and 28 U.S.C. 991-998 (2010)).

33. U.S. SENTENCING GUIDELINES MANUAL, ch. 1, subpt. 1 (1987).

Court decided *Booker*, federal judges operated under a somewhat oxymoronic scheme of "mandatory guidelines."

As relevant to this article, the first case of interest in the wake of *Booker* was *Rita v. United States*.[34] Victor Rita was convicted of making two false statements to a grand jury and faced an advisory Guidelines range of thirty-three to forty-one months.[35] Citing his work as a government cooperator, his military service, and his poor health, Rita argued that he should be sentenced below the Guidelines range.[36] The United States District Court for the Western District of North Carolina disagreed, holding that the Guidelines were appropriate and imposing a bottom-of-the-Guidelines sentence of thirty-three months imprisonment.[37] On appeal, the Fourth Circuit rejected Rita's argument that his sentence was unreasonable.[38] In doing so, the Court applied a presumption of reasonableness for all within-Guidelines sentences.[39] At that time, the Courts of Appeals for the Fifth, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits applied a presumption of reasonableness to appeals challenging within-Guidelines sentences, while the Courts of Appeals for the First, Second, Third, and Eleventh Circuits did not apply such a presumption.[40] The Supreme Court resolved the circuit split by upholding the presumption of reasonableness applied by the Fourth Circuit to Rita's case, while stating that the courts of appeals that did not apply a presumption of reasonableness were not obliged to adopt it.[41]

Fewer than six months after *Rita*, the Supreme Court issued two significant sentencing opinions: *Gall v. United States*[42] and *Kimbrough v. United States*.[43] Brian Gall was a sophomore at the University of Iowa and a user of ecstasy, cocaine, and marijuana when he joined a conspiracy to distribute ecstasy.[44] Despite his

34. 551 U.S. 338 (2007).
35. *Rita*, 551 U.S. at 341, 343.
36. *Id.* at 345.
37. *Id.*
38. *Id.* at 346.
39. *Id.*
40. *Rita*, 551 U.S. at 346.
41. *Id.* at 355-56. The Court in *Rita* also held that: (i) the presumption of reasonableness does not violate the Sixth Amendment; (ii) the trial judge's very brief review of the § 3553(a) factors was sufficient; and (iii) the trial judge did not err in considering Rita's special circumstances. *Id.* at 355-360.
42. 552 U.S. 38 (2007).
43. 552 U.S. 85 (2007).
44. *Gall*, 552 U.S. at 41.

relatively brief participation in the conspiracy, Gall trafficked enough ecstasy to earn a profit of over $30,000.[45] Gall reformed himself, graduated from college, moved to Arizona, and eventually became a master carpenter.[46] Federal agents caught up with him in Arizona, and Gall readily admitted his involvement with the drug distribution ring.[47] More than three years after he withdrew from the conspiracy, Gall was indicted in Iowa and turned himself in.[48] After reaching a written plea agreement with the government, Gall's advisory Guidelines range was thirty to thirty-seven months imprisonment.[49] The government advocated for a within-Guidelines sentence, but the District Court for the Southern District of Iowa imposed no jail time and only probation of thirty-six months.[50] Citing the various facts demonstrating that Gall had turned his life around prior to indictment, Judge Pratt concluded that a sentence of incarceration was inappropriate.[51]

The Court of Appeals for the Eighth Circuit reversed, relying on its opinion in *United States v. Claiborne*,[52] which established that sentences outside the Guidelines range must be justified in a way that "is proportional to the extent of the difference between the advisory range and the sentence imposed."[53] Informing the decision of the Eighth Circuit was its view that Gall's probationary sentence, when compared to an advisory Guidelines range of thirty to thirty-seven months imprisonment, constituted "a 100% downward variance" that must be supported by "extraordinary circumstances."[54]

The Supreme Court reversed the judgment of the Eighth Circuit, holding that "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential, abuse-of-discretion standard."[55] The Court also affirmed Gall's sentence, holding that it was rea-

45. *Id.* at 67.
46. *Id.* at 41–42.
47. *Id.* at 42.
48. *Id.*
49. *Gall*, 552 U.S. at 43.
50. *Id.*
51. *Id.* at 44–45.
52. 439 F.3d 479 (8th Cir. 2006), *vacated*, 551 U.S. 87 (2007).
53. *Gall*, 552 U.S. at 45 (quoting *Claiborne*, 439 F.3d at 481, *vacated*, 551 U.S. 87).
54. *Id.*
55. *Id.* at 41.

sonable under the circumstances.[56] Reflecting the lack of consensus on the heels of *Booker*, four justices wrote separately.[57] In a nod to stare decisis, Justice Scalia concurred, acknowledging that *Rita* must be followed but reiterating his view that "substantive-reasonableness review is inherently flawed."[58] Justice Souter also concurred, opining that a new act of Congress would be the best way to resolve "the tension between substantial consistency throughout the system and the right of jury trial" that was highlighted in *Booker*.[59] In a one sentence dissent, Justice Thomas wrote that the district court "committed statutory error when it departed below the applicable Guidelines range,"[60] a position consistent with his dissenting view in *Kimbrough* that "Congress, by making the Guidelines mandatory, quite clearly intended to bind district courts to the Sentencing Commission's categorical policy judgments."[61] Finally, in a more expansive dissent, Justice Alito explained his view that the remedial decision in *Booker* requires district courts to give "at least some significant weight" to policy decisions in the Guidelines.[62] Disagreeing with the view expressed by Justices Stevens and Scalia—that *Booker* restored essentially unconstrained discretion to sentencing judges—Justice Alito explained that "[i]t is unrealistic to think [the Sentencing Reform Act's goal of reducing sentencing disparities] can be achieved over the long term if sentencing judges need only give lip service to the Guidelines."[63] The variety of opinions expressed by five justices in *Gall* presaged the differences of opinion in the courts of appeals in the wake of *Kimbrough*.

In *Kimbrough*, which was decided the same day as *Gall*, Derrick Kimbrough pleaded guilty to: (1) conspiracy to distribute crack and powder cocaine; (2) possession with intent to distribute more than fifty grams of crack cocaine; (3) possession with intent to distribute powder cocaine; and (4) possession of a firearm in furtherance of a drug-trafficking offense.[64] Kimbrough faced a statutory

56. *Id.*

57. *Id.* at 60 (Scalia, J. concurring). *Id.* (Souter, J., concurring). *Id.* at 61 (Thomas, J., dissenting). *Id.* (Alito J., dissenting). Justice Stevens wrote the majority opinion, joined by Justices Roberts, Kennedy, Ginsburg, and Breyer. *Gall*, 552 U.S. at 38 (majority opinion).

58. *Gall*, 552 U.S. at 60 (Scalia, J., concurring).

59. *Id.* at 61 (Souter, J., concurring).

60. *Id.* (Thomas, J., dissenting).

61. Kimbrough v. United States, 552 U.S. 85, 115 (2007) (Thomas, J., dissenting).

62. *Gall*, 552 U.S. at 61 (Alito, J., dissenting).

63. *Id.* at 63.

64. *Kimbrough*, 552 U.S. at 91.

sentencing range of ten years to life for his three drug offenses and an additional five years to life for his firearm crime.[65] As part of his guilty plea, Kimbrough admitted responsibility for fifty-six grams of crack cocaine and 92.1 grams of powder cocaine.[66] Under the Sentencing Guidelines, these drug quantities yielded a base offense level of thirty-two.[67] After other adjustments, including a mandatory sixty months for the gun crime, Kimbrough's final advisory Guidelines range was 228 to 270 months imprisonment.[68]

According to the district court, a within-Guidelines sentence would have violated the "parsimony provision," which requires courts to impose sentences "sufficient, but not greater than necessary" to accomplish the purposes set forth in 18 U.S.C. § 3553(a).[69] After considering the appropriate sentencing factors, the district court noted that had Kimbrough been responsible for an equivalent quantity of powder cocaine instead of crack cocaine, his advisory Guidelines range would have been only 97 to 106 months imprisonment.[70] Citing the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing," Judge Jackson sentenced Kimbrough to the statutory mandatory minimum of 180 months, a downward variance from his advisory Guidelines range, because it was "clearly long enough."[71]

The Court of Appeals for the Fourth Circuit vacated Kimbrough's sentence based on its prior holding that a sentence "outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses."[72]

The Supreme Court reversed, holding that a sentencing judge is free to vary categorically from the suggested Guidelines range based on a disagreement with the crack/powder disparity embodied in Guideline section 2D1.1.[73] However, the Court found "no occasion for elaborative discussion" of the nature of such disagreements, because the crack cocaine "Guidelines do not exemplify the Commission's exercise of its characteristic institutional role,"

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65. *Id.* at 91-92.
66. *Id.* at 92.
67. *Id.*
68. *Id.*
69. *Kimbrough*, 552 U.S. at 92–93.
70. *Id.* at 93.
71. *Id.*
72. *Id.* (quoting United States v. Kimbrough, 174 F. App'x 798, 799 (4th Cir. 2006) (per curiam), *rev'd*, 552 U.S. 558).
73. *Id.* at 109-10.

in that they were not based on empirical study or even the Commission's own policy convictions.[74]

Kimbrough thus authorized judges to put aside the crack cocaine Guidelines range based on their disagreement with it, but also left at least three questions unanswered. First, could district courts disregard the crack cocaine Guidelines range based on a general policy disagreement in *all* cases, or only based on a specific disagreement with its application to the particular case before them? Second, could district courts reject other Guidelines sections because of a policy disagreement? If so, which ones? Finally, are such policy-based rejections applicable only to those sections which do not reflect the Commission's "exercise of its characteristic role," or could district courts vary for policy reasons despite a Guideline's basis in empirical study? The first of those questions was answered affirmatively in *Spears*.[75] The courts of appeals have expressed divergent opinions regarding the second question, to which we turn now before addressing the third question.

III. APPLICATIONS OF *KIMBROUGH / SPEARS* TO OTHER GUIDELINES SECTIONS

Since *Kimbrough* and *Spears* were decided, criminal defendants have invited federal district judges to disagree with other Guidelines on policy grounds.[76] This Section reviews three of the most heavily litigated aspects of three Guidelines: career offender designations (section 4B1.1), fast-track jurisdictions for immigration-related crimes (section 5K3.1), and child pornography (section 2G2.2).

A. *UNITED STATES SENTENCING GUIDELINES § 4B1.1—Career Offenders*

After *Kimbrough*, one of the first Guidelines to receive judicial scrutiny was section 4B1.1, the career offender provision, which is used to determine a Guidelines range when a defendant has two or more prior felony convictions for crimes of violence or drug offenses.[77] Courts initially disagreed as to whether *Kimbrough* au-

74. *Kimbrough*, 552 U.S. at 109.
75. 555 U.S. 261, 265-66 (2009).
76. *See infra* notes 81, 89, 133, 170.
77. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a)(3) (2010).

thorized sentencing judges to reject the career offender provision on policy grounds.[78] Because the provision indirectly incorporates the 100–to–1 crack/powder ratio, which the Supreme Court had already determined was a valid basis to reject a Guidelines section, the question courts faced was not simply *what* constitutes a valid policy disagreement, but rather *with what*, or *with whom* could a valid policy disagreement form the basis of a variance? Whose policy choices were embodied in the career offender provision, Congress's or the Sentencing Commission's? And, with whose policy choices were sentencing judges entitled to disagree?

If a defendant has two or more prior felony convictions for crimes of violence or drug offenses, section 4B1.1 increases his criminal history to the highest category (VI), and usually assigns a higher offense level based on the statutory maximum applicable for the defendant's crime of conviction.[79] Because the higher offense levels are based on the statutory maximum sentences, which are, in turn, based upon the crack/powder distinction, section 4B1.1 incorporates the crack/powder distinction. The Sentencing Commission promulgated the career offender Guideline pursuant to the congressional directive in the Sentencing Reform Act of 1984, which stated that the "Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for repeat offenders of certain offenses.[80] Against this backdrop, courts were asked to decide whether the authority described in *Kimbrough* to reject the crack/powder disparity in the drug table of section 2D1.1 of the Guidelines extended to the career offender provision of section 4B1.1.

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78. *See infra* notes 81, 89.

79. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(b).

80. 28 U.S.C. § 994(h) (2010). *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (2010). 28 U.S.C. § 994(h) applies only to crimes of violence and particular sections of the Controlled Substances Act, 21 U.S.C. § 841 (2010) and the Controlled Substances Import and Export Act, 21 U.S.C. §§ 952(a), 955, and 959 (2010). § 994(h). Section 4B1.1 applies to those offenses, but also sweeps in other offenses, because the Guidelines define "controlled substance offense" more broadly, as:

> [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(b). *See* United States v. Knox, 573 F.3d 441, 449-50 (7th Cir. 2009) (distinguishing between those offenses included in section 4B1.1 pursuant to 28 U.S.C. § 994(h) and those included only by the language of section 4B1.1).

The First, Fourth, Seventh, and Eleventh Circuit Courts of Appeals initially held that sentencing judges had no authority to reject section 4B1.1.[81] They reasoned that, while *Kimbrough* granted sentencing judges the authority to reject a Guideline based on the crack/powder disparity, it did not grant them the authority to reject congressional enactments.[82] Because judges could not contravene the legislative will expressed in the mandatory maximum sentences from which section 4B1.1 derived the applicable offense levels, judges likewise could not contravene the offense levels.[83] Stated differently, those courts found that the increased Guidelines range resulting from section 4B1.1 was not based on the potentially objectionable policy underlying the Sentencing Commission's use of a 100–to–1 ratio, but rather was based on statutory maxima by which Congress expressed its policy choices.[84]

Some courts holding that sentencing judges could not reject the career offender Guideline also relied on 28 U.S.C. § 994(h)[85] as the

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81. United States v. Vazquez (*Vazquez II*), 558 F.3d 1224, 1227 (11th Cir. 2009), *vacated,* 130 S. Ct. 1135 (2010) (mem.) (citation omitted); United States v. McCorkle, 291 F. App'x 545, 545 n.1 (4th Cir. 2008) ("We find that *Kimbrough* is of no assistance to McCorkle because his ultimate guideline range was not determined based on drug quantity but on his status as a career offender."); United States v. Grissom, 290 F. App'x 258, 260 (11th Cir. 2008) ("[Grissom's] offense level was based on his status as a career offender, which . . . does not distinguish between crack and powder cocaine. Thus, the range suggested by the Guidelines—and adopted by the district court—was not the result of the disparity discussed in *Kimbrough.*"); United States v. Harris, 536 F.3d 798, 812-13 (7th Cir. 2008), *overruled by* United States v. Corner, 598 F.3d 411 (7th Cir. 2010); United States v. Jimenez, 512 F.3d 1, 8-9 (1st Cir. 2007) ("[T]he crack/powder dichotomy is irrelevant to the career offender sentence actually imposed in this case").

82. *See, e.g., Vazquez II*, 558 F.3d at 1227 (citing United States v. Williams, 456 F.3d 1353, 1370 (11th Cir. 2006)) ("[B]y disregarding Section 4B1.1, the district court impermissibly 'ignored Congress's policy of targeting recidivist drug offenders for more severe punishment.'").

83. *Vazquez II*, 558 F.3d at 1227.

84. *See Harris*, 536 F.3d at 812-13.

85. 28 U.S.C. § 994(h) (2010) provides that:

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—
>
> (1) has been convicted of a felony that is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and
>
> (2) has previously been convicted of two or more prior felonies, each of which is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

legislative embodiment of an additional policy choice: namely, that career offenders should be sentenced near the maximum penalty permitted by law.[86] At least one court noted that section 4B1.1 actually included more offenses than required by § 994(h), and reasoned that those extra offenses, which were the product of the Commission's own judgment, could give rise to variances, while the others, which were included at the express direction of Congress, presumably could not.[87] Another court opined that *Kimbrough* itself impliedly supported disallowing rejection of the career offender Guideline, because "the Supreme Court in *Kimbrough* cited section 994(h) as an example of an instance where Congress has expressly incorporated a sentencing policy into the Guidelines."[88]

Meanwhile, some courts of appeals, including some of those that had initially held otherwise, held that *Kimbrough* authorized judges to reject section 4B1.1 based on a policy disagreement.[89] These courts typically reasoned that while sentencing judges are bound by statutory maxima and minima, *Kimbrough* permits them to reject the Guidelines based on a policy disagreement, regardless of whether the Guidelines range embodies a legislative policy choice.[90] Some courts opined that because 28 U.S.C. § 994(h) was directed at the Sentencing Commission rather than at the courts, it did not require specific sentences—it merely mandated the Guidelines range, which the sentencing court was then

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28 U.S.C. § 994(h) (2010).

86. United States v. Welton, 583 F.3d 494, 498-499 (7th Cir. 2009) (mem.) (citations omitted) (noting that § 994(h) "reflects a Congressional policy with which a sentencing court may not disagree"), *vacated*, 130 S. Ct. 2061 (2010), *overruled by Corner*, 598 F.3d 411; *Vazquez II*, 558 F.3d at 1227 (citing United States v. Williams, 456 F.3d 1353, 1370 (2006) (holding pre-*Kimbrough* that a sentencing judge erred by basing a sentence in part on a disagreement with section 4B1.1, because doing so "ignored Congress's policy of targeting recidivist drug offenders for more severe punishment")).

87. United States v. Knox, 573 F.3d 441, 449-50 (7th Cir. 2009) (citations omitted) (distinguishing between those offenses included in Guidelines section 4B1.1 at the discretion of the Sentencing Commission, which the sentencing judge could reject after *Kimbrough*, and those offenses specifically included because they are listed in § 994(h), which a sentencing judge impliedly could not reject).

88. *Welton*, 583 U.S. at 496, 498-99 (citing Kimbrough v. United States, 552 U.S. 85, 103 (2007) ("Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders "at or near" the statutory maximum.")).

89. United States v. Bradley, 409 F. App'x 308, 310 (11th Cir. 2011) (recognizing abrogation of *Vazquez II* and *Williams*); United States v. Gray, 577 F.3d 947, 950 (8th Cir. 2009); United States v. Michael, 576 F.3d 323, 327-28 (6th Cir. 2009) (citations omitted); United States v. Boardman, 528 F.3d 86, 87 (1st Cir. 2008) (citation omitted).

90. *See supra* note 89.

free to reject for policy reasons.[91] Eventually, and particularly after the Supreme Court's decision in *Spears*, this position prevailed and the view that sentencing judges could not reject section 4B1.1 on policy grounds fell out of favor.[92]

The case of Carlos Vazquez illustrates the convoluted trajectory of the career offender Guideline. Vazquez was arrested for trying to purchase three kilograms of cocaine from a confidential informant, and eventually pleaded guilty in the United States District Court for the Middle District of Florida to one count of conspiracy to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii), and 846.[93] At the sentencing hearing conducted before *Kimbrough* was decided, Judge Presnell determined that, but for the application of section 4B1.1, Vazquez's Guidelines offense level would have been twenty-six (based on the quantity of cocaine involved and his acceptance of responsibility) and his criminal history category would have been V (based on three previous felony convictions), yielding an advisory Guidelines range of 110 to 137 months.[94] After the career offender Guideline of section 4B1.1 was applied, however, Vazquez's offense level increased to thirty-two and his criminal history category rose to VI, yielding an advisory sentencing range of 210 to 262 months.[95]

In addition to considering the specifics of Vazquez's case, Judge Presnell noted his general dissatisfaction with the career offender provision.[96] He stated that it "created 'a quantum leap in the guideline calculation,' in which the Sentencing Commission 'attempt[ed] to come up with a definition that applie[d] to all people in all circumstances, without regard to the actual offenses or the nature of the offense or the timing of the offense.'"[97] The judge opined that "the guidelines simply cannot operate realistically on

91. United States v. Liddell, 543 F.3d 877, 883-84 (7th Cir. 2008) ("[S]ection 994(h) only addresses what the Sentencing Commission must do; it doesn't require *sentencing courts* to impose sentences "at or near" the statutory maximums."); United States v. Sanchez, 517 F.3d 651, 663 (2d Cir. 2008) ("Section 994(h), however, by its terms, is a direction to the Sentencing Commission, not to the courts, and it finds no express analog in Title 18 or Title 21.").

92. *See* United States v. Merced, 603 F.3d 203, 218 (3d Cir. 2010) (noting that "[t]his reasoning seems to be falling out of favor").

93. *See* United States v. Vazquez (*Vazquez I*), 240 F. App'x 318, 319 (11th Cir. 2007).

94. *See* United States v. Vazquez (*Vazquez III*), No. 6:04-cr-212-Orl-31DAB, 2011 WL 2565526, at *1 (M.D. Fla. June 28, 2011).

95. *See Vazquez III*, 2011 WL 2565526, at *1.

96. *See Vazquez I*, 240 F. App'x at 320.

97. *Id.*

the human level," and they could lead one "astray in situations where you have these quantum-type leaps."[98] Recognizing that "the guidelines, of course, are important and entitled to deference," he also noted that he had "a statutory obligation to consider the factors in [18 U.S.C. § 3553(a)]."[99] Pursuant to that statute, Vazquez was sentenced to 110 months imprisonment, a sentence below the Guidelines range for a career offender but within the range that would have applied but for the section 4B1.1 enhancement.[100]

The government appealed the sentence, arguing that it was procedurally unreasonable because a sentencing judge's own disagreement with the career offender provision was not a permissible basis for varying downward from the Guidelines range.[101] The Court of Appeals for the Eleventh Circuit agreed, holding that the "court's disagreement with the effect of the career-offender provision in this case imbued the entire sentencing hearing, and . . . the court's disagreement with the Guidelines [was] an impermissible factor [in the] sentencing calculus."[102] The court of appeals, following its pre-*Kimbrough* precedent in *United States v. Williams*, reasoned that "[s]ection 4B1.1 embodies Congressional policy, reflected in 28 U.S.C. § 994(h), 'that repeat drug offenders receive sentences "at or near" the enhanced statutory maximums set out in [21 U.S.C.] § 841(b).'"[103]

Before Vazquez could be re-sentenced, the Supreme Court decided *Kimbrough*. On remand, Judge Presnell recognized that *Kimbrough* had, in part, overruled *Williams*, which was the basis for the Eleventh Circuit's decision.[104] Although *Williams* had prohibited consideration of policy disagreements with both the crack/powder disparity *and* the career offender provision, Judge Presnell reasoned that only the former had been overruled by *Kimbrough*, because *Kimbrough* was based on the fact that the 100–to–1 ratio did not explicitly embody a legislative policy.[105] Therefore, having concluded that the "career-offender enhance-

98. *Id.*
99. *Id.* (alteration in original).
100. *Id.* at 321.
101. *Vazquez I*, 240 F. App'x at 319.
102. *Id.* at 323 (citing United States v. Williams, 456 F.3d 1353, 1360 (2006).
103. *Id.* (alteration in original) (quoting *Williams*, 456 F.3d 1369; U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. Background (2010)).
104. *Vazquez III*, No. 6:04-cr-212-Orl-31DAB, 2011 WL 2565526, at *2 (M.D. Fla. June 28, 2011) (citation omitted).
105. *See Vazquez III*, 2011 WL 2565526, at *2.

ment was likely still immune from policy-based criticism under *Williams*, [Judge Presnell] increased Vazquez's sentence from 110 months to 180 months [still a downward departure from the advisory sentencing range of 210 to 262 months, given on other grounds,] expressly set[ting] aside [his] policy-based concerns about [section] 4B1.1."[106]

This time *Vazquez* appealed, arguing that *Kimbrough* should extend to policy disagreements with the career offender provision.[107] Once again relying on *Williams*, the Court of Appeals affirmed the 180–month sentence.[108] The Court of Appeals found that *Kimbrough* not only failed to overrule *Williams*, it actually supported the notion that the career offender Guideline could not be rejected on policy grounds.[109] It did so by distinguishing between the crack cocaine Guidelines at issue in *Kimbrough* and the career offender Guideline.[110] The court reasoned that, although the crack/powder disparity was based originally on congressionally-created mandatory sentences, "Congress did *not* direct the Sentencing Commission [explicitly] to create [the crack/powder] disparity"—[unlike] the Guideline's punishment of career offenders—which was explicitly directed by Congress [in 28 U.S.C. § 994(h)]."[111]

When Vazquez petitioned the Supreme Court for a writ of certiorari, then-Solicitor General Elena Kagan reversed course in light of *Kimbrough* and argued, contrary to the Eleventh Circuit's decision, that "*Kimbrough*'s reference to Section 994(h) as an example of Congress directing 'the Sentencing Commission' to adopt a Guideline reflecting a particular policy, did not suggest that Congress had bound sentencing courts through Section 994."[112] The Solicitor General contended that *Booker* and *Kimbrough* had rendered all of the Guidelines open to a sentencing judge's disagreement on policy grounds, subject to reasonableness review on appeal.[113] The Supreme Court vacated the judgment and remanded for further consideration in light of the Solicitor General's posi-

106. *Id.*
107. *Vazquez II*, 558 F.3d 1224, 1227 (11th Cir. 2009), *vacated,* 130 S. Ct. 1135 (2010) (mem.).
108. *Vazquez II*, 553 F.3d at 1228.
109. *Id.*
110. *Id.*
111. *Id.*
112. Brief for the United States at 9, Vazquez v. United States, 130 S. Ct. 1135 (2010) (No. 09-5370), 2009 WL 5423020, at *9 (citation omitted).
113. *Id.* at *10 (citation omitted).

tion.[114] On remand for the second time, Judge Presnell found that his initial rejection of the career offender provision had been reasonable and resentenced Vazquez, imposing a 90-month sentence (a twenty-month reduction from the 110-month sentence he had initially imposed, to account for Vazquez's post-sentencing rehabilitation).[115]

As the trajectory of the *Vazquez* cases indicates, the effect of *Kimbrough* on the career offender Guideline posed significant confusion for the courts. But how the courts treated the career offender Guideline also provides insight into the general effects of *Kimbrough*, particularly with respect to legislative policy choices and control of the Guidelines. First, it demonstrates that for congressional directives and policy choices to bind sentencing courts, they must be directed explicitly at the courts, presumably in terms of mandatory sentences. Otherwise, congressional directives aimed at the Sentencing Commission, which become embodied in the Guidelines, can be rejected by sentencing judges with policy disagreements. This is in keeping with the second principle which can be derived from *Kimbrough*; namely, that legislative involvement with the formulation of the Guidelines may subject them to challenge. Most courts considering policy rejections of section 4B1.1 had no occasion to inquire whether that section had been promulgated by the Sentencing Commission in an "exercise of its characteristic institutional role,"[116] because they typically deemed the critique of the crack/powder disparity to be a policy disagreement that had received the Supreme Court's imprimatur. The initial confusion about this issue is reflected in the fact that one court actually found, in a now-vacated decision, that Congress's explicit control of the Guidelines through 28 U.S.C. § 994(h) indicated that the Commission *was* exercising that role.[117] The consensus among the courts of appeals now seems to be that close congressional control, short of the imposition of mandatory sentences, may weigh against a finding that the Commission exer-

114. *Vazquez II*, 130 S. Ct. 1135, 1135 (2010).

115. *Vazquez III*, No. 6:04-cr-212-Orl-31DAB, 2011 WL 2565526, at *6 (M.D. Fla. June 28, 2011) (citation omitted).

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

117. United States v. Funk, 534 F.3d 522, 528 (6th Cir. 2008), *vacated on grant of reh'g en banc*, No. 05-3708 (Dec. 18, 2008) ("[T]he career offender guideline in this case (§ 4B1.1) is exactly the type of guideline issue that 'exemplifies] the Commission's exercise of its characteristic institutional role.' In fact, this provision is the direct result of Congress's directive.").

cised its characteristic role, and actually pave the way for a policy-based rejection of the Guideline at issue.[118]

B. UNITED STATES SENTENCING GUIDELINE § 5K3.1—"Fast-Track"

Early disposition programs—colloquially known as "fast-track" jurisdictions—originated in the mid-1990s by United States Attorneys in districts in California and the southwestern United States.[119] In an effort to manage burgeoning caseloads, United States Attorneys facilitated reduced sentences for some defendants accused of immigration-related crimes.[120] These sentences were achieved by selectively charging lesser offenses ("charge bargaining"), recommending shorter sentences, or agreeing to lower Guidelines offense levels in exchange for timely plea agreements waiving various rights, such as indictment by a grand jury, trial by jury, preparation of a presentence investigation report, and the right to appeal the sentence.[121] Such programs proliferated and now exist in many districts across the country.[122]

Congress provided for these fast-track programs in § 401(m)(2)(B) of the 2003 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act ("PROTECT Act"), which instructed the Commission to issue a policy statement authorizing a downward departure "pursuant to an early disposition program authorized by the Attorney General."[123] Although § 401(m)(2)(B) created a mechanism for a downward departure, the PROTECT Act, passed before *Booker* was decided, generally sought to "ensure that the incidence of downward departures are substantially reduced."[124]

After the PROTECT Act became law, Attorney General John Ashcroft issued a memorandum ("Ashcroft Memorandum") to fed-

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118. *See infra* note 143.

119. United States v. Arrelucea-Zamudio, 581 F.3d 142, 145 (3d Cir. 2009); United States v. Mejia, 461 F.3d 158, 160 (2d Cir. 2006).

120. *Mejia*, 461 F.3d at 160.

121. *Id.*

122. As of March 31, 2009, the Attorney General had authorized early disposition programs in seventeen districts around the country. *See* Memorandum from David W. Ogden, Deputy Att'y. Gen. of the U.S., U.S. Dep't of Justice, to U.S. Att'ys on Authorization for Early Disposition Programs (Mar. 31, 2009), *reprinted in* 21 FED. SENT. R. 4, 18 (2009), *available at* http://www.fd.org/pdf_lib/ogden%20memo--ft%20authorization--5.29.09.pdf.

123. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 675 (codified in scattered sections of 18, 28, and 42 U.S.C.).

124. *Id.* § 401(m)(2)(A).

eral prosecutors regarding fast-track programs.[125] The Ashcroft Memorandum established requirements that districts must meet to qualify for early disposition programs—typically districts with a heavy caseload in a particular area.[126] It also specified what rights qualifying defendants must waive and what benefits the prosecutors could confer in return, including either a four-level departure or a lesser charge.[127] Although the Ashcroft Memorandum was not limited to the immigration context, "[m]ost fast-track programs have been authorized for 'illegal reentry after deportation,' and all other crimes that are allowed to receive fast-track disposition are immigration-related."[128]

Subsequent to the issuance of the Ashcroft Memorandum, the Sentencing Commission proposed a new policy statement, section 5K3.1, "Early Disposition Programs (Policy Statement)," effective on October 27, 2003, which provides that: "[u]pon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides."[129] At the same time, the Commission filed a report with Congress, warning of possible sentencing disparities created by section 5K3.1:

> Defendants sentenced in districts without authorized early disposition programs, however, can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted sentencing disparity among similarly-situated offenders. Furthermore, sentencing courts in districts without early disposition programs, particularly those in districts that adjoin districts with such programs, may feel pressured to employ other measures—downward de-

125. Memorandum from John Ashcroft, Att'y Gen. of the U.S., Dep't of Justice, to U.S. Att'ys on Justice Dep't's "Fast-Track" Policies (Sept. 22, 2003), *reprinted in* 16 FED. SENT. R. 134 (2003).

126. *Id.* at 134.

127. *Id.* at 135.

128. United States v. Lua-Guizar, 656 F.3d 563, 568 (2011) (citing Memorandum from David W. Ogden, Deputy Atty. Gen., U.S. Dep't of Justice, to U.S. Attorneys on Authorization for Early Disposition Programs (May 29, 2009), *reprinted in* 21 FED. SENT. REP. 318, 337-38 (2009)).

129. U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2003).

partures in particular—to reach similar sentencing outcomes for similarly situated defendants.[130]

As foreshadowed by the Sentencing Commission, defendants in districts without fast-track programs began to argue that the existence of those programs elsewhere created unwarranted sentencing disparities, which entitled them to downward variances because sentencing judges must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[131] Courts also have noted that the geographic distribution of fast-track districts does not appear to reflect the realities of heavy immigration caseloads, as Congress seemed to have assumed would be the case.[132]

As with the career offender Guideline, the courts of appeals have disagreed as to whether district judges may reject an advisory Guidelines sentencing range based on policy disagreements with the fast-track provision.[133] Three important facts about the nature of the fast-track provision warrant particular mention. First, like the career offender Guideline, the fast-track policy statement was promulgated following a congressional directive to the Commission;[134] unlike the career offender section, however, it is a *policy statement*, not a Guideline, so it does not factor into the calculation of the advisory sentencing range, although it is part of

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130. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 66-67 (2003) (footnote omitted), *available at* http://web.archive.org/web/20031127082937/http://www.ussc.gov/departrpt03/departrpt03.pdf, *quoted in* United States v. Reyes-Hernandez, 624 F.3d 405, 410-11 (7th Cir. 2010). *See infra* note 133.

131. 18 U.S.C. § 3553(a)(6) (2010). *See infra* note 133.

132. United States v. Arrelucea-Zamudio, 581 F.3d 142, 154 (3d Cir. 2009) ("[T]he implementation of fast-track districts appears to be uneven . . . . For example, in the District of Nebraska, which is a fast-track district, immigration offenses comprised 11.77% of all sentences, while in the Northern District of Florida, which is a non-fast track district, immigration offenses comprised 20.94% of all sentences.") (citing U.S. SENTENCING COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 183, 216 (2007)).

133. *Compare* United States v. Gonzalez-Zotelo, 556 F.3d 736, 740 (9th Cir. 2009), United States v. Gomez-Herrera, 523 F.3d 554, 563 (5th Cir. 2008), *and* United States v. Vega-Castillo, 540 F.3d 1235, 1238-39 (11th Cir. 2008) (all holding that sentencing judges may not vary downward based on potential sentencing disparities with fast-track districts), *with Reyes-Hernandez*, 624 F.3d at 417, 419, 422, United States v. Camacho-Arellano, 614 F.3d 244, 249, 250-51 (6th Cir. 2010), *Arrelucea-Zamudio*, 581 F.3d at 149, *and* United States v. Rodríguez, 527 F.3d 221, 231 (1st Cir. 2008) (all holding that sentencing judges may vary downward based on potential sentencing disparities with fast-track districts).

134. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (codified in scattered sections of 18, 28, and 42 U.S.C.).

the district court's consideration of 18 U.S.C. § 3553(a)(5).[135] Second, the Commission has expressed reservations about the policy statement, suggesting that it could result in unwarranted disparities, as well as reservations about sentencing judges varying downward to avoid such disparities, suggesting that they could undercut the PROTECT Act's goal of decreasing downward variances.[136] Finally, it may contradict 18 U.S.C. § 3553(a)(6), which requires judges to consider the need to avoid unwarranted sentencing disparities.

The Fifth, Ninth, and Eleventh Circuits have followed their pre-*Kimbrough* precedents and held that sentencing judges in districts without fast-track programs may not vary downward merely because other districts have such programs.[137] They reasoned that because policy statement section 5K3.1 reflects not only the Commission's policy choice but also a congressional policy choice, including choosing to allow the Attorney General to authorize fast-track programs in some districts but not others, sentencing judges could not reject it based on a policy disagreement.[138] Those courts focused on whether the discrepancy between fast-track districts and non-fast-track districts created "unwarranted sentence disparities" under § 3553(a)(6).[139] They all found that *Kimbrough* had not abrogated earlier precedents, holding that "because any disparity that results from fast-track programs is intended by Con-

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135. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2010); 18 U.S.C. § 3553(a)(5) (2010).

136. *See* U.S. SENTENCING COMM'N, *supra* note 130, at 67, *quoted in Reyes-Hernandez*, 624 F.3d at 411.

137. *Gonzalez-Zotelo*, 556 F.3d at 740; *Gomez-Herrera*, 523 F.3d at 563; *Vega-Castillo*, 540 F.3d at 1238-39 (citations omitted).

138. *Gonzalez-Zotelo*, 556 F.3d at 739-40 ("Although *Kimbrough* permits district courts to 'vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines,' it does not address a district court's ability to vary from the Guidelines based on disagreement with congressional policy, the situation we confront here." (citation omitted)); *Gomez-Herrera*, 523 F.3d at 559 ("*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."); *Vega-Castillo*, 540 F.3d at 1239 ("[W]e note that '*Kimbrough* addressed only a district court's discretion to vary from the Guidelines based on a disagreement with *Guideline*, not Congressional, policy.'" (quoting *Gomez-Herrera*, 523 F.3d at 563)).

139. *Gonzalez-Zotelo*, 556 F.3d at 740 ("[F]ast-track disparities are not 'unwarranted' so as to permit their consideration under § 3553(a)(6)."); *Gomez-Herrera*, 523 F.3d at 562 ("[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)."); *Vega-Castillo*, 540 F.3d at 1238 (relying on pre-*Kimbrough* precedent holding that fast-track disparities are not unwarranted).

gress, it is not 'unwarranted' within the meaning of § 3553(a)(6)."[140]

The First, Third, Sixth, and Seventh Circuits, however, have overruled their contrary precedents in light of *Kimbrough* and held that sentencing judges in districts without fast-track programs may vary downward merely because other districts have such programs.[141] These courts have rejected the idea that the policy statement in section 5K3.1 embodies a legislative policy to which sentencing judges must adhere, with one court noting that the PROTECT Act "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."[142] In fact, the First and Third Circuits found just the opposite: because the policy statement was promulgated at the behest of Congress, it did not exemplify an "exercise of [the Commission's] characteristic institutional role" and was thus entitled to less deference under *Kimbrough*.[143]

Courts allowing variances based on disagreement with section 5K3.1 also considered and rejected the idea that allowing such variances would impinge upon the policy decisions and prosecutorial discretion of the Attorney General in establishing fast-track districts.[144] But they found no conflict between Congress's approval of the Attorney General's establishment of such districts and sentencing judges' exercise of the "unquestionably judicial function" of deciding whether to grant the variances requested, by the government or by the defendant, in any given case.[145] In fact, some courts found that the extent of prosecutorial discretion—particularly in districts where the early disposition programs used

140. *Gomez-Herrera*, 523 F.3d at 562 (citing pre-*Kimbrough* cases). *See also Gonzalez-Zotelo*, 556 F.3d at 739 (citing United States v. Marcial-Santiago, 447 F.3d 715, 719 (9th Cir. 2006)); *Vega-Castillo*, 540 F.3d at 1238 (citing United States v. Castro, 455 F.3d 1249, 1252 (11th Cir.2006)).

141. United States v. Jimenez-Perez, 659 F.3d 704, 710 (8th Cir. 2011);. *Reyes-Hernandez*, 624 F.3d at 417; United States v. Camacho-Arellano, 614 F.3d 244, 249 (6th Cir. 2010); United States v. Arrelucea-Zamudio, 581 F.3d 142, 149 (3d Cir. 2009); United States v. Rodríguez, 527 F.3d 221, 231 (1st Cir. 2008).

142. *Rodríguez*, 527 F.3d at 229 (citation omitted) (internal quotation marks omitted), *quoted in Arrelucea-Zamudio*, 581 F.3d at 151. *See also Reyes-Hernandez*, 624 F.3d at 418; *Camacho-Arellano*, 614 F.3d at 249.

143. *See Arrelucea-Zamudio*, 581 F.3d at 155; *Rodríguez*, 527 F.3d at 227 (citation omitted).

144. *See Reyes-Hernandez*, 624 F.3d at 421-22; *Rodríguez*, 527 F.3d at 230.

145. *Reyes-Hernandez*, 624 F.3d at 421-22 (citation omitted); *Rodríguez*, 527 F.3d at 230.

"charge bargaining," as opposed to departures within the Guidelines—further justified such variances, because such prosecutorial practices were not part of Congress's grant of authority in the PROTECT Act or part of the Guidelines.[146]

Courts of appeals remain sharply divided as to whether to allow sentencing judges to vary downward based on potential disparities between defendants charged for certain immigration offenses in fast-track and non-fast-track districts. This division stands in contrast to their treatment of the career offender Guideline, where a trend toward allowing policy-based variances is apparent. Once again, the principal difference of opinion seems to be between courts holding that the Guidelines reflect a legislative policy choice, which cannot be countermanded by sentencing judges' policy disagreements, and courts holding that legislative direction, short of statutory mandatory sentences, actually makes the Guidelines *more* open to such disagreements, because the Commission has not exercised its characteristic institutional function. Unlike the career offender Guideline, but like the crack/powder Guideline at issue in *Kimbrough*, the fast-track policy statement has been criticized on policy grounds by the Sentencing Commission.[147] Unlike in *Kimbrough*, however, the Commission has also articulated policy reasons against allowing sentencing courts to vary downward.[148] Courts and litigants have generally considered these extra-Guidelines statements by the Commission, as the *Kimbrough* Court did, but they are not dispositive.[149]

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146. *Camacho-Arellano*, 614 F.3d at 250 (citation omitted) ("[E]ven if Congress could be said to have endorsed some disparity between defendants in fast-track and non-fast-track districts, it has not endorsed the further disparity that is created by charge bargaining . . . . Surely, judges in districts in which such charge bargaining is not routine for illegal-reentry defendants would be justified in imposing reduced sentences based on the disparity created by this prosecutorial practice."); *Arrelucea-Zamudio*, 581 F.3d at 152 (describing charge-bargaining programs as "alternative district-wide, early-disposition programs [that] operate outside the bounds of not only the Protect Act, but also Guidelines § 5K3.1").

147. *See* U.S. SENTENCING COMM'N, *supra* note 130, at 67.

148. *Id.*

149. Courts undertaking a *Kimbrough* analysis of the fast-track provision do not typically give any weight to the fact that it is a policy statement rather than an actual Guideline section, perhaps because it is unclear exactly how to treat them differently. *See* cases cited *infra* note 133. Sentencing judges must calculate and consider the advisory Guidelines range under § 3553(a)(4) and then must consider applicable Guidelines policy statements under § 3553(a)(5). 18 U.S.C. § 3553(a)(4)-(5) (2010). Policy statements, which were advisory even before *Booker* and do not form part of the required Guidelines range calculation, are less controlling than other Guidelines sections. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2010); 18 U.S.C. § 3553(a)(5). That may suggest that sentencing judges have more discretion to vary based upon policy statements. On the other hand, because policy statements are only advisory, sentencing judges in non-fast-track districts are faced,

C. *United States Sentencing Guideline § 2G2.2—Child Pornography*

Guidelines section 2G2.2 sets the offense level for most child pornography offenses, including possessing, receiving, trafficking, transporting, shipping, soliciting, and advertising "Material Involving the Sexual Exploitation of a Minor."[150] It does so by setting base offense levels and then supplementing them with several enhancements. In the first edition of the Guidelines, the Commission set an offense level of thirteen for violations of 18 U.S.C. § 2252 (covering trafficking in child pornography).[151] Because possession of child pornography was not then a federal crime, it was not included.[152] Section 2G2.2 included two possible enhancements at that time: an increase of two levels for images depicting a child under twelve years of age and an increase of 5 or more levels for distribution, depending on the retail value of the material distributed.[153]

Since it was first promulgated along with the rest of the Guidelines in 1987, section 2G2.2 has been amended nine times to increase penalties through sentencing enhancements, usually at the direction of Congress.[154] Now, section 2G2.2 provides a base offense level of eighteen for possession[155] of child pornography (and for the creation of images depicting child pornography that did not actually involve the abuse of a minor) and a base offense level of twenty-two for trafficking in child pornography (including distri-

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not with a straightforward disparity (wherein if a defendant were being sentenced elsewhere, his Guidelines range would definitely be lower), but rather a *potential* disparity, depending on whether a judge in a fast-track district would exercise her discretion to depart downward under section 5K3.1. That may suggest less need to vary downward. Courts of appeals apparently have not grappled with this question, choosing rather to treat the fast-track policy statement the same as a Guideline for purposes of determining whether policy-based variances were appropriate. *See* cases cited *infra* note 133.

150. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2010).

151. U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 10 (2009), *available at* http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf.

152. *Id.*

153. *Id.*

154. *Id.* at 2, 16, 54.

155. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2010). A Guidelines section covering possession was added in 1991, section 2G2.4, after Congress made possession of child pornography a federal crime. *See* U.S. SENTENCING COMM'N, *supra* note 151 at 19. Section 2G2.4 was eventually incorporated into section 2G2.2, which now covers both trafficking and possession. *Id.* at 48-49.

bution, transport, and receipt).[156] The current version of section 2G2.2 also includes a host of enhancements, including: material involving a prepubescent minor or a minor under the age of twelve years (two levels); distribution (two to seven levels, depending on the circumstances); material portraying sadistic, masochistic, or violent conduct (four levels); a pattern of activity involving the sexual abuse or exploitation of a minor (five levels); the use of a computer (two levels); and multiple images (two to five levels, depending on the number of images).[157] The enhancements for use of a computer, depictions of a prepubescent minor, and number of images apply in the great majority of cases.[158]

Twice, in 1988 and 1990, the Commission amended section 2G2.2 on its own initiative.[159] These amendments broadened the enhancement for images depicting a child under twelve, by also including images depicting a prepubescent child, since it can be difficult to prove the exact age of a child from an image, and added the four-level enhancement for sadistic, masochistic, or violent images.[160] The Commission amended section 2G2.2 seven times in response to congressional mandate in the form of either a directive to the Commission to amend the section in particular ways or the enactment of a law creating new offenses or increasing mandatory minimum and maximum sentences.[161] In 1991, when Congress was dissatisfied with the Commission's amendments, it directed the Commission to amend the section again and ordered it to treat receipt of child pornography more harshly, by ordering receipt to be treated like trafficking rather than like possession.[162] In the PROTECT Act of 2003, Congress itself amended the child pornography Guidelines, adding the enhancement for the number of images and adding the enhancement for sadistic, masochistic, or violent content to the Guidelines for possession of child pornogra-

156. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2.

157. *Id.*

158. U.S. SENTENCING COMM'N, *supra* note 151, at 46 ("[T]he overwhelming majority of these offenders received a 2-level enhancement for use of a computer (89.4%) and a 2-level enhancement for material involving a child under 12 (91.4%)."); United States v. Dorvee, 616 F.3d 174, 186 n. 9 (2d Cir. 2010) ("96.6% of defendants received at least a two-level enhancement based on the number of images possessed.").

159. U.S. SENTENCING COMM'N, *supra* note 151, at 11-17.

160. *Id.*

161. *Id.* at 17-53.

162. *Id.* at 23.

phy.[163] This was the "first and only time to date [that Congress] directly amended the guidelines."[164]

Often, the Commission expressed reservations about the extent, nature, and effects of the congressional directives.[165] For instance, the Commission objected to Congress's plan to treat receipt of child pornography like trafficking rather than like possession, because it "would negate the Commission's carefully structured efforts to treat similar conduct similarly and . . . [would ultimately] reintroduce sentencing disparity among similar defendants."[166] Despite the Commission's reservations, Congress made the change itself, directly amending the Guidelines.[167] Later, the Commission objected to Congress's directive to implement a blanket two-level computer enhancement because it would apply equally to an individual downloader of child pornography, one who emails it to a single recipient, and one "who establish[es] a[n electronic bulletin board] and distribute[s] child pornography to large numbers of subscribers."[168] Congress left the directive in place, and the Commission implemented the enhancement.[169]

In light of this history, only the Eleventh Circuit has rejected the argument that section 2G2.2 is susceptible to the same criticism as the crack/powder Guideline, finding that section 2G2.2 does "not exhibit the deficiencies the Supreme Court identified in *Kimbrough*."[170] It reasoned that section 2G2.2 "is derived at least in part from the early Parole Guidelines, rather than directly derived from Congressional mandate," although it appears to have considered only the initial promulgation of the Guidelines, without discussing the subsequent amendments or the interaction between Congress and the Sentencing Commission.[171] The Eleventh Circuit further found that *Kimbrough* was inapposite because, while "the Supreme Court found that the Sentencing Commission itself had

163. *Id.* at 38-39.

164. U.S. SENTENCING COMM'N, *supra* note 151, at 38.

165. *See* United States v. Dorvee, 616 F.3d 175, 185 (2d Cir. 2010).

166. *Dorvee*, 616 F.3d at 185 (citation omitted) (internal quotation marks omitted).

167. Treasury, Postal Service and General Government Appropriations Act, Pub. L. No. 102-141, § 632, 105 Stat. 834, 876 (1992).

168. UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN 30 (1996), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199606_RtC_Sex_Crimes_Against_Children/199606_RtC_SCAC.PDF.

169. U.S. SENTENCING COMM'N, *supra* note 168, at 31-32.

170. United States v. Pugh, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008).

171. *Pugh*, 515 F.3d at 1201 n.15 (citing U.S. SENTENCING GUIDELINES MANUAL 72 (Revised Draft Jan. 1987)).

'reported that the crack/powder disparity produces disproportionately harsh sanctions' . . . the Sentencing Commission has not made any similar statements" regarding section 2G2.2.[172] Although the Eleventh Circuit did "not rule out the possibility that a sentencing court could ever make a reasoned case for disagreeing with the policy judgments behind the child pornography guidelines," it has not issued an opinion finding that one has done so.[173]

Unlike the Eleventh Circuit, the Second, Third, and Ninth Circuits have held that sentencing judges may vary downward based on policy disagreements with Guideline section 2G2.2.[174] All three courts considered the particular history of section 2G2.2 and concluded that it was not developed through empirical study or the exercise of the Commission's characteristic institutional role.[175] Both the Second and Third Circuits went on to review the reasonableness of the sentencing judge's policy disagreement.[176] For its part, the First Circuit has acknowledged in dicta that *Kimbrough* authorizes a variance from section 2G2.2.[177]

The aforementioned courts have found problems not only with the history of section 2G2.2, but also with its results. As the Second Circuit explained in *Dorvee*, with enhancements that apply to a majority of defendants, section 2G2.2 recommends an offense level of thirty-five, yielding a probable advisory Guidelines range of 168 to 210 months for first-time offenders.[178] This has the effect of "concentrating all offenders at or near the statutory maximum," thereby allowing for "virtually no distinction between sentences for [relatively less culpable] defendants . . . and the sentences for the most dangerous offenders who, for example, distribute child pornography for pecuniary gain and who fall in higher criminal history categories."[179] Moreover, applying the enhancements in

172. *Id.* (citation omitted).

173. United States v. Irey, 612 F.3d 1160, 1212 n.32 (11th Cir. 2010).

174. United States v. Henderson, 649 F.3d 955, 960 (9th Cir. 2011); United States v. Grober, 624 F.3d 592, 608-09 (3d Cir. 2010); United States v. Dorvee, 616 F.3d 174, 183 (2d Cir. 2010).

175. Henderson, 649 F.3d at 960-63; *Grober*, 624 F.3d at 608; *Dorvee*, 616 F.3d at 188.

176. *Grober*, 624 F.3d at 609-10 (citation omitted); *Dorvee*, 616 F.3d at 183-87 (citation omitted). *See also Henderson*, 649 F.3d at 965-68 (Berzon, J., concurring) (citation omitted) (stating that the majority should have reviewed the policy disagreement and doing so).

177. United States v. Stone, 575 F.3d 83, 97 (1st Cir. 2009) (affirming a within-Guidelines sentence under section 2G2.2, but expressing the view that "the sentencing guidelines at issue are in our judgment harsher than necessary . . . . Were we collectively sitting as the district court, we would have used our *Kimbrough* power to impose a somewhat lower sentence").

178. *Dorvee*, 616 F.3d at 186.

179. *Id.* at 187.

section 2G2.2 can create some marked irrationalities—recommending a higher sentencing range for defendants, like Dorvee (sentenced for distributing child pornography to a minor)—than for those who physically abuse a minor, and recommending the same sentencing range for a first-time offender convicted of possessing non-violent videos on a computer as for a repeat offender convicted of aggravated assault with a firearm that resulted in bodily injury.[180] Such results suggest that section 2G2.2 can produce unwarranted sentencing disparities, which courts must seek to avoid under 18 U.S.C. § 3553(a)(6), and that the Guideline contradicts many judges' senses of whether the sentence "reflect[s] the seriousness of the offense, . . . promote[s] respect for the law, and . . . provide[s] just punishment for the offense" under 18 U.S.C. § 3553(a)(2)(A).[181]

IV. LOOKING FORWARD

Although *Kimbrough* and *Spears* empower judges to exercise broad discretion at sentencing, they should not be construed as a green light to exercise will instead of judgment based merely on a personal disagreement with a policy expressed by the Sentencing Guidelines. In analyzing a particular Guideline, district courts would do well to consider both its provenance and the policy arguments for and against it. These two inquiries will often be intertwined—after all, sentencing "decisions made by the Commission [and Congress] are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments,"[182]—but both inquiries ought to be undertaken before a Guideline is rejected categorically.

In reviewing the provenance of a Guideline, the central question is whether it reflects "the Commission's exercise of its characteristic institutional role."[183] Although *Kimbrough* itself does not require such a determination, most courts that have applied *Kim-*

180. *Id. See also Grober*, 624 F.3d at 607.

181. 18 U.S.C. § 3553(a)(6) (2010). Guidelines section 2G2.2 is notably unpopular with federal district judges. A 2010 survey revealed that 69% of respondents thought that the Guideline range for receipt of child pornography was too high, and 70% thought it was too high for possession; only the crack cocaine Guideline range is comparably unpopular (70% finding it too high), with the marijuana Guideline range a distant third at 41%. U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, Question 8 (2010).

182. Mistretta v. United States, 488 U.S. 361, 414 (1989) (Scalia, J. dissenting).

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

brough to different Guidelines have addressed the question, and those holding that a Guideline can be disregarded on policy grounds almost uniformly find that the Commission has not exercised its expertise in promulgating that particular Guideline.[184] In making this inquiry, courts must consider the Guideline's origin and its subsequent history. When was it adopted? Did the Commission extrapolate the Guideline from statutes and, if it did, was there sound reason for doing so (as the Court found there was not in *Kimbrough*)? Or did the Commission model the Guideline on findings from empirical study? What was the role of Congress? How specifically did Congress direct or guide the Commission's creation of the Guideline? Did Congress change the Guideline itself? What was the Commission's reaction to congressional input? It bears noting that although the Commission need not have expressed reservations about a Guideline for a court to find it objectionable on policy grounds, courts of appeals and the Supreme Court have upheld categorical variances more often when the Commission has done so.[185]

But the inquiry cannot end at the role of the Sentencing Commission and the history of the Guideline at issue. Whatever the Guideline's provenance, the ultimate question after *Kimbrough* and *Spears* is whether the advisory sentencing range is reasonable. In undertaking a policy review of a Guideline, courts must consider whether it—as a matter of course, especially in the "mine-run" case—comports with or contradicts the sentencing factors in 18 U.S.C. § 3553(a).[186]

Kimbrough and *Spears* do not *require* district courts to exercise their discretion to vary categorically from the advisory Guidelines ranges. But as defendants increasingly cite those cases as support for categorical rejection, district courts will be drawn into evaluat-

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184. *See* United States v. Henderson, 649 F.3d 955, 960-63 (9th Cir. 2011); *Grober*, 624 F.3d at 608; *Dorvee*, 616 F.3d at 188; United States v. Arrelucea-Zamudio, 581 F.3d 142, 155 (3d Cir. 2009); United States v. Rodríguez, 527 F.3d 221, 227 (1st Cir. 2008).

185. *See Kimbrough*, 552 U.S. at 109; *Henderson*, 649 F.3d 955, 960-61; *Grober*, 624 F.3d at 608; United States v. Reyes-Hernandez, 624 F.3d 405, 417 (7th Cir. 2010); *Dorvee*, 616 F.3d at 188; United States v. Camacho-Arellano, 614 F.3d 244, 249 (6th Cir. 2010); *Arrelucea-Zamudio*, 581 F.3d at149; *Rodríguez*, 527 F.3d at 231. *Cf.* United States v. Vega-Castillo, 540 F.3d 1235, 1238-39 (11th Cir. 2008) (considering the Commission's concern that non-fast-track districts would vary categorically from the fast-track Guideline as a basis for *not* allowing such categorical variances).

186. *Kimbrough*, 552 U.S. at 575. The court must always consider how an advisory sentence comports with the 3553(a) factors when considered in light of the particular crime and the defendant before it, but this is an individualized inquiry, distinct from a policy disagreement authorized by *Kimbrough* and *Spears*. 18 U.S.C. § 3553(a) (2010).

ing every policy underlying every challenged Guideline. This enterprise runs the risk of asking district judges to opine on broad policy questions as they seek to impose just sentences upon the individual defendants who appear before them.

Courts of appeals, in turn, will increasingly be required to review variances based on policy disagreements with various Guidelines. If such categorical variances become the norm, not only with respect to the crack/powder disparity, but across the Guidelines writ large, Congress might impose new, detailed statutory penalties that will leave district judges with even less discretion than they possessed in the mandatory Guidelines era. Whether Congress chooses to act in this regard might depend upon whether it deems the judiciary to be exercising prudent judgment as opposed to imposing its will on broad questions of crime and punishment.

V. CONCLUSION

The Supreme Court's decision in *Booker* ushered in a new era of sentencing. By leaving the Sentencing Guidelines in place as an advisory matter, however, the Court did not return federal courts to the days of essentially unfettered discretion that existed before Congress created the United States Sentencing Commission. The Guidelines remain an important frame of reference and starting point for trial judges as they seek to impose just sentences.

The Court's decisions in *Kimbrough* and *Spears* make clear that district judges may adopt their own crack/powder ratios based on their policy preferences. Whether that principle extends to all Guidelines may soon be answered by the Supreme Court, and the career offender and child pornography Guidelines, as well as the policy statement related to fast-track jurisdictions, are likely candidates for resolution in light of the differences of opinion expressed by courts of appeals to date. If the Court extends *Kimbrough/Spears* to the Guidelines writ large, district courts should take care to exercise judgment instead of will, lest history show that *Booker* heralded not a welcome era of guided discretion, but the death knell of the Sentencing Guidelines.