COMMENTS

THE POTENTIAL POWER OF FEDERAL CHILD PORNOGRAPHY SENTENCING DISPARITIES*

I. INTRODUCTION

Congress and some of the judiciary are divided on child pornography sentencing. Since the late 1980s, Congress has consistently increased sentences and penalties for child pornography offenders.[1] Some federal judges disagree with this congressional policy and have departed downward from child pornography sentences in response.[2] Significant sentencing disparities have developed among similarly situated offenders, and the question is what effect these disparities will have on the child pornography Guidelines and the entire sentencing system.

Judicially created sentencing disparities among similarly situated defendants have historically held great power to compel legislative reform in sentencing. With the Sentencing Reform Act of 1984,[3] Congress first sought to mitigate sentencing disparities that had developed as the result of broad judicial discretion in sentencing.[4] To curtail these disparities, the Sentencing Reform Act created the U.S. Sentencing Commission (Commission), which in turn created the Federal Sentencing Guidelines (Guidelines), a set of mandatory sentencing guidelines for federal judges to follow.[5] But the mandatory Guidelines failed to fully realize Congress's desired uniformity in sentencing, so Congress imposed additional restrictions on judicial discretion with the Feeney Amendment to the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act).[6]

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1. See *infra* notes 171–90 and accompanying text for a discussion of how Congress has increased sentences and penalties for child pornography offenses.

2. See *infra* notes 191–201 and accompanying text for a discussion of circuits that have responded to child pornography sentences in this manner.

3. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified in scattered sections of 18 and 28 U.S.C.).

4. See *infra* Part II.A for a discussion of the role sentencing disparities among similarly situated defendants played in bringing about the Sentencing Reform Act of 1984.

5. Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1945–46 (1988).

6. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C.). See *infra* Part II.B for a discussion of the role sentencing disparities among similarly situated defendants played in bringing about the

The Supreme Court then halted Congress's march toward limited judicial discretion in sentencing. In 2004, the Court decided *United States v. Booker*,[7] holding that the mandatory Guidelines were unconstitutional under the Sixth Amendment and therefore now "effectively advisory."[8] The *Booker* Court also excised the provision requiring de novo appellate review of sentences and reinstated a more deferential standard of appellate review of sentences.[9]

In 2007, the Court again transformed federal sentencing when it decided *Kimbrough v. United States*,[10] a case examining crack cocaine sentencing. To address problems associated with crack cocaine during the 1980s, Congress passed the Anti-Drug Abuse Act of 1986, which established a 100-to-1 powder-to-crack quantity ratio in cocaine sentencing.[11] Despite this ratio's lack of an empirical basis, the Commission adopted it as part of the mandatory sentencing Guidelines in 1987.[12] The Commission, however, recognized its error and submitted reports from 1995 to 2007 to Congress recommending a lower ratio—but Congress did not act.[13] Importantly, some federal judges shared the Commission's discontent with the cocaine-sentencing ratio. Using their post-*Booker* discretion, these judges began departing downward when sentencing crack cocaine offenders, leading to the Court's holding in *Kimbrough* that district courts could consider a policy disagreement with the 100-to-1 ratio when departing downward from a crack cocaine defendant's Guidelines sentence.[14] Relying on *Kimbrough*, judges increasingly deviated from the ratio based on a policy disagreement with it, but others adhered to it.[15] Sentencing disparities thus increased among similarly situated crack cocaine defendants.[16]

In 2010, Congress reduced the 100-to-1 ratio to 18-to-1 with the Fair Sentencing Act.[17] On its face, this Act addressed a different sentencing disparity than the Sentencing Reform Act of 1984 and the Feeney Amendment to the PROTECT Act. The Sentencing Reform Act and the Feeney Amendment focused on mitigating the sentencing disparities that developed when individual judges sentenced differently two defendants who had the same criminal history and were convicted of the *same*

PROTECT Act's restrictions on judicial discretion.

7. 543 U.S. 220 (2005).

8. *Booker*, 543 U.S. at 245–46.

9. *Id.* at 261.

10. 552 U.S. 85 (2007).

11. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 841 (2012)).

12. *Kimbrough*, 552 U.S. at 96–97.

13. See *infra* note 140 and accompanying text for an overview of these reports and their recommendations.

14. See *infra* Part II.E for a discussion on why federal district judges departed downward in these cases and the Court's response in *Kimbrough*.

15. See *infra* notes 232–35 and accompanying text for a discussion of the increasing percentage of below-range sentences after *Kimbrough*.

16. See *infra* notes 232–35 and accompanying text for a discussion of sentencing disparities among similarly situated crack defendants after *Kimbrough*.

17. Fair Sentencing Act of 2010, Pub. L. No. 111-220, §2, 124 Stat. 2372 (codified as amended at 21 U.S.C. § 841 (2012)).

offense.[18] The Fair Sentencing Act, on the other hand, is commonly understood as Congress's solution to the disparity that occurred when a *crack* cocaine defendant was sentenced 100 times more harshly than a *powder* cocaine defendant.[19]

The history leading up to this Act, however, suggests it was also Congress's solution to the sentencing disparities that had developed among similarly situated crack cocaine defendants. Prior to the Court's holdings in *Booker* and *Kimbrough*, Congress had no reason to act on the Commission's recommendations to reduce the ratio because supporting such legislation could label a member of Congress "soft on crime."[20] But the emergence of sentencing disparities among similar defendants caused by *Booker* and *Kimbrough* provided the motivation historically necessary for legislative reform in sentencing.[21] Rather than constraining judicial discretion, though, Congress reduced the ratio from 100-to-1 to 18-to-1 to achieve uniformity in crack cocaine sentencing.[22] That is, judges with differing positions on the 100-to-1 ratio presumably would all apply the new 18-to-1 ratio, thereby mitigating sentencing disparities among similarly situated crack cocaine defendants.

Some federal judges have relied on *Kimbrough* as authority to depart downward in child pornography cases. They feel that the child pornography Guidelines, like the 100-to-1 ratio, are the result of uninformed congressional legislation rather than empirical evidence, causing unreasonable outcomes in many cases.[23] Given the parallels between the crack cocaine and child pornography Guidelines, similar legislative reform of the child pornography Guidelines seems possible. After examining the differences between crack cocaine and child pornography sentencing, however, this Comment concludes that Congress is more likely to revert to its historical response to sentencing disparities of constraining judicial discretion in sentencing.

II. OVERVIEW

A. The Legislative Shift to Mandatory Sentencing Guidelines

Leading up to the 1980s, federal judges in the United States imposed criminal sentences with almost unfettered discretion.[24] Constrained only by statutory maximum terms of imprisonment and fines, judges sentenced criminals as they saw fit.[25] This

18. See *infra* Parts II.A–B for a discussion of the role sentencing disparities among similarly situated defendants played in bringing about these Acts.

19. See *infra* Part II.E for a discussion of the 100-to-1 ratio and its reduction to 18-to-1 with the Fair Sentencing Act of 2010.

20. See *infra* notes 227–31 and accompanying text for a discussion on why Congress failed to act prior to *Booker* and *Kimbrough*.

21. See *infra* Part III.A for this Comment's argument that sentencing disparities among similarly situated crack defendants played a role in bringing about the Fair Sentencing Act.

22. See *infra* notes 259–63 and accompanying text for an explanation of how the Fair Sentencing Act would achieve uniformity in crack cocaine sentencing.

23. See *infra* notes 268–71 for federal courts' rationale behind applying *Kimbrough* to the child pornography Guidelines.

24. Ogletree, *supra* note 5, at 1941.

25. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL

judicial discretion resulted from a shift in the late nineteenth and early twentieth centuries from retributive to rehabilitative purposes in sentencing, which resulted in a sentencing scheme called indeterminate sentencing.[26] Under an indeterminate sentencing system, judges sentenced convicted criminals within broad maximum and minimum terms of imprisonment, leaving parole boards to decide each individual's exact date of release.[27] In *Williams v. New York*,[28] the Supreme Court explicitly recognized and approved of indeterminate sentences as the preferable alternative to the "old rigidly fixed punishments."[29] A logical consequence of this type of discretionary sentencing was that the judiciary possessed more power in sentencing, as opposed to the legislature.[30]

But judicial discretion and rehabilitative sentencing did not last. Galvanized by former federal judge Marvin Frankel and his 1973 book, *Criminal Sentences: Law Without Order*, the sentencing reform movement sought to establish sentencing commissions and uniform standards.[31] Frankel opposed judicial discretion in sentencing because he felt that the "wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."[32] He envisioned a permanent agency or commission that would study sentencing, formulate laws and rules in accordance with the studies, and enact sentencing guidelines.[33]

For Frankel, this sentencing commission would mitigate the wide disparities in sentences that were resulting from judicial discretion.[34] Judicial discretion allowed each judge to sentence in accordance with his or her view of the purpose of sentencing, which led to different sentences for similarly situated defendants.[35] Frankel felt that these disparities were the "central evil in the system,"[36] caused by the inability of individualized judges to sentence in an intelligent and consistent manner.[37] Frankel's assumption behind judicial discretion in sentencing was the opposite of the accepted assumption underlying judicial discretion up to that point: rather than assuming judges were "uniquely competent" to make these "individualized decisions,"[38] he assumed

COURTS 9 (1998).

26. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893–94 (1990).

27. MICHAEL TONRY, SENTENCING MATTERS 6 (1996).

28. 337 U.S. 241 (1949).

29. *Williams*, 337 U.S. at 248.

30. Nagel, *supra* note 26, at 894.

31. TONRY, *supra* note 27, at 25.

32. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973).

33. *Id.*

34. TONRY, *supra* note 27, at 25.

35. *See* FRANKEL, *supra* note 32, at 106–07 (describing an example of the sentencing disparity that occurs when one judge sentences in accordance with a retribution theory and another does not). Similarly situated defendants can be defined as "defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B) (2012).

36. FRANKEL, *supra* note 32, at 69.

37. *See id.* at 12 ("The absurdities of our sentencing laws would remain aesthetically repulsive, but might be otherwise tolerable, if our judges were uniformly brilliant, sensitive, and humane.").

38. TONRY, *supra* note 27, at 3.

most judges were ill equipped for sentencing and should therefore not have such power.[39] For that reason, Frankel felt that Congress should eliminate the sentencing disparity problem by creating a sentencing commission comprised of people from inside and outside of the legal profession to formulate objective guidelines for judges to follow.[40]

A "disparity study" conducted in the Second Circuit in 1974 demonstrated the individualized nature of sentencing at this time and its impact on defendants.[41] In the study, fifty district court judges in the Second Circuit received identical presentence reports from which they were to impose sentences in accordance with their usual sentencing practices.[42] The results were revealing: out of a group of twenty cases, the study showed considerable disparity among them, with marked differences in the prison sentences imposed in similar cases.[43] The Second Circuit study helped to reinforce Frankel's position that sentencing should be a legislative matter rather than one left to individual judges' discretion.[44]

Frankel's position that judicial discretion caused unjustified sentencing disparities had the distinctive effect of bringing together liberals and conservatives in Congress to come up with a legislative solution: the Sentencing Reform Act of 1984.[45] Liberals and conservatives differed in their reasons for wanting to eliminate judicial discretion, as liberals thought judicial discretion undermined equal treatment of similar crimes, and conservatives felt that it resulted in lower sentences.[46] Yet both sides agreed that sentencing disparities should be mitigated,[47] and the bipartisan effort brought together ideological opposites Ted Kennedy and Strom Thurmond as cosponsors.[48]

Passed as part of the Comprehensive Crime Act of 1984, the Sentencing Reform Act established the U.S. Sentencing Commission as an "independent commission in the

39. *Compare id.* (stating that the dominant assumption up until the sentencing reform movement was that individual judges were "uniquely competent" to make sentencing decisions), *with* FRANKEL, *supra* note 32, at 22 (stating that judges, as lawyers first, have no formal training in sentencing before assuming the bench).

40. FRANKEL, *supra* note 32, at 119–20.

41. ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 10 (1974). Notably, Marvin Frankel organized the committee in charge of this study. STITH & CABRANES, *supra* note 25, at 31.

42. PARTRIDGE & ELDRIDGE, *supra* note 41, at 1.

43. *Id.* at 9.

44. *See* FRANKEL, *supra* note 32, at 107 (stating that "[w]hatever our individual preferences may be, it is for the legislature in our system to decide and prescribe the legitimate bases for criminal sanctions"); STITH & CABRANES, *supra* note 25, at 31 (describing the Second Circuit study as "especially significant for future [sentencing] debates").

45. *See* STITH & CABRANES, *supra* note 25, at 37, 104 (highlighting Frankel's efforts in the name of disparity to lobby Congress to eliminate judicial discretion and the resulting bipartisan compromise of the Sentencing Reform Act of 1984).

46. *Id.* at 104.

47. *Id.*

48. *See* Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker: *A First Look*, 63 STAN. L. REV. 1, 8 n.35 (2010) (calling Ted Kennedy and Strom Thurmond "strange bedfellows" in reference to their cosponsoring the Act).

judicial branch of the United States."[49] The Commission was intended to be an administrative agency isolated from the powerful influence of politics.[50] It was comprised of seven voting members and one nonvoting member, with at least three federal judges and not more than four members of the same political party.[51] In 1987, the Commission promulgated its Guidelines, which amounted to a mandatory sentencing scheme.[52]

Under the Guidelines, a defendant's sentence range is calculated based on two factors: the seriousness of the crime and the defendant's criminal history.[53] For the seriousness of the crime, the judge determines the base offense level for the defendant's crime on a scale between 1 and 43 and adjusts this number upward or downward based on any specific offense characteristics.[54] Next, based on the defendant's criminal record, a criminal history category is designated between I and VI.[55] The defendant's Guideline range is determined by the intersection of these two numbers on the Commission's sentencing matrix.[56]

From the outset, many federal district judges strongly opposed the mandatory nature of the Guidelines, with over 200 judges finding the Guidelines unconstitutional.[57] But another 120 federal district judges upheld the Guidelines' constitutionality, and the Supreme Court agreed in *Mistretta v. United States*.[58] John Mistretta sought to invalidate the Guidelines after he pleaded guilty to conspiracy and agreement to distribute cocaine and received a sentence of eighteen months' imprisonment.[59] He argued that the formation of the Commission violated the doctrine of separation of powers and that the power Congress gave to the Commission to promulgate the Guidelines amounted to "excessive legislative discretion in violation of the constitutionally based nondelegation doctrine."[60] The Court rejected both arguments and held that the Sentencing Reform Act of 1984 was constitutional, thus preserving the mandatory Guidelines.[61]

B. Further Legislative Restrictions on Judicial Discretion

Although the Guidelines were mandatory, federal judges still retained some discretion in sentencing. A judge, for example, was permitted to depart downward if

49. 28 U.S.C. § 991(a) (2012).

50. STITH & CABRANES, *supra* note 25, at 48.

51. 28 U.S.C. § 991(a).

52. *See* 18 U.S.C. § 3553(b)(1) (2000) ("[T]he court *shall* impose a sentence of the kind, and within the range [prescribed by the United States Sentencing Guidelines]." (emphasis added)).

53. U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 2, http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/Overview_Federal_Sentencing_Guidelines.pdf.

54. *Id.* at 1–2.

55. *Id.* at 2.

56. *Id.* at 3.

57. Nagel, *supra* note 26, at 906.

58. 488 U.S. 361, 412 (1989).

59. *Mistretta*, 488 U.S. at 370–71.

60. *Id.* at 371.

61. *Id.* at 412.

there "exist[ed] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[62] The Commission provided two reasons for allowing departures in these types of cases. First, the Commission recognized the inherent difficulty in prescribing guidelines that would cover the "vast range of human conduct potentially relevant to a sentencing decision."[63] Second, while the Commission recognized that the Guidelines could not cover every type of situation, it believed that the Guidelines contemplated most of the influential factors involved in sentencing, so Guidelines departures would occur infrequently.[64]

Yet as the years passed since the promulgation of the Guidelines, courts increasingly used this discretionary power to depart downward.[65] Not all courts, though, departed downward at a similar rate, and courts in some jurisdictions departed downward at much higher rates than courts in other jurisdictions, causing significant disparities among defendants sentenced for the same crimes in different locations.[66] In 2003, Congress reacted to this trend by passing the Feeney Amendment as part of the PROTECT Act.[67] This amendment imposed the harshest restrictions on judicial discretion of the Guidelines era.[68]

Representative Tom Feeney and others in Congress felt that the Court's holding in *Koon v. United States*[69] had contributed to these sentencing disparities by empowering judges to depart downward at a higher rate.[70] In *Koon*, a California district court had

62. 18 U.S.C. § 3553(b)(1) (2012).

63. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, at 5 (1995), http://www.ussc.gov/Guidelines/2005_guidelines/Manual/CHAP1.pdf

64. *Id.*

65. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Figure G (2001), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2001/FigG.pdf (showing that from 1997 to 2001 between sixty-eight and sixty-four percent of sentences were within the Guidelines range).

66. Kirby D. Behre & A. Jeff Ifrah, *Perspectives on the Federal Sentencing Guidelines and Mandatory Sentencing—Foreword: You Be the Judge: The Success of Fifteen Years of Sentencing Under the United States Sentencing Guidelines*, 40 AM. CRIM. L. REV. 5, 7 (2003).

67. *See* Recent Legislation, *Criminal Law—Federal Sentencing Guidelines—Congress Amends the Sentencing Guidelines in an Attempt to Reduce Disparities—Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28, and 42 U.S.C.)*, 117 HARV. L. REV. 751, 753 (2003) (stating that concerns about unwarranted disparities from departures "fueled the passage of the Act").

68. *See* Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform*, THE CHAMPION, June 2003, at 6, 9 (describing the Feeney Amendment as "essentially eliminat[ing] judges' discretion to depart below the Guidelines in all cases").

69. 518 U.S. 81 (1996).

70. *See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES B-28–31 (2003) [hereinafter DOWNWARD DEPARTURES REPORT], http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Departures/200310_RtC_Downward_Departures/departrpt03.pdf (discussing congressional concern that *Koon* caused an increase in downward departures that contributed to sentencing disparity among different districts); Allenbaugh, *supra* note 68, at 9 (describing the Feeney Amendment as taking away almost all judicial

departed downward when sentencing the police officers who assaulted Rodney King, and the Supreme Court considered the proper standard of appellate review for evaluating the district court's sentence.[71] The government argued that de novo review was appropriate because eliminating deference to a trial court's potentially disparate sentence would allow sentences that varied from the Guidelines to be overturned more easily.[72] The Court disagreed, holding that the more deferential abuse-of-discretion standard was appropriate.[73]

In rejecting the de novo standard, the Court emphasized the "institutional advantage" that district courts, as the sentencing courts, possessed over appellate courts in determining whether a case was appropriate for downward departure.[74] Indeed, in language reminiscent of the reasons for supporting unfettered judicial discretion in the pre-Guidelines era,[75] the Court highlighted the unique "vantage point" of the district court and its "day-to-day experience in criminal sentencing."[76] That unique viewpoint is why, according to the Court, a district court's decision to depart downward should be shown "substantial deference" on appeal.[77]

These members of Congress thus partially blamed *Koon* for an increase in downward departures and the resulting sentencing disparities.[78] As a result, Representative Feeney proposed an amendment to the PROTECT Act that contained severe restrictions on judicial discretion in sentencing, including a prohibition of any downward departure unless specifically authorized by the Guidelines.[79] In its original proposed form, this revision would have taken away a judge's flexibility to depart downward even when there was "an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission."[80] Although the PROTECT Act's prohibition on downward departures on nonspecified grounds was mitigated through political compromise, the final version of the PROTECT Act that passed both houses still significantly constrained judicial discretion in sentencing.[81] The final version changed the appellate standard of review back to de novo—legislatively overturning *Koon*.[82] It also required courts to provide written reasons for departing downward and to report sentencing decisions to the Commission.[83]

discretion and overruling *Koon*).

71. *Koon*, 518 U.S. at 89, 96.

72. *Id.* at 96–97.

73. *Id.* at 98–99.

74. *Id.* at 98.

75. *See* TONRY, *supra* note 27, at 3 (stating that before the Guidelines the dominant view was that sentencing "involved individualized decisions that judges were uniquely competent to make").

76. *Koon*, 518 U.S. at 98.

77. *Id.*

78. *See* DOWNWARD DEPARTURES REPORT, *supra* note 70, at B-28–29 (discussing congressional concern that *Koon* caused an increase in downward departures that contributed to sentencing disparities among different districts).

79. *Id.* at B-30–31.

80. *Id.*; 18 U.S.C. § 3553(b)(1) (2012).

81. DOWNWARD DEPARTURES REPORT, *supra* note 70, at B-32.

82. *Id.*

83. *Id.*

C. The End of the Mandatory Guidelines

Three years before the Feeney Amendment to the PROTECT Act, the Court set in motion a line of decisions that brought about the end of the mandatory Guidelines.[84] In each case, the Court grounded its decision in the Sixth Amendment. Under the Sixth Amendment, "the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[85] Concerning the sentencing Guidelines cases, the general idea underlying the Court's decisions was that judges violate this Amendment when they impose a sentence above the maximum sentence authorized by the jury's guilty verdict or the defendant's guilty plea.[86]

The first in this series of cases was *Apprendi v. New Jersey*,[87] which held that any fact, other than a prior conviction, that increases a defendant's sentence above the statutory maximum must be proved beyond a reasonable doubt to a jury.[88] Charles Apprendi pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose after he fired several shots into the home of an African-American family.[89] Although one of the charges to which he pleaded guilty carried a statutory maximum of ten years, the judge imposed a twelve-year sentence after finding at the sentencing hearing that the defendant's shooting was motivated by a racial bias.[90] Because Apprendi pleaded guilty only to a crime with a ten-year maximum, the Court held that he could not be sentenced for what was essentially a more serious crime—committing the offense with a biased purpose—unless the fact of inculpatory bias was proved to a jury beyond a reasonable doubt.[91]

Four years later, in *Blakely v. Washington*,[92] the Court applied the rule from *Apprendi* and held that the Washington state sentencing guidelines violated the defendant's Sixth Amendment right to a jury trial.[93] Ralph Blakely was arrested and charged with first-degree kidnapping, but he ultimately pleaded guilty to second-degree kidnapping and admitted no other facts except the ones relevant to the latter charge.[94] Under Washington state law, Blakely's second-degree kidnapping offense carried a maximum sentence of 120 months, but Washington's Sentencing Reform Act limited his sentence to a range of 49 to 53 months.[95] The Act also authorized an upward departure upon a judge's finding of "substantial and compelling reasons justifying an

84. *See* Mark S. Hurwitz, *Much Ado About Sentencing: The Influence of* Apprendi*,* Blakely*, and* Booker *in the U.S. Courts of Appeals*, 27 JUST. SYS. J. 81, 82 (2006) (describing *Apprendi v. New Jersey* as the case that set into motion the line of cases ending with *United States v. Booker*).

85. U.S. CONST. amend. VI.

86. Craig Green, Booker *and* Fanfan*: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395, 397 (2005).

87. 530 U.S. 466 (2000).

88. *Apprendi*, 530 U.S. at 490.

89. *Id.* at 469–70.

90. *Id.* at 470.

91. *Id.* at 490.

92. 542 U.S. 296 (2004).

93. *Blakely*, 542 U.S. at 301, 305.

94. *Id.* at 298–99.

95. *Id.* at 299.

exceptional sentence."[96] At sentencing, the judge imposed a sentence of 90 months based on a finding that the defendant had acted with "deliberate cruelty."[97] Finding that the judge could not have imposed this sentence with the facts admitted in the guilty plea, the Court invalidated the defendant's sentence as a violation of the Sixth Amendment.[98]

Although the *Blakely* Court explicitly stated that it was not passing judgment on the federal Guidelines,[99] it waited less than a year before extending *Blakely*'s holding to the federal Guidelines in *United States v. Booker*.[100] Freddie Booker was convicted by a jury of possession with intent to distribute powder and crack cocaine and subjected to a Guidelines sentence of 210 to 262 months based on his criminal history category and the amount of drugs the jury found him to have possessed.[101] In a post-trial sentencing hearing, however, the judge found that Booker possessed an additional amount of drugs and added 120 months to his mandatory 210- to 262-month Guidelines sentence.[102]

On certiorari to the Supreme Court, the question presented was "whether [its] *Apprendi* line of cases applies to the Sentencing Guidelines, and if so, what portions of the Guidelines remain in effect."[103] The question elicited two holdings, the first of which was that the mandatory Guidelines were unconstitutional under the Sixth Amendment.[104] To remedy this constitutional violation, the Court "severed and excised" the provision of the Sentencing Reform Act that made the Guidelines mandatory, thereby rendering them "effectively advisory."[105]

D. Post-Booker *Appellate Review of Sentences*

In addition to excising the provision of the Sentencing Reform Act that made the Guidelines mandatory, the *Booker* Court excised the provision containing the appellate standard of de novo review of Guidelines departures.[106] As a result, the Sentencing Reform Act lacked an explicit provision governing sentencing appeals, but the *Booker* Court solved this problem by finding an implicit standard of "review for 'unreasonable[ness].'"[107] To reach this conclusion, the Court first highlighted that the unreasonableness standard was "explicitly set forth" until 2003, when the PROTECT

96. *Id.* (quoting WASH. REV. CODE. § 994A.120(2)).

97. *Id.* at 300 (quoting WASH. REV. CODE. § 994A.390(2)(h)(iii)).

98. *Id.* at 305.

99. *See id.* at 305 n.9 ("The Federal Guidelines are not before us, and we express no opinion on them."). The potential for the *Blakely* opinion to impact the constitutionality of the Federal Guidelines stemmed mostly from the similarities between the two sentencing schemes and the effect a ruling on the Washington guidelines would have on sentencing guidelines in general. *See id.* at 326 (O'Connor, J., dissenting) ("If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.").

100. 543 U.S. 220 (2005).

101. *Booker*, 543 U.S. at 227.

102. *Id.*

103. *Id.* at 229.

104. *Id.* at 244–45.

105. *Id.* at 245.

106. *Id.* at 259.

107. *Id.* at 261.

Act changed it to a de novo standard of review.[108] The Court further explained that, because the de novo standard was intended to strengthen the mandatory nature of the Guidelines, and the mandatory Guidelines now no longer existed, the pre-PROTECT Act standard of review for unreasonableness was implicitly reinstated.[109]

Under this standard, appellate courts were to review sentences for reasonableness in light of the § 3553(a) factors that trial courts consider when sentencing.[110] These factors include "the nature and circumstances of the offense and the history and characteristics of the defendant,"[111] the sentencing range established for "the applicable category of defendant as set forth in the guidelines,"[112] "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,"[113] and "any pertinent policy statement issued by the Sentencing Commission."[114] Under this deferential "reasonableness" standard of review, the appellate court could therefore examine whether the trial court considered the recommended Guidelines sentence, but this consideration was only one of several factors to review in determining whether a trial court's sentence was reasonable.[115]

In 2007, the Court decided two cases involving post-*Booker* appellate review of sentencing decisions. In *United States v. Rita*,[116] the issue before the Court was "whether a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines."[117] Victor Rita was convicted of perjury, making false statements, and obstructing justice.[118] At sentencing, a probation officer submitted a presentence report containing a calculated Guidelines sentence of 33 to 41 months, along with a recommendation that no circumstances existed to justify a downward departure.[119] After rejecting the defendant's argument that his circumstances compelled a downward departure under the § 3553(a) factors, the district judge sentenced the defendant to 33 months—the bottom of the Guidelines range.[120] On appeal, the defendant argued that his sentence was "unreasonable" because the district court failed to properly apply the § 3553(a) factors; the Fourth Circuit disagreed, finding that a sentence within the Guidelines was "presumptively reasonable."[121] The Supreme Court held that this presumption was acceptable even under "advisory" Guidelines, but no corresponding presumption of

108. *Id.*

109. *Id.* at 261–62.

110. *Id.* at 261.

111. 18 U.S.C. § 3553(a)(1) (2012).

112. *Id.* § 3553(a)(4)(A).

113. *Id.* § 3553(a)(6).

114. *Id.* § 3553(a)(5).

115. *See id.* § 3553(a)(1)–(7) (listing factors for trial courts to consider when sentencing, one of which was the applicable Guidelines sentence).

116. 551 U.S. 338 (2007).

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

118. *Id.* at 342.

119. *Id.* at 344.

120. *Id.* at 345.

121. *Id.* at 345–46.

unreasonableness should apply to sentences outside an advisory Guidelines range.[122]

In *Gall v. United States*,[123] the Court considered whether appellate courts should require "'extraordinary' circumstances to justify a sentence outside the Guidelines range."[124] Brian Gall, as a college student, became briefly involved with an ecstasy distribution organization from which he made over $30,000.[125] His involvement, however, lasted only two months, and he went on to graduate from college and gain employment as a master carpenter, without further involvement with drugs.[126] Three and a half years later, he was charged and pleaded guilty to conspiring to distribute drugs.[127] Gall's presentence report recommended a sentence within the applicable Guidelines range of 30 to 37 months in prison, but the district court judge sentenced him to 36 months of probation.[128] Relying on the § 3553(a) factors, the district court judge concluded that the defendant's circumstances—his voluntary withdrawal from the conspiracy and the meaningful life he had built for himself after graduating from college—warranted this downward departure.[129]

On appeal, the Eighth Circuit remanded the case for resentencing, holding that a sentence that varied from the Guidelines must be justified in proportion to the difference between the Guidelines sentence and the sentence actually imposed.[130] According to the Eighth Circuit, the more substantial the variance between the Guidelines range and the actual sentence, the more necessary it was for the sentence to be justified by "extraordinary" circumstances, a condition that was not satisfied in this case.[131]

In reversing the Eighth Circuit, the Court held that an appellate court can consider the degree of variance, but it cannot "require[] 'extraordinary' circumstances to justify a sentence outside the Guidelines range."[132] The Court also reaffirmed *Booker*'s abuse-of-discretion appellate standard of review, which requires that appellate courts give due deference to a district court's downward departure based on the § 3553(a) factors when reviewing the district court's sentence for reasonableness.[133]

*E. Post-*Booker *Sentencing for Crack Cocaine Offenders*

In the post-*Booker* era of advisory sentencing and reasonableness appellate review, federal judges struggled to define the scope of judicial discretion in departing downward from Guidelines sentences, particularly in the area of crack cocaine

122. *Id.* at 354–55.

123. 552 U.S. 38 (2007).

124. *Gall*, 552 U.S. at 47.

125. *Id.* at 41.

126. *Id.* at 41–42.

127. *Id.* at 42.

128. *Id.* at 43.

129. *Id.* at 43–45.

130. *Id.* at 45.

131. *See id.* (finding that the district court's "100% downward variance" was not justified by extraordinary circumstances).

132. *Id.* at 47.

133. *Id.* at 51.

sentencing.[134] Starting in the 1980s, crack, a form of cocaine usually smoked,[135] saw explosive growth in inner-city neighborhoods, mostly because it was a more affordable alternative to powder cocaine.[136] To combat this problem, Congress passed the Anti-Drug Abuse Act of 1986, which established a 100-to-1 quantity ratio in cocaine sentencing.[137] For example, a person could receive the same mandatory five-year sentence for possessing 5 grams of crack or for possessing 500 grams of powder cocaine.[138]

When promulgating the Guidelines in 1987, the Commission adopted Congress's 100-to-1 ratio without conducting any empirical studies.[139] Recognizing its error in adopting the ratio without an empirical basis, the Commission explicitly objected to the crack-powder Guidelines. From 1995 to 2007, the Commission submitted four reports to Congress, each of which discussed the ratio as empirically unsound and as having a potentially disproportionate impact on the African-American community.[140] All four reports recommended changes to the 100-to-1 ratio, but Congress sat idle.[141]

134. Thomas M. Hardiman & Richard L. Heppner, Jr., *Policy Disagreements with the United States Sentencing Guidelines: A Welcome Expansion of Judicial Discretion or the Beginning of the End of the Sentencing Guidelines?*, 50 DUQ. L. REV. 5, 7 (2012).

135. Crack cocaine is typically smoked, as opposed to powder cocaine, which is usually snorted but sometimes injected. *Drug Facts: Cocaine*, NAT'L INST. DRUG ABUSE, http://www.drugabuse.gov/publications/drugfacts/cocaine (last visited Aug. 15, 2014).

136. Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us That It Is Time to Restore the Balance*, 16 FED. SENT'G REP. 87, 90 (2003).

137. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 841 (2012)).

138. Steven L. Chanenson, Booker *on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL'Y 551, 558 (2006) (citing 21 U.S.C. § 841 (2000)).

139. Kimbrough v. United States, 552 U.S. 85, 96 (2007). By contrast, in developing most of the Federal Sentencing Guidelines, the Commission used an empirical approach that was grounded in past sentencing practices and presentence investigation reports. *Id.*

140. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2, 15 (2007) [hereinafter 2007 COCAINE REPORT] (describing the "universal criticism" of the ratio and how historically most crack cocaine offenders are black); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 62 (2002) [hereinafter 2002 COCAINE REPORT] (stating that some of the conclusions on which the ratio was based may not be correct and that most crack cocaine offenders have been black); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2, 8 (1997) [hereinafter 1997 COCAINE REPORT] (stating that a 100-to-1 ratio "cannot be justified" and that sentences appear harsher for racial minorities); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 195, 154 (1995) [hereinafter 1995 COCAINE REPORT] (noting the "relatively sparse empirical evidence" distinguishing crack and powder cocaine and stating that the 100-to-1 ratio is a "primary cause of the growing disparity between sentences for Black and White federal defendants"). All reports are available at http://www.ussc.gov/Meetings_and_Rulemaking/Materials_on_Federal_Cocaine_Offenses/index.cfm.

141. *See* 2007 COCAINE REPORT, *supra* note 140, at 7–10 (recommending changes and concluding by stating that it is "the Commission's firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio"); 2002 COCAINE REPORT, *supra* note 140, at 91–92 (stating that "the current federal cocaine sentencing policy is unjustified"); 1997 COCAINE REPORT, *supra* note 140, at 10 (reiterating its unanimous finding that "the penalty for simple possession of crack cocaine should be the same as for the simple possession of powder cocaine"); 1995 COCAINE REPORT, *supra* note 140, at 195–96 (strongly recommending against a 100-to-1 quantity ratio).

Echoing objections to the 100-to-1 ratio, some district court judges used their post-*Booker* discretion to depart downward when sentencing crack cocaine offenders.[142] These departures led to a Supreme Court ruling in *Kimbrough v. United States* concerning whether a reduced sentence was "per se unreasonable" because it was based on the district court's disagreement with the sentencing disparity between crack and powder cocaine offenses.[143] Derrick Kimbrough was convicted of distributing 56 grams of crack and 92 grams of powder cocaine, which, given his offense characteristics, yielded a Guidelines range of 228 to 270 months.[144]

The district court, however, imposed a sentence of 180 months after considering the unjust effect of the 100-to-1 ratio, among other factors.[145] The district court judge contrasted the defendant's Guidelines range of 228 to 270 months with what the defendant's Guidelines range would have been for an equal amount of powder cocaine, 97 to 106 months.[146] The Fourth Circuit vacated Kimbrough's sentence after concluding that it was "per se unreasonable" for a district court to depart downward based on a policy disagreement with the crack cocaine Guidelines.[147] The Supreme Court reversed that decision and reinstated the district court's sentence, holding under *Booker* that the Guidelines and the 100-to-1 ratio are only advisory.[148] The Court explicitly stressed that a sentencing judge "may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses," as had occurred in Kimbrough's case.[149]

Critical to its holding was the Court's position that the crack cocaine Guidelines "do not exemplify the Commission's exercise of its characteristic institutional role."[150] The Court explained that the Commission's role in formulating sentencing Guidelines was to use empirical evidence derived from past sentencing practices to form rational and consistent Guidelines.[151] A defendant's sentencing Guidelines range is therefore usually consistent with the § 3553(a) objectives—that is, in the typical case, a judge's consideration of the § 3553(a) factors will not lead him or her to depart from the Guidelines sentence.[152] But the Commission did not employ this practice with respect to the crack cocaine Guidelines; it simply adopted the "1986 Act's weight-driven scheme."[153] The Court also highlighted the Commission's subsequent recognition of

142. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 127 (2006), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf (noting that downward departures were approximately "twice as high post-*Booker* compared to pre-PROTECT Act").

143. *Kimbrough*, 552 U.S. at 91 (quoting United States v. Kimbrough, 174 F. App'x 798, 799 (4th Cir. 2006) (per curiam)).

144. *Id.* at 92.

145. *Id.* at 93.

146. *Id.*

147. *Id.*

148. *Id.* at 91.

149. *Id.*

150. *Id.* at 109.

151. *Id.* at 96.

152. *Id.* at 109 (citing Rita v. United States, 551 U.S. 338, 350 (2007)).

153. *Id.* at 96.

the problems with the 100-to-1 ratio and its corresponding reports to Congress recommending changes that were never adopted.[154] The Court thus concluded that because the district court had appropriately considered "the Sentencing Commission's consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a)," the appellate court could not find that the district court abused its discretion in departing downward.[155]

Despite what the Court thought was a clear and easily applicable holding,[156] some confusion followed over the scope of the discretion that *Kimbrough* afforded district courts in cocaine sentencing.[157] Some lower courts were interpreting *Kimbrough* to mean that district courts could depart from the cocaine Guidelines based only on the individual circumstances of a given case and could not "categorically reject the ratio set forth by the Guidelines."[158]

The Court therefore clarified its *Kimbrough* holding in *Spears v. United States*.[159] Steven Spears was convicted of conspiracy to distribute at least 50 and 500 grams of crack and powder cocaine, respectively.[160] The district court sentenced Spears based on a 20-to-1 ratio rather than the 100-to-1 ratio recommended by the Guidelines—a sentence in line with its general view that the 100-to-1 ratio resulted in excessive sentences.[161] But the Eighth Circuit reversed and held that the district court could not categorically reject the 100-to-1 ratio in favor of its own ratio.[162] In reversing the Eighth Circuit, the Supreme Court emphasized that "district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines."[163]

In 2010, Congress passed the Fair Sentencing Act, which reduced the 100-to-1 ratio to 18-to-1.[164] The bill as originally introduced would have completely eliminated the disparity, but the 18-to-1 ratio was established as part of a bipartisan compromise[165] that was also strongly supported by President Obama and Attorney General Eric Holder.[166] The tumultuous experience with the cocaine Guidelines and sentencing

154. *Id.* at 97–100.

155. *Id.* at 111.

156. *See* Spears v. United States, 555 U.S. 261, 264 (2009) ("That was indeed the point of *Kimbrough*: a recognition of district courts' authority to vary from the crack cocaine Guidelines based on a *policy* disagreement with them . . . .").

157. *See id.* at 265 (noting that the *Kimbrough* holding was becoming "obscured" by at least one lower court).

158. United States v. Spears, 533 F.3d 715, 717 (8th Cir. 2008); *see also* United States v. Sevilla, 541 F.3d 226, 232 n.5 (3d Cir. 2008) (misinterpreting the *Kimbrough* holding by stating that a district court's downward departure based on a disagreement with the crack/powder cocaine sentencing disparity cannot be a "categorical rejection of that disparity").

159. 555 U.S. 261 (2009).

160. *Spears*, 555 U.S. at 261.

161. *Id.* at 262.

162. *Id.* at 262–63.

163. *Id.* at 265–66.

164. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended at 21 U.S.C. § 841 (2012)).

165. *Fair Sentencing Act*, ACLU, http://www.aclu.org/fair-sentencing-act (last visited Aug. 15, 2014).

166. Terry Frieden, *House Passes Bill To Reduce Disparity in Cocaine Penalties*, CNN POLITICS (July

disparity had come full circle, but it would soon influence sentencing in other substantive contexts.

F. Post-Kimbrough *Sentencing for Child Pornography Offenders*

The Court's post-*Booker* rulings in *Kimbrough* and *Spears* have prompted district courts to consider whether downward departures based on policy disagreements with certain Guidelines are appropriate in another controversial area: child pornography sentencing.[167] Child pornography is defined broadly as "any visual depiction" in which "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct."[168] Facilitated by the creation of the Internet, an expansive market for child pornography has grown.[169] Consequently, child pornography cases have become "one of the fastest-growing segments of the federal court docket."[170] Furthermore, a series of congressional modifications to the child pornography Guidelines since the early 1990s has dramatically increased the average sentence imposed on child pornography offenders.[171] Several circuits have responded to these congressional modifications by holding, consistent with *Booker*, *Kimbrough*, and *Spears*, that district court judges may depart downward based on policy disagreements with the child pornography Guidelines.[172] According to decisions in these circuits, the child pornography Guidelines, like the crack cocaine Guidelines, resulted from uninformed congressional directives that have usurped the Commission's characteristic role of promulgating Guidelines that are based on data from past sentencing practices.[173]

In 1987, as part of the Guidelines, the Commission promulgated section 2G2.2 to govern the trafficking of child pornography.[174] The Commission set a base offense

28, 2010, 7:20 PM), http://www.cnn.com/2010/POLITICS/07/28/house.drug.penalties/.

167. *See, e.g.*, Hardiman & Heppner, *supra* note 134, at 28–32 (discussing the application of *Kimbrough* and *Spears* to child pornography Guidelines).

168. 18 U.S.C. § 2256(8)(A) (2012). In *New York v. Ferber*, the Court held that child pornography—whether obscene or not—is banned and falls outside the protection of the First Amendment. 458 U.S. 747, 763–64 (1982).

169. *See* Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 RICH. J.L. & TECH. 8, 14 (2010) (discussing the impact of the Internet on the child pornography market).

170. Mark Hansen, *A Reluctant Rebellion*, ABA J. (June 1, 2009, 11:19 PM), http://www.abajournal.com/magazine/article/a_reluctant_rebellion/.

171. TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES 1, 3 (2009), *available at* http://www.lb7.uscourts.gov/documents/INND/110CR40.pdf.

172. United States v. Henderson, 649 F.3d 955, 963 (9th Cir. 2011); United States v. Grober, 624 F.3d 592, 608–09 (3d Cir. 2010); United States v. Dorvee, 616 F.3d 174, 188 (2d Cir. 2010). *But see* United States v. Pugh, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008) (finding that child pornography Guidelines are different than crack cocaine Guidelines).

173. *Henderson*, 649 F.3d at 960; *Grober*, 624 F.2d at 608; *Dorvee*, 616 F.3d at 184.

174. U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 10 (2009), [hereinafter CHILD PORNOGRAPHY GUIDELINES HISTORY], http://www.ussc.gov/Research_and_Statistics/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf. Note that possession of child pornography was not a federal crime at this time. *Id.*

level of 13, with three possible enhancements based on the specific characteristics of the offense.[175] The Commission prescribed a 2-level enhancement for material depicting a child under twelve, a 5-level enhancement for distribution, and additional enhancements based on the monetary value of the distributed material.[176] In setting the base offense level of 13, the Commission considered past sentencing practices "by translating the Parole Commission's offense categorization into an estimated guideline offense level."[177] The Parole Commission categorization came out to an offense level of 18 to 20, but the Commission purposely lowered it to 13 because it expected the enhancements to apply in many cases, which would increase the base offense level from 13 to 20 at the highest.[178]

With the Child Protection Restoration and Penalties Enhancement Act of 1990, passed as part of the Crime Control Act of 1990, Congress made possession of child pornography a federal criminal offense.[179] In response, the Commission promulgated section 2G2.4 in 1991 to govern possession of child pornography, setting the base offense level at 10, with a 2-level enhancement for material involving a "prepubescent minor or a minor under the age of twelve years."[180]

The Commission also decided to treat receipt and possession of child pornography similarly, giving both base offense levels of 10—a change that did not sit well with certain members of Congress.[181] Prior to section 2G2.4, receipt without the intent to distribute fell under section 2G2.2, which governed trafficking and had a base offense level of 13.[182] With the Commission's promulgation of section 2G2.4, receipt now had a base offense level of 10 because the Commission felt that culpability for receipt—as opposed to receipt with intent to traffic—should be similar to culpability for possession.[183] To some members of Congress, lumping these two offenses together undermined congressional efforts to increase the severity of child pornography sentences.[184] Consequently, Congress amended the Guidelines and directed that receipt should be treated the same as trafficking, raising the base offense levels of section 2G2.2 and section 2G2.4 and adding new enhancements.[185] With the Sex Crimes Against Children Prevention Act of 1995, Congress again directed the Commission to raise the base level by at least 2 levels and to add a 2-level enhancement if a computer

175. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (1987)).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 17 (citing Crime Control Act of 1990, Pub. L. No. 101-647, § 323(a), (b), 104 Stat. 4789).

180. *Id.* at 19.

181. *Id.* at 19–25; *see also* STABENOW, *supra* note 171, at 6–9 (discussing the legislative history of this change and its expansive impact).

182. *See* CHILD PORNOGRAPHY GUIDELINES HISTORY, *supra* note 174, at 20 (highlighting a congressional directive to the Commission to "return" the offense of receipt of child pornography to the trafficking guideline at section 2G2.2).

183. *Id.* at 19.

184. *Id.* at 20–22.

185. *Id.* at 23–25. The base offense level for section 2G2.2 was raised from 13 to 15 and a 5-level pattern of activity enhancement was added; the base offense level for section 2G2.4 was raised from 10 to 13; and an enhancement regarding number of items was added. *Id.* at 25.

was used to transport the material.[186]

In 2003, Congress directly amended the Guidelines with the PROTECT Act.[187] In addition to constraining judicial discretion in sentencing,[188] the PROTECT Act established a five-year mandatory minimum for trafficking and receipt of child pornography and increased by five years the statutory maximums for trafficking, receipt, and possession of child pornography.[189] The PROTECT Act also added an enhancement based on the number of images and raised the base offense level for the depiction of sadistic or masochistic conduct.[190]

In *United States v. Dorvee*,[191] the Second Circuit found that these congressional directives that raised the base offense levels and added enhancements "routinely result in Guidelines projections near or exceeding the statutory maximum, even in run-of-the-mill cases."[192] In that case, Justin Dorvee started out with a base offense level of 22, but five enhancements raised his base offense level to 39, leaving him with a Guidelines range of 262 to 327 months of incarceration.[193] According to the court, Guidelines enhancements "apply to the vast majority of defendants sentenced under § 2G2.2 . . . resulting in a typical total offense level of 35."[194] Dorvee, for example, was subject to a 2-level enhancement because he used a computer for his offense, an enhancement that applied to 97.2% of offenders sentenced under section 2G2.2 in 2009.[195] Accordingly, the court found that first-time offenders were likely to be sentenced close to or at the statutory maximum "based solely on sentencing enhancements that are all but inherent to the crime of conviction."[196]

The practice of sentencing child pornographer offenders near the statutory maximum has caused many of these offenders to receive sentences higher than they would have received for actual sexual conduct with a child.[197] The *Dorvee* court explained that, under federal law at the time, an adult who cultivated a relationship with a minor through the Internet, convinced the child to cross state lines for a meeting, and then had sex with the minor would have a total offense level of 34 for a Guidelines range of 151 to 188 months.[198] Dorvee, on the other hand, never engaged in any sexual conduct with a minor but was sentenced to 233 months.[199] For these reasons, the

186. *Id.* at 26.

187. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C.); CHILD PORNOGRAPHY GUIDELINES HISTORY, *supra* note 174, at 38–39.

188. See *supra* notes 78–83 and accompanying text for a discussion of the PROTECT Act's restrictions on judicial discretion.

189. CHILD PORNOGRAPHY GUIDELINES HISTORY, *supra* note 174, at 44.

190. *Id.* at 39.

191. 616 F.3d 174 (2d Cir. 2010).

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

193. *Id.* at 177.

194. *Id.* at 186.

195. *Id.*

196. *Id.*

197. United States v. Henderson, 649 F.3d 955, 965 (9th Cir. 2011) (Berzon, J., concurring).

198. *Dorvee*, 616 F.3d at 187.

199. *Id.*

Second and Third Circuits have concluded that the child pornography Guidelines "can easily generate unreasonable results"[200] and are therefore "not worthy of the weight afforded to other Guidelines."[201]

Many judges have responded to these circumstances by applying their own sentencing schemes, which has increased sentencing disparities among similarly situated section 2G2.2 defendants.[202] In December 2012, the Commission released a comprehensive report on child pornography sentencing containing suggested revisions to the Guidelines.[203] The Commission believes that three categories should be the focus of sentencing in section 2G2.2 cases: the content of the offender's child pornography collection and the nature of his or her collecting behavior; the level of the offender's engagement with the Internet child pornography "community;" and his or her history of sexually abusive or predatory behavior.[204] According to the report, shifting the focus to these three categories will, among other things, "reduce much of the unwarranted sentencing disparity that . . . exists."[205] To implement its recommendations, the Commission requested from Congress legislation giving it the express authority to amend the Guidelines.[206]

III. DISCUSSION

Like the Sentencing Reform Act of 1984 and the Feeney Amendment to the PROTECT Act,[207] the Fair Sentencing Act of 2010, which reduced the 100-to-1 crack-powder cocaine ratio to 18-to-1, was partially the product of congressional concern over sentencing disparities among similarly situated defendants. While one view is that bipartisan recognition of the unjust nature of the 100-to-1 ratio finally compelled this reform, Congress's history of ignoring and rejecting the Commission's requests to change the ratio suggests that Congress did not just finally come to its senses.[208]

200. *Id.* at 188.

201. United States v. Grober, 624 F.3d 592, 607 (3d Cir. 2010); *see also Henderson*, 649 F.3d at 959–60 (concluding that district judges have the same liberty to depart from the child pornography Guidelines based on a policy disagreement as they do from the crack cocaine Guidelines). In his 2009 article, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, Troy Stabenow, a federal defender and influential commentator, proclaims Congress's involvement in the child pornography Guidelines to be based on a "general moral sense that penalties for 'smut peddlers' should always, and regularly, be made stricter, not weaker," rather than on empirical evidence gleaned from "experience and study." STABENOW, *supra* note 171, at 8–9. He also contends that congressional changes to the child pornography were the result of "morality earmarks, slipped into larger bills over the last fifteen years, often without notice, debate, or empirical study of any kind." *Id*. at 3.

202. U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 244 (2012) [hereinafter 2012 CHILD PORNOGRAPHY REPORT], http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/Full_Report_to_Congress.pdf.

203. *Id.* at 311–31.

204. *Id.* at 320.

205. *Id.* at 331.

206. *Id.* at 322.

207. See *supra* Parts II.A–B for a discussion of the role sentencing disparities played in bringing about the Sentencing Reform Act and the Feeney Amendment to the PROTECT Act.

208. See *infra* notes 219–20 and accompanying text for a description of Congress's history of ignoring

Something must have changed, and one possibility is the increase in sentencing disparities among similarly situated crack cocaine defendants pursuant to the Court's decisions in *Booker*, *Kimbrough*, and *Spears*.[209] These sentencing disparities among similarly situated crack cocaine defendants—quite separate from the sentencing disparity between crack and powder cocaine offenses—became apparent to Congress and were a quiet but powerful force underlying the passage of the Fair Sentencing Act of 2010.[210] Rather than constraining judicial discretion, however, as had occurred under the Sentencing Reform Act of 1984 and the Feeney Amendment to the PROTECT Act, Congress sought to achieve more uniformity in crack cocaine sentencing by reducing the ratio to 18-to-1.[211]

Because the Court's decisions in *Booker* and *Kimbrough* have also created sentencing disparities among similarly situated child pornography offenders,[212] child pornography sentencing could undergo similar reform as the cocaine Guidelines, resulting in significantly lower sentences across the board.[213] Perhaps a more likely, and in a sense older, possibility might hark back to the Sentencing Reform Act of 1984 and the Feeney Amendment to the PROTECT Act: Congress could use sentencing disparities among similarly situated child pornography offenders as motivation to restrict judicial discretion in sentencing.

This latter scenario seems more probable for two reasons. First, unlike crack cocaine disparities, sentencing disparities among similarly situated child pornography defendants evince a rejection of congressional sentencing policy.[214] With crack, Congress had shown some support for reformation of the 100-to-1 ratio not long after the Anti-Drug Abuse Act of 1986.[215] That is not the case with child pornography sentencing: Congress has made clear its policy that child pornography sentences should continue to be increasingly harsh, and new offenses have been repeatedly added.[216] Second, child pornography does not tap into the politics of race like the 100-to-1 ratio did.[217] By comparison, the politics of child pornography intersect with social and legal prohibitions against pedophilia and child abuse that are overwhelmingly popular for

the Commission's reports.

209. See *infra* notes 232–35 and accompanying text for a discussion of the increase in sentencing disparities after *Booker*, *Kimbrough*, and *Spears*.

210. See *infra* Part III.A for a discussion of the role that sentencing disparities among similarly situated crack cocaine defendants played in bringing about the Fair Sentencing Act of 2010.

211. See *infra* notes 259–63 and accompanying text for a discussion of how reducing the ratio would achieve more uniformity among similarly situated crack defendants.

212. See *infra* notes 272–76 and accompanying text for a discussion of the increase in sentencing disparities since the Court decided *Kimbrough*.

213. See *infra* notes 285–91 and accompanying text for the similarities between crack cocaine and child pornography sentencing disparities among similarly situated defendants.

214. See *infra* Part III.B.1 for a discussion of how circuits departing downward in child pornography sentencing reject congressional policy on child pornography sentencing.

215. See *infra* notes 305–09 and accompanying text for a discussion of the support shown for reformation of the 100-to-1 ratio.

216. See *infra* notes 292–300 and accompanying text for a discussion of Congress's policy on child pornography sentencing and offenses.

217. See *infra* notes 315–20 and accompanying text for a discussion of the disproportionate racial impact of the 100-to-1 ratio.

American society as a whole.[218] For these reasons, Congress may use sentencing disparities among similarly situated child pornography defendants to return to the days of more constrained judicial discretion in sentencing.

A. The Fair Sentencing Act of 2010: Same Disparity, Different Result

The twenty-five-year gap between the Anti-Drug Abuse Act of 1986 and the Fair Sentencing Act of 2010 raises the question: what took so long for a bill like the Fair Sentencing Act of 2010 to gain bipartisan support and effect change in crack cocaine sentencing? In 1995, 1997, 2002, and 2007, the Commission repeatedly objected to the 100-to-1 ratio and proposed amendments that would have changed the ratio to 1-to-1.[219] But rather than adopt these amendments, Congress rejected them.[220] Moreover, in the twenty-five years between the Anti-Drug Abuse Act of 1986 and the Fair Sentencing Act of 2010, many bills attempting to change the 100-to-1 ratio were introduced in Congress but did not pass.[221] This Comment submits that what contributed to the change in crack cocaine sentencing was an increase in sentencing disparities among similarly situated crack cocaine defendants caused by the Court's decisions in *Booker* and *Kimbrough*.

On the surface, the Fair Sentencing Act of 2010 solved a different type of sentencing disparity problem than the one addressed by the Sentencing Reform Act of 1984 and the Feeney Amendment to the PROTECT Act.[222] The Sentencing Reform Act of 1984 attempted to mitigate disparities arising from different judges imposing different sentences on similarly situated defendants.[223] Likewise, the restrictions on judicial discretion in the Feeney Amendment to the PROTECT Act were aimed at lessening disparities caused by judges in different jurisdictions departing downward at varying rates when sentencing similarly situated defendants.[224] These bills therefore

218. See *infra* notes 326–31 for a discussion of the rhetoric associated with child pornography sentences and offenses.

219. See *supra* note 140 and accompanying text for a discussion of these reports.

220. See *supra* note 141 and accompanying text for a discussion of the amendments and Congress's rejection of them.

221. *E.g.*, Crack-Cocaine Equitable Sentencing Act of 2009, H.R. 2178, 111th Cong. (2009); Fairness in Cocaine Sentencing Act of 2008, H.R. 5035, 110th Cong. (2008); Drug Sentencing Reform Act of 2007, S. 1383, 110th Cong. (2007); Crack-Cocaine Equitable Sentencing Act of 2005, H.R. 2456, 109th Cong. (2005); Crack-Cocaine Equitable Sentencing Act of 2003, H.R. 1435, 108th Cong. (2003); Powder-Crack Cocaine Penalty Equalization Act of 2002, H.R. 4026, 107th Cong. (2002); Powder Cocaine Sentencing Act of 1999, S. 146, 106th Cong. (1999); Powder-Crack Cocaine Penalty Equalization Act of 1997, S. 1162, 105th Cong. (1997); Powder-Crack Cocaine Penalty Equalization Act of 1995, H.R. 2598, 104th Cong. (1995); Crack-Cocaine Equitable Sentencing Act of 1993, H.R. 3277, 103d Cong. (1993).

222. *Compare* STITH & CABRANES, *supra* note 25, at 39 (stating that the "focus of the Sentencing Reform Act . . . was to reduce disparity resulting from the exercise of *judicial* discretion"), *and* DOWNWARD DEPARTURES REPORT, *supra* note 70, at B-28–30 (stating that the PROTECT Act addressed Congress's concern about "disparity among different judicial districts that seemed to result from the varying use of downward departures"), *with* Adam Liptak, *Justices to Decide On Fairness in Sentencing*, N.Y. TIMES, Nov. 29, 2011, at A18 (describing the Fair Sentencing Act of 2010 as reducing the sentencing disparity between power and crack cocaine offenders).

223. STITH & CABRANES, *supra* note 25, at 39.

224. Behre & Ifrah, *supra* note 66, at 6.

focused on restraining the power of individual judges to sentence similarly situated defendants differently.[225] The Fair Sentencing Act of 2010, on the other hand, addressed the disparity in sentencing between two different crimes—powder and crack cocaine offenses—that many people thought should be treated similarly.[226] Although Congress purportedly passed the Fair Sentencing Act of 2010 to correct this type of sentencing disparity, its motivation for passing the Act can be at least partially attributed to sentencing disparities among similarly situated crack cocaine defendants.

Prior to the Court's holdings in *Booker*, *Kimbrough*, and *Spears*, the politically powerful goal of mitigating sentencing disparities among similarly situated defendants was mostly realized. Because the mandatory Guidelines assured that judges imposed sentences mostly in accordance with the 100-to-1 ratio, most similarly situated crack cocaine defendants received similar sentences.[227] Without a strong reason in addition to the Commission's findings that the ratio was unjustifiable, any legislation seeking to reduce the ratio could earn the politically dangerous label of "soft on crime."[228] In fact, political figures generally aim for the opposite perception; with crime and sentencing legislation, they tend to espouse "get tough" political rhetoric to please their constituents.[229] Congress passed the Anti-Drug Abuse Act of 1986 on the power of this type of "get tough" political rhetoric.[230] For many members of Congress, absent a compelling reason, retreating from this "get tough" position by reducing the 100-to-1 ratio would have been too politically risky.[231]

225. The disparities these bills sought to reduce are referred to as interjurisdictional and intrajurisdictional disparities. Interjurisdictional disparities arise when judges in different jurisdictions impose different sentences for similarly situated defendants. CASSIA SPOHN, HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 134 (2002). Intrajurisdictional disparities occur when judges within the same jurisdiction impose different sentences for similarly situated defendants. *Id*. In either situation, the disparities arise from conflicting sentencing practices among judges when sentencing similarly situated defendants. *Id*. at 134, 136.

226. *See, e.g.*, ACLU, *supra* note 165 (stating that it is "scientifically unjustifiable" for people to face longer sentences for offenses involving crack cocaine).

227. *See* Prepared Statement of Ricardo H. Hinojosa, Acting Chair, U.S. Sentencing Comm'n, Before the Senate Committee on the Judiciary Subcommittee on Crime and Drugs 11–12 (Apr. 29, 2009) [hereinafter Hinojosa Statement], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20090428_Hinojosa_Testimony.pdf (stating that district courts departed downward in crack cases only 5.7% of the time in 2004, the year prior to *Booker*).

228. *See* David Yellen, *The Sentencing Commission Takes on Crack, Again*, 20 FED. SENT'G REP. 227, 227 (2008) (describing "soft on crime" as a "feared label" in the context of cocaine sentencing); *U.S. Sentencing Commission Hearing, 2/25/02: Cocaine Pharmacology, "Crack Babies,"* 14 FED. SENT'G REP. 191, 207–09 (2002) (recognizing that reducing the 100-to-1 ratio is politically dangerous because of the premise that this type of reform is "soft on crime").

229. Carol A. Bergman, *The Politics of Federal Sentencing on Cocaine*, 10 FED. SENT'G REP. 196, 196 (1998).

230. One example of this type of rhetoric is seen in Representative Joseph DioGuardi's statements in support of the bill. He spoke of his constituents' "overwhelming" concern about crack cocaine and their desire for a "call for Federal action." 132 CONG. REC. 22,657 (1986) (statement of Rep. Joseph J. DioGuardi). He also described crack as a "problem that will threaten our Nation's future unless we act now." *Id.*

231. *See* Bergman, *supra* note 229, at 198 ("Most Members of Congress are only too aware that any action—especially a vote—which can be used against them in campaign advertisements usually will be. The rhetoric is just too appealing.").

Sentencing disparities among similarly situated crack cocaine defendants, however, increased with the Court's decisions in *Booker*, *Kimbrough*, and *Spears.* In the three years before the enactment of the PROTECT Act, district courts imposed below-range sentences 6.9% of the time in crack cocaine cases.[232] Yet in the three years after the Court's holding in *Booker* that the Guidelines were advisory, district courts imposed below-range sentences an average of 13.8% of the time in crack cocaine cases.[233] Moreover, after the Court's holding in *Kimbrough*—that the cocaine Guidelines are also advisory, and district courts may consider the Commission's findings that the 100-to-1 ratio is an unfair sentencing scheme when sentencing—district courts sentenced crack defendants below their Guidelines range 15.5% of the time.[234] Finally, with the Court's holding in *Spears*, which simply clarified and reinforced the *Kimbrough* holding, evidence indicated that district courts were departing downward in crack cocaine cases 18.4% of the time.[235]

The potential for sentencing disparities made possible by the Court can be seen in the district courts' sentences in *Kimbrough* and *Spears*.[236] In Kimbrough's case, he pleaded guilty to four charges: conspiracy to distribute crack and powder cocaine; possession with intent to distribute more than fifty grams of crack cocaine; possession with intent to distribute powder cocaine; and possession of a firearm in furtherance of a drug-trafficking offense.[237] His final Guidelines range for all of these charges was 19 to 22.5 years.[238] But the district court judge departed downward to 15 years—the statutory minimum—after considering Kimbrough's history and circumstances as well as the unjust effect of the 100-to-1 ratio.[239] Similarly, in Spears's case, his Guidelines range was 27 to 34 years, but the district court judge departed downward to the statutory minimum of 20 years.[240] If defendants with the same charges and criminal history as Kimbrough and Spears were sentenced by judges who adhered to the 100-to-1 ratio, they would have received sentences longer by 4 to 6.5 and 7 to 14 years, respectively.[241]

232. *See* Hinojosa Statement, *supra* note 227, at 14.

233. *See id.* at 12 (calculating the average of 15.2% in 2005, 13.3% in 2006, and 12.9% in 2007).

234. *Id.*

235. *Id.* at 14.

236. In *Kimbrough*, the government argued that these types of disparities were certain to occur more frequently if the Court allowed district courts to vary categorically from the ratio. The government "maintain[ed] that, if district courts are permitted to vary from the Guidelines based on their disagreement with the crack/powder disparity, 'defendants with identical real conduct will receive markedly different sentences, depending on nothing more than the particular judge drawn for sentencing.'" 552 U.S. 85, 107 (2007). The Court rejected this argument, stating that "some departures from uniformity were a necessary cost" of advisory Guidelines combined with appellate review for reasonableness. *Id.* at 108 (citing United States v. Booker, 543 U.S. 220, 263 (2005)).

237. *Id.* at 91.

238. *Id.* at 92.

239. *Id.* at 91–93.

240. Spears v. United States, 555 U.S. 261, 262 (2009).

241. *See id.* (stating the Guidelines sentence and actual sentence imposed); *Kimbrough*, 552 U.S. at 93 (stating the Guidelines sentences and actual sentence imposed). *Kimbrough* created the potential for these sentencing disparities among similarly situated defendants by allowing judges to sentence in accordance with their own policy agendas. Judges who believed in "get tough" drug policies would probably not depart from

The Commission brought the potential for these sentencing disparities to Congress's attention before the Court had even decided *Kimbrough* and *Spears*.[242] In its 2007 report to Congress, the Commission described the circuit split that *Booker* had created over the extent to which district courts could consider the 100-to-1 ratio when sentencing.[243] Some circuits held that district courts could not vary from the Guidelines based on a policy disagreement with the ratio, whereas other circuits held that district courts could consider the unjust nature of the 100-to-1 ratio when sentencing.[244] These sentencing disparities that had arisen among "similarly-situated defendants in different jurisdictions"[245] were analogous to those that led Congress to restrict judicial discretion with the PROTECT Act.[246] Congress was thus well informed about the potentially increasing sentencing disparities that would soon emerge in the post-*Booker* era.

One month after the Commission reported to Congress about *Booker*'s sentencing disparities, two senators introduced legislation that attempted to change the 100-to-1 ratio. Each of these legislators had played an influential role in the Sentencing Reform Act of 1984's efforts to reduce sentencing disparities among similarly situated defendants. Then-Senator Joseph Biden introduced the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, which would have completely eliminated the 100-to-1 ratio.[247] Biden was the ranking Democrat on the Judiciary Committee at the time Congress passed the Sentencing Reform Act of 1984.[248] In addition, Senator Orrin Hatch introduced the Fairness in Drug Sentencing Act of 2007, which would have effectively reduced the ratio to 20-to-1.[249] Senator Hatch, a Republican, had worked closely with Senator Biden to ensure that Congress passed the Sentencing Reform Act of 1984.[250] And yet still, nothing passed.

On April 29, 2009, the acting chair of the Commission, Ricardo H. Hinojosa, reported to Congress about the effect of *Kimbrough* and *Spears* on sentencing disparities among similarly situated defendants.[251] After analyzing the data collected by the Commission, Hinojosa explained that the Court's decisions in *Booker*, *Kimbrough*, and *Spears* had "some impact on federal crack cocaine sentencing practices."[252] Taking into account this conclusion, Hinojosa reaffirmed the Commission's position that the 100-to-1 ratio was unjustifiable and recommended that Congress adopt a ratio of no

the 100-to-1 ratio, but judges who felt that the 100-to-1 ratio was unjust would likely rely on *Kimbrough* as authority to deviate from the ratio. Michael B. Cassidy, *Examining Crack Cocaine Sentencing in a Post-*Kimbrough *World*, 42 AKRON L. REV. 105, 130–31 (2009).

242. The Commission's 2007 report was submitted in May of that year, and *Kimbrough* and *Spears* were not decided until December 2007 and January 2009, respectively.

243. 2007 COCAINE REPORT, *supra* note 140, at 115.

244. *Id.* at 115–22.

245. Behre & Ifrah, *supra* note 66, at 7.

246. See *supra* Part II.B for a discussion of these types of sentencing disparities and the PROTECT Act.

247. Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, S. 1711, 110th Cong. (2007).

248. STITH & CABRANES, *supra* note 25, at 43, 104.

249. Fairness in Drug Sentencing Act of 2007, S. 1685, 110th Cong. (2007).

250. STITH & CABRANES, *supra* note 25, at 48.

251. Hinojosa Statement, *supra* note 227, at 11–14.

252. *Id.* at 14.

more than 20-to-1.[253]

In October 2009, approximately six months after Hinojosa's report, the bill that would eventually become the Fair Sentencing Act of 2010 and reduce the ratio to 18-to-1 was introduced in the Senate.[254] On March 17, 2010, the Senate unanimously passed the bill;[255] on July 28, 2010, the House of Representatives passed the bill;[256] and on August 3, 2010, President Obama signed the bill into law.[257] Members of Congress praised the legislation, calling it the product of an overdue bipartisan compromise.[258]

In light of this history, the Fair Sentencing Act of 2010 can be understood as legislation enacted in part to reduce sentencing disparities among similarly situated crack cocaine defendants. But unlike the sentencing disparities compelling Congress's enactment of the Sentencing Reform Act of 1984 and the PROTECT Act, these sentencing disparities did not motivate Congress to constrain judicial discretion in sentencing.[259] Instead, the Fair Sentencing Act of 2010 employed a different solution to these sentencing disparities. By lowering the ratio from 100-to-1 to 18-to-1, sentencing disparities among similarly situated crack cocaine defendants would be less severe, without constraining judicial discretion. Take *Spears*, for example. There, the district court judge substituted a 20-to-1 ratio to come up with a sentence of 20 years, but a judge applying the 100-to-1 ratio would have sentenced an identical defendant to 27 to 33.5 years.[260] Presumably, in the same scenario today, both judges would apply the 18-to-1 ratio—but for different reasons. The judge who adhered to the 100-to-1 ratio would apply the 18-to-1 ratio because it comports with the intent of Congress.[261]

253. *Id.* at 16.

254. 155 CONG. REC. 24,950 (2009).

255. Press Release, ACLU, Senate Unanimously Passes Cocaine Sentencing Legislation (Mar. 17, 2010), *available at* https://www.aclu.org/drug-law-reform/senate-unanimously-passes-cocaine-sentencing-legislation.

256. *Historic Reform: Congress Lowers Penalties for Crack Cocaine*, THE SENTENCING PROJECT (July 28, 2010), http://www.sentencingproject.org/detail/news.cfm?news_id=966.

257. *Obama Signs Bill Reducing Cocaine Sentencing Gap*, CNN (Aug. 3, 2010, 4:45 PM), http://www.cnn.com/2010/POLITICS/08/03/fair.sentencing/.

258. *See, e.g.*, 156 CONG. REC. S1,681 (daily ed. Mar. 17, 2010) (statement of Sen. Dick Durbin) ("We have talked about the need to address the crack-powder disparity for too long. . . . I wish this bill went further. My initial bill established a 1-to-1 ratio, but this is a good bipartisan compromise.").

259. See *supra* Parts II.A–B for a discussion of the role that sentencing disparities among similarly situated defendants played in the Sentencing Reform Act of 1984 and the PROTECT Act.

260. Spears v. United States, 555 U.S. 261, 262 (2009).

261. The First Circuit's opinion in *United States v. Pho* demonstrates the deference that judges who adhered to the 100-to-1 ratio will show to whatever ratio Congress imposes. In *Pho*, the court stated the following:

> The decision to employ a 100:1 crack-to-powder ratio rather than a 20:1 ratio, a 5:1 ratio, or a 1:1 ratio is a policy judgment, pure and simple. After all, Congress incorporated the 100:1 ratio in the statutory scheme, rejected the Sentencing Commission's 1995 proposal to rid the guidelines of it, and failed to adopt any of the Commission's subsequent recommendations for easing the differential between crack and powdered cocaine. It follows inexorably that the district court's categorical rejection of the 100:1 ratio impermissibly usurps Congress's judgment about the proper sentencing ratio for cocaine offenses.

433 F.3d 53, 62–63 (1st Cir. 2006) (citation omitted), *abrogated by* Kimbrough v. United States, 552 U.S. 85 (2007); *see also* United States v. Williams, 456 F.3d 1353, 1367 (11th Cir. 2006) ("[T]he statutory minimums

The district court judge in *Spears*, on the other hand, would apply the 18-to-1 ratio because it is almost the same as the 20-to-1 ratio that he originally thought was fair.[262] So under the Fair Sentencing Act, different judges would now sentence similarly situated crack defendants uniformly, thereby reducing disparities among similarly situated crack defendants.[263]

B. Child Pornography Sentencing: Same Disparity, Back to Congress's Historical Response?

The Court's decision in *Kimbrough* has empowered many district courts to depart downward when sentencing child pornography defendants.[264] As with crack, sentencing disparities among similarly situated defendants have become more severe.[265] Unlike crack cocaine sentencing disparities, however, these disparities probably will not prompt legislative reform of the Guidelines.[266] More likely is the historical congressional response of constraining judicial discretion in response to sentencing disparities among similarly situated defendants.[267]

Some federal judges have relied on *Kimbrough* as authority to depart downward in child pornography cases based on a policy disagreement with the child pornography Guidelines.[268] These judges feel that the Court's holding in *Kimbrough*—that district courts can categorically reject the cocaine Guidelines based on a policy disagreement with them—applies to the child pornography Guidelines.[269] For the Court in

and maximums and the Guidelines reflect Congress's policy decision to punish crack offenses more severely than powder cocaine offenses by equating one gram of crack to 100 grams of cocaine."), *abrogated by Kimbrough*, 552 U.S. at 85.

262. *See Spears*, 555 U.S. at 262 (describing the district court's decision to substitute a 20-to-1 ratio because of its view that the 100-to-1 ratio yielded excessive sentences).

263. *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after* U.S. v. Booker*: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 7 (2011) [hereinafter *Uncertain Justice*] (statement of Rep. Robert Scott, Ranking Member, S. Comm. on Crime, Terrorism, and Homeland Security) (noting that the reduction in below range sentencing during the first three quarters of 2011 was a consequence of the Fair Sentencing Act of 2010).

264. See *infra* notes 268–71 and accompanying text for a discussion of how courts are applying *Kimbrough* to section 2G2.2.

265. See *infra* notes 272–76 and accompanying text for a discussion of how sentencing disparities have increased.

266. See *infra* Parts III.B.1–2 for a discussion on why these disparities will not prompt legislative reform of section 2G2.2.

267. See *supra* Parts II.A–B for discussions of how Congress restricted judicial discretion with the Sentencing Reform Act of 1984 and the PROTECT Act in response to sentencing disparities among similarly situated defendants.

268. *E.g.*, United States v. Henderson, 649 F.3d 955, 963 (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); United States v. Johnson, 588 F. Supp. 2d 997, 1003–04 (S.D. Iowa 2008); United States v. Hanson, 561 F. Supp. 2d 1004, 1009 (E.D. Wis. 2008). *But see* United States v. Pugh, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008) (finding that child pornography Guidelines are different than crack Guidelines).

269. *See, e.g.*, *Henderson*, 649 F.3d at 963 ("We therefore hold that, similar to the crack cocaine Guidelines, district courts may vary from the child pornography Guidelines, § 2G2.2, based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive

Kimbrough, the 100-to-1 ratio was the result of hasty and uninformed congressional legislation rather than empirical evidence developed by the Commission. Courts could therefore categorically reject the ratio because it did "not exemplify the Commission's exercise of its characteristic institutional role."[270] Some federal judges have found that section 2G2.2 is susceptible to similar criticism and have thus relied on *Kimbrough* as authority to depart downward based on a policy disagreement.[271]

As a result, since *Kimbrough*, sentencing disparities have increased among similarly situated child pornography defendants sentenced under section 2G2.2. The Court decided *Kimbrough* in December 2007, leaving less than a month in 2007 for courts to apply *Kimbrough* to section 2G2.2 cases. In that year, district courts departed downward or imposed below-range sentences in 27.2% of section 2G2.2 cases.[272] In 2008, the year after *Kimbrough*, district courts departed downward or imposed below-range sentences in 35.7% of section 2G2.2 cases.[273] In 2009, district courts departed downward or imposed below-range sentences in 43% of section 2G2.2 cases.[274] In 2010, district courts departed downward or imposed below-range sentences in 44.6% of section 2G2.2 cases.[275] Finally, district courts in 2011 departed downward or imposed below-range sentences in 48% of section 2G2.2 cases.[276]

United States v. Grober[277] illustrates the kind of sentencing disparity among similarly situated child pornography offenders that can occur from judges applying *Kimbrough* to deviate from section 2G2.2. David Grober pleaded guilty to six counts

sentence in a particular case."); *Grober*, 624 F.3d at 608 (finding that *Kimbrough* empowers courts to depart from the Guidelines even when the Guidelines are the product of congressional directives).

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

271. *See, e.g.*, *Henderson*, 649 F.3d at 962–63 ("[T]he child pornography Guidelines are, to a large extent, not the result of the Commission's 'exercise of its characteristic institutional role,' which requires that it base its determinations on 'empirical data and national experience,' but of frequent mandatory minimum legislation and specific congressional directives to the Commission to amend the Guidelines." (quoting *Kimbrough*, 552 U.S. at 109)).

272. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 28 (2007), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2007/Table28.pdf (dividing total number of section 2G2.2 downward departures and below range sentences by total number of section 2G2.2 sentences in 2007).

273. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 28 (2008), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2008/Table28.pdf (dividing total number of section 2G2.2 downward departures and below range sentences by total number of section 2G2.2 sentences in 2008).

274. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 28 (2009), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2009/Table28.pdf (dividing total number of section 2G2.2 downward departures and below range sentences by total number of section 2G2.2 sentences in 2009).

275. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 28 (2010), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table28.pdf (dividing total number of section 2G2.2 downward departures and below range sentences by total number of section 2G2.2 sentences in 2010).

276. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 28 (2011), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table28.pdf (dividing total number of section 2G2.2 downward departures and below range sentences by total number of section 2G2.2 sentences in 2011).

277. 624 F.3d 592 (3d Cir. 2010).

involving the transportation, receipt, and possession of child pornography through his computer.[278] Under section 2G2.2, his base offense level was 22 with a criminal history category of I, placing him in a Guidelines range of 41- to 51-months' imprisonment.[279] But an 18-level enhancement increase under section 2G2.2 propelled his Guidelines sentence to 235 to 293 months.[280] The district court, however, departed downward and sentenced Grober to the mandatory minimum sentence of 60 months based on a policy disagreement with section 2G2.2.[281]

On appeal, the Third Circuit held that the district court did not abuse its discretion by varying from section 2G2.2 based on a policy disagreement with the Guidelines,[282] but it added the qualifying statement that "if a district court does not in fact have a policy disagreement with § 2G2.2, it is not obligated to vary on this basis."[283] Consequently, if a district court judge who did not have a policy disagreement with section 2G2.2 were to sentence a defendant like Grober, that defendant would probably receive the statutory maximum sentence of 240 months.[284] Under this scenario, one defendant would receive a 60-month sentence while the other identically situated defendant would receive a 240-month sentence.

Given the role these types of disparities played in bringing about the Fair Sentencing Act of 2010, similar legislative reform of section 2G2.2 seems possible.[285] The Court's decisions in *Kimbrough* and *Spears* empowered district courts to express their disapproval of the 100-to-1 ratio by varying from the ratio based on a policy disagreement with it.[286] District courts used this power to vary from the ratio more often, which resulted in a corresponding increase in sentencing disparities among similarly situated defendants.[287] These sentencing disparities were brought to the attention of Congress by the Commission and contributed to the Fair Sentencing Act's reform of the 100-to-1 ratio.[288]

With child pornography sentencing, judges have expressed similar disapproval by relying on *Kimbrough* as authority to deviate from section 2G2.2 based on a policy

278. *Grober*, 624 F.3d at 596.

279. *Id.*

280. *Id.*

281. *Id.* at 598.

282. *Id.* at 609.

283. *Id.* (citing United States v. Arrelucea-Zamudio, 581 F.3d 142, 148–49 (3d Cir. 2009)); *see also* United States v. Henderson, 649 F.3d 955, 964 (9th Cir. 2011) ("We further emphasize that district courts are not obligated to vary from the child pornography Guidelines on policy grounds if they do not have, in fact, a policy disagreement with them.").

284. *See Grober*, 624 F.3d at 611 (Hardiman, J., dissenting) (noting that the defendant's sentence was capped at the statutory maximum of 240 months).

285. See *supra* Part III.A for a discussion of the influence of sentencing disparities among similarly situated defendants that contributed to the Fair Sentencing Act of 2010.

286. See *supra* notes 156–63 and accompanying text for a discussion of the discretion *Kimbrough* and *Spears* gave district courts to reject the 100-to-1 ratio.

287. See *supra* notes 232–35 for a discussion of the increase in sentencing disparities in crack cocaine cases after *Booker*, *Kimbrough*, and *Spears*.

288. See *supra* Part III.A for a discussion of the influence of sentencing disparities among similarly situated defendants that contributed to the Fair Sentencing Act of 2010.

disagreement with it.[289] As with crack cocaine, variances from the child pornography Guidelines and corresponding disparities have increased.[290] Moreover, the Commission's December 2012 report on the state of child pornography sentencing has brought these disparities to Congress's attention while also recommending changes to section 2G2.2.[291] For two reasons, though, the more likely scenario is that Congress will revert to its historical response of constraining judicial discretion in response to sentencing disparities among similarly situated defendants.

1. Sentencing Disparities Among Similarly Situated Child Pornography Defendants Evince a Rejection of Congressional Sentencing Policy

Over the last twenty-two years, Congress's persistent and repeated policy has been to increase sentences and add new offenses in an effort to deter and punish child pornography offenders. In support of the Crime Control Act of 1990, which made possession of child pornography a federal crime, Congressman Hughes stressed the importance of "[c]los[ing the] loophole through which child pornographers escape prosecution and provid[ing] tougher penalties for these child molesters."[292] Congress again emphasized its get-tough stance with the Sex Crimes Against Children Prevention Act of 1995 by directing the Commission to increase the penalties for certain offenses.[293] Congressman Schiff, in supporting this bill that "toughens the penalties for sexual exploitation of children," called child pornography one of the "most horrendous and repulsive crimes that can possibly exist."[294] In 1998, as part of an effort to crack down on "purveyors of child pornography," Congress passed the Protection of Children from Sexual Predators Act of 1998,[295] which was enacted to impose "severe and unforgiving" consequences on offenders.[296] Congress then got "tough on pedophiles" by directly amending the Guidelines with the PROTECT Act of 2003[297] to "prevent the resurgence of the child pornography market."[298] More recently, Congress passed the PROTECT Our Children Act of 2008,[299] adding a new offense with a statutory maximum of fifteen years for possession of modified depictions of minors, in an effort to take "bold action" to make a "dent in this problem" that "keeps

289. See *supra* notes 268–71 and accompanying text for a discussion of how judges are applying *Kimbrough* to the child pornography Guidelines.

290. See *supra* notes 272–76 and accompanying text for a discussion of the increase in downward departures and sentencing disparities among similarly situated defendants.

291. 2012 CHILD PORNOGRAPHY REPORT, *supra* note 202, at 224.

292. 136 CONG. REC. 36,926 (1990) (statement of Rep. William Hughes).

293. Sex Crimes Against Children Prevention Act of 1995, Pub. L. No. 104–71, 109 Stat. 774.

294. 141 CONG. REC. 10,278 (1995) (statement of Rep. Steven Schiff).

295. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (codified in scattered sections of 18 U.S.C.).

296. 144 CONG. REC. 20,714 (1998) (statement of Sen. Orrin Hatch).

297. CHILD PORNOGRAPHY GUIDELINES HISTORY, *supra* note 174, at 38.

298. 149 CONG. REC. 9,345 (2003) (statement of Sen. Orrin Hatch); 149 CONG. REC. 9,086 (2003) (statement of Rep. James Sensenbrenner).

299. Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229 (codified as amended in scattered sections of 18 and 42 U.S.C.).

growing and growing."[300]

Circuits that have relied on Congress's continued involvement in the child pornography Guidelines to justify departing downward in child pornography sentences thus defy Congress's unequivocal and enduring position on child pornography sentencing. In *United States v. Dorvee*,[301] the Second Circuit described Congress's consistent involvement in the Guidelines as resulting in "an eccentric Guideline of highly unusual provenance."[302] The Ninth Circuit has taken a similar position, holding that judges can depart from the child pornography Guidelines because they were "Congressionally-mandated and not the result of an empirical study."[303] These circuits have held that, because Congress has displaced the Commission's role in sentencing by regularly directing changes to the child pornography Guidelines without any empirical basis, *Kimbrough* gives judges the power to depart downward based on a policy disagreement with the Guidelines.[304] As a result, these circuits and Congress have taken contrary positions with respect to the child pornography Guidelines.

Congress and the judiciary did not hold such polarizing positions on crack cocaine sentencing. Congress passed the Anti-Drug Abuse Act of 1986 in reaction to the extensive coverage that problems with crack were receiving in the media.[305] Because of Congress's perception that, among other things, crack was much more addictive and dangerous than powder cocaine, it created the 100-to-1 ratio in cocaine sentencing as part of the Anti-Drug Abuse Act.[306] Yet in the twenty-five years between the Anti-Drug Abuse Act and the Fair Sentencing Act, which reduced the ratio to 18-to-1, Congress never increased the ratio,[307] and all bills introduced to change the ratio sought to reduce it rather than increase it.[308] Although these bills failed to materialize until the Fair Sentencing Act of 2010, they show that from the early 1990s, some members of Congress recognized problems with such a harsh ratio and the need to change it.[309]

300. 153 CONG. REC. 17,900 (2007) (statement of Sen. Joseph Biden).

301. 616 F.3d 174 (2d Cir. 2010).

302. *Dorvee*, 616 F.3d at 188.

303. United States v. Henderson, 649 F.3d 955, 962 (9th Cir. 2011).

304. *See, e.g.*, United States v. Grober, 624 F.3d 592, 608 (3d Cir. 2010) (finding that section 2G2.2 was not developed in accordance with the Commission's characteristic institutional role); *Dorvee*, 616 F.3d at 185 (asserting that the congressional directives without empirical basis show disrespect for the Commission's role).

305. *See* Cassidy, *supra* note 241, at 108–09 (discussing the intense media attention and its effect on Congress). Additionally, powder and crack cocaine became a national issue after University of Maryland basketball star Len Bias died as a result of using cocaine. Jonathon King, *Deadly 'Rock' Cocaine a Lucrative Trade*, S. FLA. SUN-SENTINEL, June 30, 1986, at 1B.

306. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS ON COCAINE AND FEDERAL SENTENCING POLICY 1–3 (1995), http://cdn.ca9.uscourts.gov/datastore/library/2013/04/08/Augustine_1995.pdf.

307. *See, e.g.*, *Obama Signs Bill Reducing Cocaine Sentencing Gap*, *supra* note 257 (noting that the 100-to-ratio had been in place for twenty-five years until the Fair Sentencing Act).

308. See *supra* note 221 for examples of bills introduced that sought to reduce the ratio.

309. Representative Charles Rangel, who voted for the Anti-Drug Abuse Act of 1986, introduced the Crack-Cocaine Equitable Sentencing Act of 1993, which would have eliminated the distinction between crack and powder cocaine. H.R. 3277, 103d Cong. (1993). Although Rangel's bill did not get any support at that time, twelve other representatives joined him as cosponsors when he reintroduced it in 1995. *See H.R. 1264 (104th): Crack-Cocaine Equitable Sentencing Act of 1995*, GOVTRACK.US, http://www.govtrack.us/congress/bills/104/hr1264#overview (last visited Aug. 15, 2014).

The Court's decisions in *Kimbrough* and *Spears* therefore confronted a deep legislative ambivalence concerning crack cocaine sentences. In *Kimbrough* and *Spears*, the Court based its holding—that district courts could vary from the crack cocaine Guidelines based on a policy disagreement—on the Guidelines' failure to "exemplify the Commission's exercise of its characteristic institutional role."[310] But unlike the child pornography Guidelines, the 100-to-1 ratio was already thought by some members of Congress to be arbitrary and in need of revision.[311] Bills seeking to reduce the ratio, however, could not gain enough bipartisan support, presumably in part out of fear of looking "soft on crime."[312] In a sense, some members of Congress were politically satisfied with doing nothing until sentencing disparities among similarly situated crack cocaine defendants compelled a change in the ratio.[313]

That is why applying *Kimbrough* to section 2G2.2 is a dangerous position for the judiciary to take. Sentencing disparities among similarly situated crack cocaine defendants can be understood as providing the necessary motivation for a change that many members of Congress supported.[314] In contrast, by rejecting Congress's policy on child pornography sentencing, sentencing disparities among similarly situated child pornography defendants may motivate Congress to constrain judicial discretion in child pornography sentencing and possibly the whole sentencing system.

2. Child Pornography Does Not Invoke the Politics of Race

A primary criticism of the 100-to-1 ratio concerned its disproportionate impact on African-American offenders.[315] Though Congress passed the Anti-Drug Abuse Act of 1986 in part to protect impoverished and minority areas, the 100-to-1 ratio ended up incarcerating a high percentage of people living in these areas for long periods of time.[316] An annual report by the Commission revealed that from September 1991 through October 1992, over 91% of federal crack cocaine defendants sentenced were African-American, whereas only roughly 3% were white.[317] The Commission's 1995 report to Congress on cocaine and federal sentencing policy declared that "federal sentencing data leads to the inescapable conclusion that blacks comprise the largest

310. Spears v. United States, 555 U.S. 261, 264 (2009) (quoting Kimbrough v. United States, 552 U.S. 85, 109 (2007)).

311. *See, e.g.*, 156 CONG. REC. S1,680 (daily ed. Mar. 17, 2010) (statement of Sen. Dick Durbin) ("Current law is based on an unjustified distinction between crack cocaine and powder cocaine.").

312. See *supra* notes 227–31 and accompanying text for a discussion of the political risk involved in looking "soft on crime."

313. See *supra* Part III.A for a discussion of how sentencing disparities among similarly situated crack cocaine defendants provided the political motivation needed for the Fair Sentencing Act of 2010.

314. See *supra* Part III.A for a discussion of the role that sentencing disparities among similarly situated crack cocaine defendants played in bringing about the Fair Sentencing Act of 2010.

315. *See* Blumstein, *supra* note 136, at 89 (stating that the 100-to-1 ratio is "widely seen as a blatant demonstration of racial discrimination by the criminal justice system."); Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing*, U.S. NEWS (Aug. 3, 2010), http://www.usnews.com/news/articles/2010/08/03/data-show-racial-disparity-in-crack-sentencing (noting that "no class of drug is as racially skewed as crack in terms of numbers of offenses").

316. 2002 COCAINE REPORT, *supra* note 140, at 103.

317. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995).

percentage of those affected by the penalties associated with crack cocaine."[318] In 2000, the numbers were largely comparable: 84.2% of federal crack cocaine defendants were African-American, as opposed to 5.7% who were white.[319] The Commission reported similar numbers in 2006, finding that 81.8% of federal crack defendants were African-American and 8.8% white.[320]

Given the 100-to-1 ratio's disproportionate racial impact, Congress's reformation of the ratio can be understood as an aberration from its historical response to sentencing disparities among similarly situated defendants.[321] The politics of race have the power to compel positive legislative reform.[322] With the cocaine ratio, however, its disproportionate impact on African-Americans was not enough alone to compel change. Congress needed an additional nudge that could persuade all sides of the political spectrum, a nudge provided by sentencing disparities among similarly situated crack defendants.[323] When celebrating the passing of the Fair Sentencing Act of 2010, members of Congress, after years of ignoring the Commission's recommendations to change the ratio, acknowledged the ratio's disproportionate impact on the African-American community. Representative Inglis described the ratio's "devastating effect on our urban communities and racial minorities," which "has encouraged skepticism and resentment within our African American community."[324] For Senator Kaufman, the bill's passage was necessary because "it disproportionately affects African Americans who make up more than 80 percent of those convicted of Federal crack offenses."[325]

The politics underlying child pornography sentencing could not be more different. Through much of Congress's involvement with the child pornography Guidelines, one way it has justified increasing sentences and adding offenses has been by connecting child pornography possession to sexual molestation of children.[326] Congress has also justified harsher sentences by contending that they will help dry up the market for child pornography.[327] Although these conclusions are empirically contested,[328] they continue

318. 1995 COCAINE REPORT, *supra* note 140, at xii.

319. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 34 (2000), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2000/table-34.pdf.

320. 2007 COCAINE REPORT, *supra* note 140, at 16.

321. See *supra* Parts II.A–B for a discussion of the role sentencing disparities among similarly situated crack defendants played in bringing about the Sentencing Reform Act of 1984 and the Feeney Amendment to the PROTECT Act.

322. *E.g.*, U.S. CONST. amend. XIII, § 1.

323. See *supra* Part III.A for a discussion of the role sentencing disparities played in bringing about the Fair Sentencing Act of 2010.

324. 156 CONG. REC. E1,666 (daily ed. Sept. 16, 2010) (statement of Rep. Robert Inglis).

325. 156 CONG. REC. S6,867 (daily ed. Aug. 5, 2010) (statement of Sen. Edward Kaufman).

326. *See*, *e.g.*, 149 CONG. REC. 4,234 (2003) (statement of Sen. Orrin Hatch) (asserting that "child pornography whets the appetites of pedophiles and prompts them to act out their perverse sexual fantasies on real children"); Carissa Byrne Hessick, *Disentangling Child Pornography From Child Sex Abuse*, 88 WASH. U. L. REV. 853, 872–73 (2011) (discussing Congress's view that child pornography compels its viewers to molest children).

327. *E.g.*, 149 CONG. REC. 4,234 (2003) (statement of Sen. Orrin Hatch).

328. *See* Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1729 (2012) (describing the market thesis as "more speculative and ideological than supported by experiential data"); Hessick, *supra* note 326, at 874 (stating that empirical literature is unable to validate a

to drive legislation today. With the Child Protection Act of 2012, signed into law by President Obama in December of that year, Congress, among other things, raised the maximum penalty from 10 to 20 years imprisonment for possession offenses involving prepubescent children or those under twelve.[329] According to a House report on the bill, "[t]here is a growing link between the possession of child pornography and the actual molestation of children."[330] The report also claimed that the people who consume child pornography "create the market for it."[331]

Sentencing disparities among similarly situated child pornography offenders may therefore prompt a much different legislative response than crack cocaine sentencing disparities.[332] Sentencing disparities could provide Congress with the opportunity to increase child pornography sentences or add offenses, while also simultaneously restricting judicial discretion in sentencing. Indeed, Congress has used child-sex-crime legislation in the past as a convenient and powerful vehicle for restricting judicial discretion and eliminating sentencing disparities.[333] As originally introduced in the Senate, the PROTECT Act of 2003 was intended in part to improve the laws and processes for investigating and prosecuting child kidnapping and sexual exploitation crimes, a provision that garnered significant support for the bill.[334] But the introduction of the Feeney amendment changed the nature of the bill.[335] No longer was it a bill enacted solely for the protection of this country's children; the bill suddenly had the potential to affect the whole sentencing system.[336] Moreover, Representative Feeney proposed the amendment at the end of the process, without any input from the judiciary

causal connection between child pornography and child sex abuse). *But see* 2012 CHILD PORNOGRAPHY REPORT, *supra* note 202, at 204–06 (suggesting there may be a connection between child pornography and child molestation).

329. Child Protection Act of 2012, Pub. L. No. 112-206, 126 Stat. 1490 (codified throughout 18, 28, and 42 U.S.C.).

330. H.R. REP. No. 112-638, at 6 (2012).

331. *Id.*

332. *See id.* at 5 (playing a role in the Child Protection Act of 2012's increased maximum sentence for possession was the "increasingly low sentences for child pornography offenses" made possible by the Court's decision in *Booker*).

333. Senators who did not agree with the Feeney Amendment's restrictions on judicial discretion felt that they were not worth fighting over at the expense of delaying the provisions in the PROTECT Act aimed at fighting child pornography. *See* 149 CONG. REC. 9,588 (2003) (statement of Sen. Max Baucus) ("[T]he child abduction notification provisions and virtual child pornography provisions of S. 151 are too important to delay any longer than necessary . . . . It is just unfortunate that this must-pass legislation was taken advantage of to move sweeping reforms of the larger U.S. criminal justice system . . . ."); *id.* (statement of Sen. Jesse Bingaman) ("I am hopeful that this new measure will help ensure that child pornographers are held accountable for their actions . . . . [But the Feeney Amendment] was added in conference as an amendment with little opportunity . . . to engage in thoughtful debate.").

334. Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT'G REP. 310, 310 (2003). One of the more popular provisions of the bill established a national network to quickly alert the public when a child was abducted. Carl Hulse, *Bill To Create Alert System on Abduction Approved*, N.Y. TIMES, Apr. 11, 2003, at A22.

335. *See* DOWNWARD DEPARTURES REPORT, *supra* note 70, at B–30 (stating that Feeney's amendment went far beyond the provisions of the original bill).

336. *See* Vinegrad, *supra* note 334, at 310 (describing the PROTECT Act as containing the "most far-reaching changes to the federal sentencing laws since the creation of the Sentencing Guidelines").

or the Commission.[337] To critics of the bill, adding a controversial amendment to a popular bill at the last minute was a politically manipulative way to seamlessly change the nature of federal sentencing.[338] Representative Feeney, as justification for his amendment, pointed to the sentencing disparities he said had resulted from judges "arbitrarily deviating from the sentencing guidelines."[339] Although the PROTECT Act was passed in 2003, Congress's attitude toward sentencing disparities and child pornography has not drastically changed, suggesting that similar legislation in the future is possible.[340]

IV. CONCLUSION

In varying from the child pornography Guidelines, the judiciary may awaken a sleeping giant in Congress, if that giant was ever sleeping in the first place. Since the Sentencing Reform Act of 1984, sentencing disparities among similarly situated defendants have provided strong motivation for restricting judicial discretion in sentencing. At this moment, due to the Court's decisions in *Booker* and *Kimbrough*, judicial discretion is at its greatest since before the Sentencing Reform Act of 1984. Congress had an opportunity to restrict this discretion in response to sentencing disparities among similarly situated crack cocaine defendants, but it preferred to reform the cocaine Guidelines themselves to achieve uniformity. Child pornography sentencing disparities, on the other hand, are a different story. Because circuits deviating from the child pornography Guidelines reject Congress's policy on child pornography sentencing and exacerbate the politically powerful rhetoric underlying it, these circuits risk inviting Congress to take away the discretion the Supreme Court granted with *Booker*.

337. *Id.* at 314–15.

338. *See, e.g.*, Adam Liptak, *Opposition Rises to Crime Bill's Curb on Judicial Power in Sentencing*, N.Y. TIMES, Apr. 18, 2003, at A10 (quoting a law professor who called the bill a "Trojan horse approach to sentencing reform").

339. DOWNWARD DEPARTURES REPORT, *supra* note 70, at B–31 n.185.

340. *See* H.R. REP. No. 112-638, at 5 (2012) (highlighting the "increasingly low sentences for child pornography offenses" caused by judges departing downward); *Uncertain Justice*, *supra* note 263, at 2 (statement of Rep. F. James Sensenbrenner, Chairman, S. Comm. on Crime, Terrorism, and Homeland Security) ("It seems only yesterday that Congress passed the PROTECT Act in an attempt to bring fairness and consistency to Federal sentences across the country. . . . If the defendant is a convicted child porn [possessor], he is in luck. Federal judges now lower sentences for child porn possessors at the highest rate—30 percent are below the guidelines.").