

Brooklyn Law Review

Volume 76 | Issue 2

Article 10

2010

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Recommended Citation

Sarah C. White, *The Good, the Bad, and the Disparate: Analyzing Federal Sentencing in the Border Districts, 1996-2008*, 76 Brook. L. Rev. (2011).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol76/iss2/10>

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The Good, the Bad, and the Disparate

ANALYZING FEDERAL SENTENCING IN THE BORDER DISTRICTS, 1996-2008

INTRODUCTION

The escalating violence along the United States' border with Mexico could be likened to the days of the "Old West": grenades rolling into saloons, bullets fired into city halls, violent assassinations.¹ Unlike the days of the "Old West," however, constitutional protections now take the place of hired guns. Rather than vigilante justice meted out by the luck of the draw, federal courts provide offenders charged along the border with the promise of certainty and fairness.

Offenders in the federal districts along the border need not fear the arbitrary possibility of death from a heavy trigger finger—the federal sentencing system was designed to provide "certainty and fairness" by avoiding "unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct."² In theory, this uniform sentencing system ensures that similar offenders are sentenced in similar ways.³ However, given the intense pressures on law enforcement and courts and the sometimes war-like state of unrest in the border states, the risk seems real that the certainty and fairness of the system might give way to chaos—or at least disparity.

This note undertakes an empirical analysis of United States Sentencing Guidelines data from the border districts from 1996-2008. This note's analysis assumes that the border districts are facing one overarching problem: heightened federal crime

¹ On August 9, 2010, Texas Governor Rick Perry gave President Barack Obama a letter describing such incidents as examples of the "dire threat amassing on our southern border" and asking for increased federal resources along the border. Letter from Rick Perry, Governor of Tex., to Barack Obama, President of the U.S. (Aug. 9, 2010), *available at* http://governor.state.tx.us/files/press-office/080910_PerryObamaletter.pdf.

² U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION (2010), *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf.

³ *See id.*

related to activities along the United States' border with Mexico. Operating on this assumption, this note analyzes two aspects of border district sentencing—fast-track motions⁴ and substantial assistance motions⁵—to determine whether the districts are dealing with their unifying problem in the same ways. This analysis focuses on these two particular sentencing motions because of the way they relate to the border districts: substantial assistance motions are used less frequently in the border districts than in the rest of the federal districts,⁶ and fast-track motions originated in the border districts as a mechanism for prosecutors to deal with heavy caseloads.⁷

Part I of this note gives context for a discussion of the border districts and their sentencing practices in the last several years. Section A introduces the five federal districts along the U.S.-Mexico border and describes the growth of their dockets over the last twelve years. This section discusses the reasons for this growth, namely the increased law enforcement efforts on the border and increased volume of federal immigration offenders charged in the five districts. Section B explains changes to the sentencing systems in the five border districts, including the development of fast-track programs and changes in the applicability of the United States Sentencing Guidelines. Part I concludes by explaining the source of the data used for this note's analysis and defining key terms.

Parts II and III of this note each analyze an aspect of border district sentencing to look for trends or disparities, and to determine whether such trends or disparities are justified or unjustified. Part II analyzes rates of fast-track motions in the border districts in years 2005-2008—concluding that the border districts are using fast-track motions at different rates—and theorizes that this disparity can be attributed to differing prosecutorial practices in the districts. Part III analyzes rates of substantial assistance motions in the border districts in years 1996-2008 and reveals that the districts have converged around a

⁴ The term “fast-track motion” is used in this note to refer to motions currently made under the United States Sentencing Guidelines (U.S.S.G.) section 5k3.1 for a downward departure in a defendant's sentence based on his agreement to expedited and truncated proceedings. See *infra* Part I.B for a discussion of the development and use of these motions in the border districts.

⁵ The term “substantial assistance motion” is used in this note to refer to motions made under U.S.S.G. section 5k1.1 for a downward departure in a defendant's sentence based on his cooperation with the government. See *infra* Part I.B.1 for a discussion of these motions.

⁶ See *infra* Part III.A.

⁷ See *infra* Part I.B.1.

trend of low rates of substantial assistance motions. Part III also examines the possible reasons for this trend and theorizes that there are correlations between rates of substantial assistance motions and variables such as the citizenship of offenders on the docket and the use of fast-track sentencing in the districts.

This note contributes to literature on sentencing disparities in the national context⁸ by examining a group of federal districts dealing with an overwhelming localized crime problem—illegal immigration and drug activities along the U.S.-Mexico border—in order to see whether the chaos of the region has permeated the uniform federal sentencing scheme. This note's analysis shows that, while the border districts are dealing with their unifying problem in similar ways in one respect (decreasing rates of substantial assistance motions), they are unjustifiably disparate in their use of fast-track motions. This note concludes that these decreased rates of substantial assistance motions and disparate use of fast-track motions suggest that prosecutors in the border districts are sacrificing goals of uniformity and thorough law enforcement in favor of expedient processing.

⁸ Sentencing scholars have discussed many aspects of the United States Sentencing Guidelines. For a discussion of the history and policy strategies motivating the creation of the Guidelines, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-9 (1988) (explaining the purposes, creation, and key motivations behind the guidelines). For criticisms of the Guidelines as allowing too much prosecutorial discretion or creating unwarranted sentencing disparities, see Ian Weinstein, *Regulating the Market for Snitches*, 46 BUFF. L. REV. 563, 600-21 (1999) (explaining the difficulty in quantifying the impact of differing prosecutorial policies on substantial assistance motions, the most common form of downward departure under the federal sentencing guidelines, and presenting the varying rates of substantial assistance sentencing over the federal districts), and Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137 (2005) (discussing several sources of variation in sentencing under the federal sentencing guidelines and whether or not they are justified). For examples of other empirical analyses of sentencing, see Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 FED. SENT'G REP. 260, 260 (2002) [hereinafter Maxfield & Burchfield, *Immigration Offenses Involving Unlawful Entry*] (an empirical analysis of unlawful reentry sentences across offenders and districts); Linda Drazga Maxfield & John H. Kramer, U.S. SENTENCING COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 2-4 (1998) [hereinafter Maxfield, *EMPIRICAL YARDSTICK*], available at <http://www.uscc.gov/publicat/5kreport.pdf> (explaining the origin and mechanics of section 5k1.1 "substantial assistance" motions); and Max Schanzenbach, *Have Federal Judges Changed Their Sentencing Practices?: The Shaky Empirical Foundations of the Feeney Amendment*, 2 J. EMPIRICAL LEGAL STUD. 1, 24-35 (2005) (an empirical analysis examining the impact of judicial discretion and other factors on sentences).

I. OVERVIEW OF THE BORDER DISTRICTS AND FEDERAL SENTENCING IN THE BORDER DISTRICTS

The federal district courts along the border between the United States and Mexico are no strangers to policy shifts, precedent upsets, and high-volume, fast-paced prosecutions. In the mid-1990s, national attention and increased law enforcement efforts along the U.S.-Mexico border led to an “exploding volume” of immigration-related cases.⁹ As a result, the federal district courts experienced not only an increase in their dockets but also national pressure to continue disposition of cases at expeditious rates.¹⁰ This Part gives an overview of the events impacting sentencing in the border districts, both within the region and nationally.

A. *Growth of the Border District Criminal Dockets, 1996-2008*

There are five federal districts along the U.S.-Mexico border: the District of Arizona, the District of New Mexico, the Southern District of California, the Southern District of Texas, and the Western District of Texas.¹¹ The Southern District of California and the District of New Mexico are in the Court of Appeals for the Ninth Circuit, while Arizona is in the Tenth Circuit, and the Texas districts are in the Fifth Circuit.¹² Each district has a United States Attorney assigned to prosecute federal criminal offenses in the district.¹³

According to the United States Sentencing Commission’s published data, all five border districts experienced a notable general increase in the percent of immigration offenders¹⁴ comprising their total dockets between

⁹ Thomas E. Gorman, *A History of Fast-Track Sentencing*, 21 FED. SENT’G REP. 311, 311 (2009).

¹⁰ *Id.*

¹¹ *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, <http://www.uscourts.gov/uscourts/images/CircuitMap.pdf> (last visited Nov. 16, 2010).

¹² *Id.*

¹³ *United States Attorneys’ Mission Statement*, U.S. DEPT’ OF JUSTICE, <http://www.justice.gov/usao/offices/mission.html> (last visited Nov. 16, 2010).

¹⁴ Data by offense type (i.e. “immigration offenders”) represents the Sentencing Commission’s representation of the offender’s “primary offense category,” obtained from the Judgment of Conviction Order. U.S. SENTENCING COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2008 app. A (2009) [hereinafter SOURCEBOOK APPENDIX], available at http://www.uscourts.gov/ANNRPT/2008/appendix_A.pdf. The “primary offense category” is the offense code applicable to the conviction on the charge carrying the highest statutory maximum sentence. *Id.* Information on “immigration

1996 and 2008.¹⁵ The United States as a whole also experienced an overall increase in federal immigration cases,¹⁶ due largely to the increased volume of immigration offenders in the border districts.¹⁷ This increase has been the subject of national attention from high-level government officials and the press.¹⁸

offenders” represents offenders whose primary offense was “trafficking in U.S. passports; trafficking in entry documents; failure to surrender naturalization certificate; fraudulently acquiring entry documents; smuggling, etc.; unlawful alien; fraudulently acquiring entry documents; and unlawfully entering U.S.” *Id.*

¹⁵ See U.S. SENTENCING COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2009) [hereinafter 2008 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm>; U.S. SENTENCING COMM’N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2008) [hereinafter 2007 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm>; U.S. SENTENCING COMM’N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2007) [hereinafter 2006 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm>; U.S. SENTENCING COMM’N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2006) [hereinafter 2005 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2005/SBTOC05.htm>; U.S. SENTENCING COMM’N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2005) [hereinafter 2004 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2004/SBTOC04.htm>; U.S. SENTENCING COMM’N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2004) [hereinafter 2003 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2003/SBTOC03.htm>; U.S. SENTENCING COMM’N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2003) [hereinafter 2002 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2002/SBTOC02.htm>; U.S. SENTENCING COMM’N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2002) [hereinafter 2001 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm>; U.S. SENTENCING COMM’N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2001) [hereinafter 2000 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2000/SBTOC00.htm>; U.S. SENTENCING COMM’N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2000) [hereinafter 1999 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/1999/Sbtoc99.htm>; U.S. SENTENCING COMM’N, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (1999) [hereinafter 1998 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/1998/Sbtoc98.htm>; U.S. SENTENCING COMM’N, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (1998) [hereinafter 1997 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/annrpt/1997/sbtoc97.htm>; U.S. SENTENCING COMM’N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (1997) [hereinafter 1996 SENTENCING COMM’N SOURCEBOOK], available at <http://www.ussc.gov/annrpt/1996/sourcbk.htm>; [collectively, hereinafter SENTENCING COMM’N SOURCEBOOKS 1996-2008] (showing an increase over the years in the number of immigration offenders in the districts in relation to total offenders sentenced in the districts).

¹⁶ The percentage of immigration offenses of the national total rose steadily from 11.6% in 1996 to 28% in 2008. See SENTENCING COMM’N SOURCEBOOKS 1996-2008, *supra* note 15.

¹⁷ Gorman, *supra* note 9, at 311.

¹⁸ See, e.g., President William Clinton, Remarks on Immigration Policy (July 27, 1993), available at http://findarticles.com/p/articles/mi_m1584/is_n32_v4/ai_13263265 (beginning the outline of his new immigration policy by explaining that he was “especially concerned about the growing problems of alien smuggling and international terrorists hiding behind immigrant status, as well as the continuing flow of illegal immigrants across American borders”); Jim Yardley, *Expanded Border Policing Clogs the Courts and*

In fact, President Barack Obama recently signed a \$600 million bill to increase border surveillance and the number of federal agents along the border.¹⁹

Of the five border districts, the District of New Mexico and the Southern District of Texas experienced the sharpest increases in federal immigration offenders. The percent of the total docket composed of immigration offenders in the District of New Mexico rose from 26% in 1996 to 70% in 2008,²⁰ and the Southern District of Texas similarly rose from 27% to 72% immigration offenders.²¹ The other three districts similarly experienced large increases in the percentage of immigration offenders on their criminal dockets.²²

Not all immigration offenders are charged in federal court. Federal prosecutors have general discretion whether to prosecute referrals from federal law enforcement agencies.²³ Immigration offenses, which “rang[e] from a noncitizen seeking to enter the country illegally, to a legal immigrant overstaying a visa permit, to organized criminal efforts to produce counterfeit social security cards,”²⁴ not only violate federal criminal law, but violate administrative regulations and implicate civil law as well.²⁵ Roughly 80% of immigration matters are handled in administrative proceedings.²⁶

Many of the immigration offenders in the border districts are Mexican citizens crossing the border without legal

Jails, N.Y. TIMES, July 1, 2000, at A7 (discussing the increased law enforcement efforts along the border and the consequent shortages in local and federal resources to deal with the offenders).

¹⁹ Julia Preston, *Obama Signs Border Bill to Increase Surveillance*, N.Y. TIMES, Aug. 13, 2010, at A10.

²⁰ SENTENCING COMM'N SOURCEBOOKS 1996-2008, *supra* note 15.

²¹ *Id.*

²² The other three districts rose as follows: the District of Arizona from 33.5% to 57.9%, the Southern District of California from 45.5% to 61.5%, and the Western District of Texas from 32.3% to 47%. *Id.*

²³ Dorie Apollonio et al., *An Analysis of Federal Immigration Prosecutions 4*, prepared for presentation at the Midwest Political Science Association annual meeting, Apr. 2-5, 2009 (Chicago, Ill.), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/3/6/1/2/0/pages361209/p361209-4.php. Prosecutorial discretion on whether to prosecute immigration offenses is outside the scope of this note. This note concerns disparities in sentencing resulting from practices undertaken only after the decision to bring federal charges has been made.

²⁴ *Id.* at 5-6.

²⁵ *Id.* at 6 (discussing the fact that most immigration offenses used to be administrative offenses until Congress expanded the scope of immigration law).

²⁶ *Surge in Immigration Prosecutions Continues*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (June 17, 2008), <http://trac.syr.edu/immigration/reports/188>.

authorization to do so.²⁷ Increased law enforcement efforts at the border have caused increased use of “coyotes,” or professional smugglers who collect a stiff fee to assist in illegal border crossings.²⁸ Drug trafficking across the border is another common immigration-related offense.²⁹ In fact, national policymakers recognize drug trafficking across the U.S.-Mexico border as a severe and persistent problem, leading to escalating violence in both countries.³⁰ Top officials in the border states have declared states of emergency several times in the last decade due to escalating violence relating to drug cartel activities along the border.³¹

The percent rise in immigration cases came at the same time as an increase in the size of the criminal dockets of each district.³² In 1996, the District of New Mexico sentenced 613 criminal defendants, and in 2008 it sentenced almost 3000³³—meaning that its criminal docket more than quadrupled. The Western District of Texas nearly quadrupled the number of defendants sentenced between 1996 and 2008, growing from only 1912 criminal offenders sentenced in 1996 to 7233 sentenced in 2008.³⁴

The growth of the border district criminal dockets was primarily due to increased law enforcement activities along the border, which led to increased immigration arrests and prosecutions.³⁵ In the 1990s, law enforcement agencies received increased funding and federal lawmakers expanded the

²⁷ *Illegal Immigration from Mexico*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegal_immigration_mexico.html (last visited Jan. 20, 2011).

²⁸ *Id.*

²⁹ Spencer S. Hsu & Joby Warrick, *U.S. Stepping Up Response to Mexican Drug Violence*, WASH. POST, Mar. 25, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032401155.html>.

³⁰ *Id.*

³¹ Randal C. Archibold, *Arizona Law Causes Split for Border Governors*, N.Y. TIMES, July 6, 2010, at A1, available at <http://www.nytimes.com/2010/07/07/us/07governors.html>.

³² SENTENCING COMM'N SOURCEBOOKS 1996-2008, *supra* note 15. Although the four other border districts experienced overall growth between 1996 and 2008, the Southern District of California alone experienced a period of decline in docket size between 2002 and 2005. *Id.* The reasons for this decline not related to the disparities discussed herein are outside the scope of this note. For a discussion of the low number of prosecutions in several offense areas and the forced resignation of Carol Lam, the United States Attorney for the Southern District of California, see Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 378-80 (2009).

³³ SENTENCING COMM'N SOURCEBOOKS 1996-2008, *supra* note 15.

³⁴ *Id.*

³⁵ Gorman, *supra* note 9, at 311.

applicability of federal immigration offenses.³⁶ The increase in the size of the border districts' criminal dockets came at the same time as other significant changes in sentencing. The next section discusses changes in sentencing policy that occurred in the border districts and nationally.

B. Changes in Border District Sentencing: Federal Sentencing Guidelines and Fast-Track Programs

Although they are often discussed as a singular region,³⁷ the border districts are governed by the same sentencing scheme as the other eighty-nine districts in the federal judiciary: the United States Sentencing Guidelines ("the Guidelines").³⁸ The Sentencing Reform Act of 1984 created the United States Sentencing Commission, an independent agency within the judicial branch, to devise and promulgate federal sentencing guidelines.³⁹ The Guidelines went into effect in 1987⁴⁰ and were found by the Supreme Court to be a constitutional delegation of Congressional authority to the judiciary.⁴¹

The Guidelines were designed to "provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct."⁴² The Guidelines provide a framework for calculating the sentencing range for a defendant.⁴³ First, each offense in the conviction or plea correlates to a base-level point assignment.⁴⁴ The base-level point assignment can be increased or decreased based on the breadth and severity of the criminal conduct, the defendant's criminal record, and certain heightening or mitigating circumstances of the criminal conduct.⁴⁵ The Guidelines also provide for downward and upward departures

³⁶ *Id.*

³⁷ *See, e.g.*, Bibas, *supra* note 8, at 145-46; Schanzenbach, *supra* note 8, at 24-35.

³⁸ U.S. SENTENCING COMM'N, OVERVIEW OF THE FEDERAL SENTENCING COMMISSION (2009) [hereinafter SENTENCING COMM'N OVERVIEW], available at http://www.ussc.gov/general/USSC_Overview_200906.pdf.

³⁹ *Id.*

⁴⁰ *Id.* at 2.

⁴¹ *United States v. Mistretta*, 488 U.S. 361, 412 (1989) (finding that, although the Sentencing Commission was an "unusual hybrid in structure and authority," its creation did not violate the non-delegation doctrine nor separation of powers).

⁴² SENTENCING COMM'N OVERVIEW, *supra* note 38, at 1.

⁴³ *Id.* at 2-3.

⁴⁴ *Id.*

⁴⁵ *Id.*

from the calculated sentencing range based on factors relating to the defendant's criminal proceedings.⁴⁶ The final point calculation corresponds to a range of months for the defendant's sentence.⁴⁷

1. Substantial Assistance Departures and Fast-Track Sentencing

The two types of downward departures examined in this note—fast-track motions and substantial assistance motions—are notable because of their relationship to the border districts: fast-track motions originated in the border districts and are considered mainly a border district phenomenon, and the border districts generally employ a much lower rate of substantial assistance motions than most of the other federal districts.⁴⁸ These two downward departures are based on government motions to lower a defendant's sentence due to some benefit received by the government in the course of the defendant's proceedings: fast-track motions reflect the government's benefit from a defendant's agreement to expedited and truncated proceedings, and substantial assistance motions reflect the government's benefit from a defendant's cooperation with law enforcement investigations or prosecutions of other individuals.

Substantial assistance motions are the older and more widely-used of the two downward departures discussed in this note.⁴⁹ Under the United States Sentencing Guidelines, the government can make a motion under U.S.S.G. § 5k1.1⁵⁰ for a downward departure for “substantial assistance.”⁵¹ These motions, also known as “5k1.1” motions, are motions where the

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* As explained later in this Part, the final Guidelines range used to be binding upon the sentencing court. *Id.* at 2. However, after *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines are merely advisory, rather than mandatory. *Id.*

⁴⁸ See *infra* Part III.A.

⁴⁹ Substantial assistance motions are motions within the United States Sentencing Guidelines and can be used in any federal district. See Maxfield, EMPIRICAL YARDSTICK, *supra* note 8, at 2. In contrast, fast-track motions can only be used in certain districts experiencing high volumes of certain types of offenders. See *infra* note 61 and accompanying text.

⁵⁰ United States Sentencing Guidelines [U.S.S.G.] § 5k1.1 (1994) (“Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”).

⁵¹ See Maxfield, EMPIRICAL YARDSTICK, *supra* note 8, at 3-4 (explaining the origin and mechanics of section 5k1.1 “substantial assistance” motions).

government essentially “pays” a defendant for his cooperation in a criminal investigation by requesting a reduction in his sentence.⁵² The amount of cooperation necessary to receive such a motion may vary among U.S. Attorney’s offices.⁵³ The potential for sentencing disparities due to differing use of substantial assistance motions has been the subject of significant scholarly debate since the creation of the Guidelines.⁵⁴

Compared to substantial assistance motions, fast-track motions are a recent and even more controversial phenomenon. The rise in the number of immigration offenders and growth in the overall dockets in the border districts in the mid-1990s caused federal prosecutors to look for ways within the Guidelines to process the ever-heavier caseloads.⁵⁵ Prosecutors began asking for shorter sentences for defendants who would agree to plead guilty at an early stage in the criminal proceedings.⁵⁶

At first these motions were made *ad hoc*.⁵⁷ Prosecutors in the Southern District of California began using an informal program in 1994, asking for lower sentences in exchange for a defendant’s agreement to a speedy disposition of his case.⁵⁸ Although the early disposition program originated solely from continued use by prosecutors and the acquiescence of the district courts, the Ninth Circuit officially approved the programs in 1995.⁵⁹

Other districts developed similar programs, and the federal circuit courts upheld the programs against constitutional challenges brought under equal protection, due process, and the Fifth, Sixth, and Eighth Amendments.⁶⁰ Districts in other

⁵² Miriam H. Baer, *Cooperation’s Cost*, 88 WASH. U. L. REV. (forthcoming 2011).

⁵³ Bibas, *supra* note 8, at 151.

⁵⁴ See, e.g., Maxfield, *EMPIRICAL YARDSTICK*, *supra* note 8, at 5 (examining trends in substantial assistance departures in the first years of the guidelines); Bibas, *supra* note 8, at 146-47 (arguing that substantial assistance motions are a source of significant disparities).

⁵⁵ Gorman, *supra* note 9, at 311-12.

⁵⁶ *Id.* at 311.

⁵⁷ *Id.*

⁵⁸ Testimony of Judge Marilyn L. Huff, Southern District of California, to the U.S. Sentencing Commission, Concerning Fast-Track or Early Disposition Programs 1-2 (Sept. 23, 2003), available at http://ftp.ussc.gov/hearings/9_23_03/Huff.pdf. Judge Huff explained that the fast-track program mainly addressed reentry after deportation offenders in the District. Judge Huff also listed shortage of resources to house pretrial defendants, marshal shortages, and inability to meet vast interpreter needs. *Id.* at 2-3.

⁵⁹ *United States v. Estrada-Plata*, 57 F.3d 757, 761 (9th Cir. 1995).

⁶⁰ See Gorman, *supra* note 9, at 312 (listing the cases upholding the constitutionality of early fast-track programs). In *United States v. Ruiz*, 536 U.S. 622, 633 (2002), the Supreme Court found that a defendant’s guilty plea taken without being informed of a potential later right to impeachment information did not violate

regions of the country currently use fast-track programs.⁶¹ However, the ad hoc “early disposition programs” originated in the border districts and sentencing literature often refers to them as a border district phenomenon.⁶²

Fast-track programs gained official sanction in 2003.⁶³ After reviewing sentencing reports, federal legislators worried that judicial discretion to use speedy disposition to depart below the Guidelines ranges had grown to unacceptable rates.⁶⁴ To remedy the perceived problem, Congress added the Feeney Amendment to the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (the PROTECT Act).⁶⁵ The PROTECT Act was an omnibus crime control act which, among other things, created the AMBER Alert system and made changes to the federal criminal code and United States Sentencing Guidelines.⁶⁶ The Feeney Amendment required the Sentencing Commission to limit judicial discretion in sentencing, including limits to downward departures under the then-mandatory federal sentencing guidelines.⁶⁷ By

the Fifth and Sixth Amendments. The *Ruiz* court noted that fast-track dispositions require defendants to waive the right to receive any information from the Government on affirmative defenses to be used at trial, and that this practice is constitutional. *Id.* In *United States v. Estrada-Plata*, 57 F.3d 757, 762-63 (9th Cir. 1995), the case where the Ninth Circuit approved the early disposition practice of the Southern District of California, the court noted that the program satisfied Eighth Amendment concerns because the defendant’s sentence was not so “grossly out of proportion to the severity of the crime as to shock our sense of justice.” (quoting *United States v. Cupa-Guillen*, 34 F.3d 860, 864 (9th Cir. 1994)). Moreover, the *Estrada-Plata* court found due process arguments against the fast-track sentence to be frivolous, because under the same logic all mandatory minimums and sentencing enhancements would also violate due process. *Ruiz*, 536 U.S. at 623. The Ninth Circuit has also ruled en banc that fast-track programs do not violate equal protection. In *United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000) (en banc), the court emphasized the lack of any evidence of racial animosity motivating the fast-track programs. Although the defendant argued that prosecutors maintained the discretion not to “give” fast-track sentences to defendants of different nationalities, the court admonished that defendant’s argument should “be made to the executive, not the judicial, branch.” *Id.* at 977.

⁶¹ Memorandum from Craig Morford, Acting Deputy Att’y Gen., U.S. Dep’t of Justice, Regarding Reauthorization of Early Disposition Programs (Feb. 1, 2008) [hereinafter Morford Memo], reprinted in 21 FED. SENT’G REP. 318, 330-32 (2009). Districts in Florida, New York, Idaho, Kansas, Utah, Nebraska, Georgia, Oregon, Puerto Rico, and Washington have been authorized for fast-track programs. *Id.* at 331-32.

⁶² See, e.g., Bibas, *supra* note 8, at 146-47 (referring to justifications of border district fast-track programs, and arguing that they cause disparities between border districts and districts in other regions).

⁶³ Gorman, *supra* note 9, at 312.

⁶⁴ Schanzenbach, *supra* note 8, at 12-13.

⁶⁵ Pub. L. No. 108-21, 117 Stat. 650 (2003).

⁶⁶ Schanzenbach, *supra* note 8, at 8-9.

⁶⁷ *Id.*; see also Gorman, *supra* note 9, at 312.

legitimizing the fast-track programs, legislators hoped to control their use and impact.⁶⁸

The Guidelines amended pursuant to the Feeney Amendment provide that when a defendant has participated in an expedited plea and sentencing program, the government will make a motion for downward departure known as a “fast-track motion,”⁶⁹ or a “5k3.1 motion.”⁷⁰ The Sentencing Commission reports participation in fast-track programs by reporting the number of cases in which the government made a 5k3.1 motion.⁷¹ The Commission data on fast-track departures includes departures for all offense types authorized to have fast-track programs—in the border districts, the offenses authorized for fast-track programs are all immigration and drug offenses.⁷²

After the Feeney Amendment became law, the Department of Justice (DOJ) promulgated rules and reporting criteria for the newly legitimized fast-track programs under the Guidelines.⁷³ Under the DOJ’s framework, federal prosecutors have the option to move for a downward departure of a specified number of levels in the Guidelines in exchange for a defendant’s expedited plea.⁷⁴ In addition to pleading to the offense, a fast-track plea must contain the defendant’s acknowledgement of conduct constituting the charged offense, agreement not to file any Rule 12(b)(3) motions,⁷⁵ agreement to waive appeal, and agreement to waive the opportunity to challenge the conviction by collateral attack under 28 U.S.C.

⁶⁸ See Thomas E. Gorman, Note, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. CHI. L. REV. 479 [hereinafter Gorman, *Rereading Congressional Intent*] (discussing the legislative history of the Feeney Amendment and the stated goals of the legislators responsible for its passage).

⁶⁹ Downward departures are a decrease in the calculated Guidelines sentence, after the defendant’s Guidelines sentence range has been calculated from his/her offense and criminal history. See *supra* Part I.B.

⁷⁰ U.S.S.G. § 5k3.1 (“Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.”). This analysis refers to 5k3.1 motions as “fast-track motions.”

⁷¹ SOURCEBOOK APPENDIX, *supra* note 14.

⁷² See *supra* Part I.B.

⁷³ Memorandum from John Ashcroft, Att’y Gen., U.S. Dep’t of Justice, Setting Forth Justice Department’s Sentencing Policies (July 28, 2003) [hereinafter Ashcroft Memo], reprinted in 21 FED. SENT’G REP. 318 (2009).

⁷⁴ *Id.* at 319-20.

⁷⁵ Motions under the Federal Rules of Criminal Procedure Rule 12(b)(3) must be made before trial. These motions include motions alleging a defect in instituting the prosecution, alleging a defect in an indictment, or motions to suppress evidence. FED. R. CRIM. P. 12(b)(3).

§ 2255.⁷⁶ Although U.S. Attorney's offices employing the fast-track programs may determine how many levels of departure a fast-track plea merits, departures cannot be for more than four levels.⁷⁷

In the first official authorization of fast-track programs, the DOJ authorized all five of the border districts to use fast-track programs for the offenses of illegal entry after deportation and transportation or harboring of illegal immigrants.⁷⁸ The District of Arizona was additionally authorized to use fast-track motions for the offenses of alien/baby smuggling⁷⁹ and first-time petty marijuana offenses along the border.⁸⁰ Between 2003 and 2008, the DOJ periodically reauthorized the districts for the same programs.⁸¹

In 2009, Deputy Attorney General David W. Ogden reminded districts that reapproval of fast-track programs depends on "demonstrable results establishing that the authorized early disposition program is permitting the prosecution of a significantly larger number of defendants . . . than would occur if the program was discontinued."⁸² Ogden's memorandum underscores the original intent of fast-track programs: to equip districts to handle more cases.⁸³

2. Changes in the Applicability of the Guidelines

In addition to the development of new sentencing practices within the United States Sentencing Guidelines, changes between 2004 and 2008 in the applicability of the

⁷⁶ Ashcroft Memo, *supra* note 73, at 319-20. Under 28 U.S.C. § 2255(a) (2006), a federal prisoner would normally be able to petition for habeas corpus relief by asking the court that imposed the sentence to "vacate, set aside or correct the sentence."

⁷⁷ Ashcroft Memo, *supra* note 73, at 320.

⁷⁸ Both of these offenses are considered "[i]mmigration" offenses. Memorandum from James B. Comey, Deputy Att'y Gen., U.S. Dep't of Justice, to U.S. Attorneys on Authorization of Early Disposition Programs (Oct. 29, 2004) [hereinafter Comey Memo], *reprinted in* 21 FED. SENT'G REP. 322, 323 (2009).

⁷⁹ Baby smuggling has cropped up in several of the border districts. Smugglers bring babies born in other countries (usually Mexico) over the border to be adopted in the U.S. *Sentences Handed Down in Baby Smuggling Case*, VISALAW.COM (Apr. 4, 2000), <http://www.visalaw.com/00apr4/18apr400.html>.

⁸⁰ Comey Memo, *supra* note 78.

⁸¹ *Id.*; Memorandum from Paul J. McNulty, Att'y Gen., U.S. Dep't of Justice, to U.S. Attorneys on Reauthorization of Early Disposition Programs (Mar. 19, 2007) [hereinafter McNulty Memo], *reprinted in* 21 FED. SENT'G REP. 325 (2009).

⁸² Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to U.S. Attorneys on Authorization for Early Disposition Programs (Mar. 29, 2009), *reprinted in* 21 FED. SENT'G REP. 337, 338 (2009).

⁸³ Gorman, *supra* note 9, at 311.

Guidelines impacted sentencing in all federal districts. In 2004, the Supreme Court ruled in *Blakely v. Washington*⁸⁴ that a state determinate sentencing scheme allowing a judicial finding to increase the maximum allowable sentence for a defendant was unconstitutional under the Sixth Amendment's requirement of a jury trial.⁸⁵ In 2005, the Supreme Court ruled in *United States v. Booker*⁸⁶ that the Sixth Amendment's requirement of a jury trial for any element of a crime heightening the maximum allowable sentence was incompatible with mandatory application of the United States Sentencing Guidelines, and therefore the Guidelines must be merely advisory, rather than mandatory.⁸⁷

Changes to the applicability of the Guidelines impacted the use of substantial assistance departures and fast-track departures. *Booker's* holding arguably "undid the Feeney Amendment, [and] limited the power that inheres in prosecutors in a regime of mandatory sentencing rules."⁸⁸ The Feeney Amendment set forth rigid confines for judicial departures, but the entire system became advisory under *Booker*. The shift from prosecutorial power to judicial power occurred because, rather than being limited to departures when the government has motioned for them (under the mandatory guidelines system), the advisory system allows judges to give lower sentences without government motion.

Some sentencing scholars question whether defendants still have an incentive to cooperate after *Booker*.⁸⁹ Motions for downward departure due to substantial assistance or participation in a fast-track program remain on the books as an important aspect of calculating a defendant's Guidelines range to assist the court in sentencing. However, unless the

⁸⁴ 542 U.S. 296, 313-14 (2004). *Blakely's* holding came on the tail of the Supreme Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that the Sixth Amendment's jury requirement applies to any factors (other than prior convictions) that increase the penalty for a crime beyond a statutory maximum. 530 U.S. at 476-77.

⁸⁵ *Blakely*, 542 U.S. at 313-14.

⁸⁶ 543 U.S. 220, 233-34 (2005).

⁸⁷ *Id.*

⁸⁸ Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1426 (2008).

⁸⁹ Doug Berman, *What of Substantial Assistance?*, SENTENCING L. & POL'Y (Jan. 13, 2005, 11:02 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/what_of_substan.html.

defendant faces a statutory mandatory minimum,⁹⁰ a government motion is no longer a necessary element for a judge to depart downward.

C. *Data Analysis: Methods and Key Terms*

The United States Sentencing Commission publishes sentencing data in the Sourcebook of Federal Sentencing Statistics, which accompanies the Commission's Annual Report for each fiscal year.⁹¹ In 2004, the Sentencing Commission issued the data in two separate forms: pre- and post-*Blakely*.⁹² In 2005, the Sentencing Commission again issued the data in two separate forms: pre- and post-*Booker*.⁹³ Rather than divide each year into two data points for analysis, this note combines the pre- and post-data for each year into one overall data figure for the year by calculating a weighted average⁹⁴ of the two sets.

Scholars have used several methods for analyzing sentencing disparities and evaluating the reasons for them.⁹⁵ This note analyzes two aspects of sentencing in the border

⁹⁰ See Baer, *supra* note 52, at 2 n.3 (describing the implications of a defendant's conviction for an offense carrying a statutory minimum, and the inability of a sentencing judge to depart downward without a government motion).

⁹¹ Each fiscal year represents the sentencing data for offenders sentenced between October 1 and September 30 of the following year. 2008 SENTENCING COMM'N SOURCEBOOK, *supra* note 15, at introduction. The Sourcebooks are available online, published by year, and contain appendices with sentencing data broken down by district. *Annual Reports & Statistical Sourcebooks*, U.S. SENTENCING COMM'N, available at <http://ftp.usssc.gov/annrpts.htm> (last visited Jan. 20, 2011).

⁹² 542 U.S. 296 (2004) (holding that a judicial finding increasing the maximum allowable sentence for a crime violated the Sixth Amendment right to a jury trial). The two data sets denoted sentencing data before and after the opinion.

⁹³ 543 U.S. 220 (2005) (holding that in order to be constitutional under the Sixth Amendment, the United States Sentencing Guidelines must be advisory, not mandatory).

⁹⁴ Calculating a weighted average ensures that "quantities being averaged [are given] their proper degree of importance." JOHN E. FREUND, *MODERN ELEMENTARY STATISTICS* 54 (10th ed. 2001). For example, an analysis merely averaging the pre- and post-*Booker* data sets would not take into account the different periods of time the two data sets represent. Here, the weighted averages were calculated by multiplying each x (data point for which a full year total needed to be calculated) by the proportion of the total data (x /the sum of the pre-and post-data) it represented before figuring it into the average.

⁹⁵ See, e.g., Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921 (2002) (analyzing district disparities in use of substantial assistance motions in drug cases by looking at percent of drug offenders receiving substantial assistance motions in "high cooperation" districts and "low cooperation" districts, and comparing the respective proportions of drug trafficking offenses within the districts' total dockets); Schanzenbach, *supra* note 8, at 1 (Schanzenbach ran a detailed statistical analysis of departure rates between 1993 and 2001. He found that, though at first glance rates of cooperation increased between 1993 and 2001, analysis controlling for variables such as characteristics of the crime and offender reveals that the actual increase was minimal.).

districts—fast-track sentencing and substantial assistance departures—in three steps. First, this note looks at the sentencing data in the border districts and looks for patterns or disparities among the districts in order to ascertain whether the districts seem to be using the motions in similar ways. Second, this note theorizes possible explanations for the patterns or disparities, based on factors such as sentence composition,⁹⁶ prosecutorial practices, or the characteristics of the offenders on the district dockets. This second step of analysis will also examine connections between the rates of the two motions in the individual districts.

Third, this note uses Professor Stephanos Bibas's framework for analyzing sentencing disparities to theorize about whether the disparities seem justified or unjustified. Under Bibas's framework, a disparity is presumptively justifiable if it "correlate[s] closely with temporary, localized crime problems."⁹⁷ A sentencing disparity is unjustifiable if it is "unrelated to local crime problems or . . . track[s] legally irrelevant factors."⁹⁸ Bibas's framework is based on the notion that district-level disagreements about policy or value are unjustified sources of disparity, while responses to special problems within the districts are justified sources of disparity.⁹⁹

Each district has different judges and courthouse cultures, a different U.S. Attorney, and specialized local needs. However, the border districts' heavy immigration-related criminal caseloads set them apart from the other federal districts and unite them as a unique bloc within the federal courts.¹⁰⁰ This note's analysis operates on the assumption that the districts share a "local crime problem": significant law enforcement efforts on the border leading to a heavy volume of immigration offenders on their criminal dockets. The next two sections will look at whether the border districts are using

⁹⁶ Scholars often use composition of offenses as a statistical factor to find correlations between how pervasive an offense is on a district's docket, and how that corresponds (or does not correspond) to rates of downward departure motions or sentencing practices. *See, e.g.*, Simons, *supra* note 95, at 949 ("The volume of drug cases in a particular district does not explain the variation . . ."); Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 487 (2002) (describing these scholars' previous analysis of changes in proportion of drug type prosecuted in federal courts).

⁹⁷ Bibas, *supra* note 8, at 141.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See supra* Part I.A.

similar methods to deal with the heavy task of implementing national policy goals in local federal courts.

II. ANALYSIS OF FAST-TRACK SENTENCING, 2005-2008

According to sentencing scholar Doug Berman, fast-track disparity is a persistent “hot-spot” in post-*Booker* jurisprudence.¹⁰¹ The disparity Berman refers to, however, stems from sentencing arguments that “defendants who are not within so-called ‘fast-track’ districts should be eligible for comparable early plea reductions” when their situations are similar to defendants who would get the fast-track reductions in districts using fast-track programs.¹⁰² This note reveals another type of disparity: disparity in how frequently fast-track districts are using fast-track motions in sentencing.

This Part analyzes fast-track sentencing for the years 2005-2008 by looking at the rates of fast-track motions¹⁰³ in each of the five districts. The first step in the analysis identifies significant disparities among the border districts in their use of fast-track motions. The second step in the analysis discusses possible reasons for the disparities and adopts the conclusion that differing prosecutorial practices, such as the use of charge bargaining,¹⁰⁴ are the most likely reason for the disparities. This Part concludes that the disparate use of fast-track sentencing prevents fast-track programs from achieving the goals that originally justified their creation.

¹⁰¹ Doug Berman, *The Persistent Problems with Fast-Track Disparity After Booker and Kimbrough*, SENT’G L. & POL’Y (Feb. 11, 2009, 9:41 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2009/02/the-persistent-problems-with-fasttrack-disparity-after-booker-and-kimbrough.html.

¹⁰² *Id.*

¹⁰³ For a discussion of the history of fast-track sentencing and the requirements for a fast-track sentence, see *supra* Part I.B.1.

¹⁰⁴ Charge bargaining, as discussed by sentencing scholars, is the exercise of prosecutorial discretion to charge a lower crime in exchange for something given up by the offender. See, e.g., Bibas, *supra* note 8, at 146 n.30 (explaining different means for prosecutors to exercise discretion in charging and sentencing in the fast-track context, and citing to a study where charge bargaining led to higher processing of cases in a district) (citing William Braniff, *Local Discretion, Prosecutorial Choice and the Sentencing Guidelines*, 5 FED. SENT’G REP. 309, 310-11 (1993)).

A. *Step 1: Disparate Use of Fast-Track Motions in the Five Border Districts*

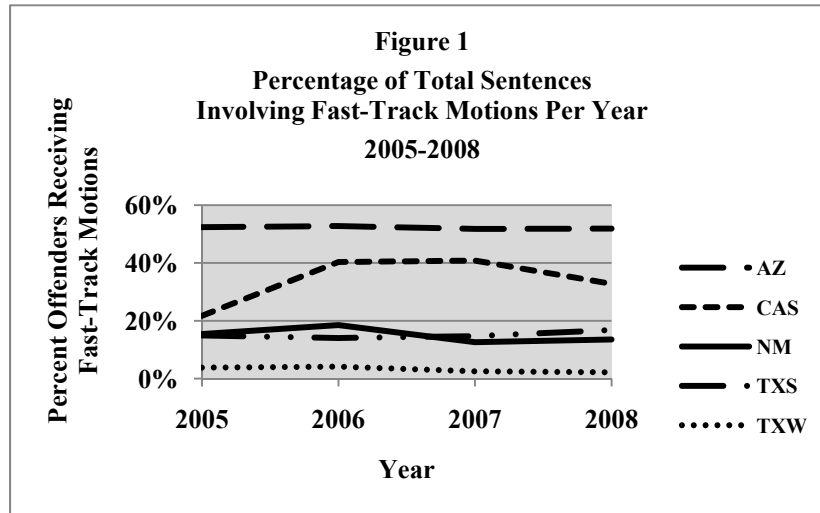
The sentencing data on fast-track motions since 2005¹⁰⁵ reveals substantial disparity among the districts in their use of fast-track motions.¹⁰⁶ To compare the districts' use of fast-track motions, this note compares the rates of fast-track motions in each district: the percent of offenders—out of total offenders sentenced—receiving a fast-track motion in each border district in each year 2005-2008.¹⁰⁷ Figure 1 shows the rate of fast-track motions per year in each of the five border districts for the years 2005-2008. In 2008, 5 out of 10 defendants in the District of Arizona received a downward departure due to participation in a fast-track program, compared to about 3 of 10 defendants in the Southern District of California, 1 of 10 in the Districts of

¹⁰⁵ The Sentencing Commission began reporting 5k3.1 (fast-track) motions in the post-*Booker* data in 2005. See 2005 SENTENCING COMM'N SOURCEBOOK, *supra* note 15. Before these reports, the Sentencing Commission reported "other government downward departures." See 2002 SENTENCING COMM'N SOURCEBOOK, *supra* note 15. These other motions for 2004, after Congressional authorization of fast-track programs, likely include 5k3.1 motions. Data reported before Congressional authorization also likely includes downward departures due to ad hoc fast-track programs. However, since these motions are reported within the general category of "other downward departures," this note does not incorporate the data for those years into analysis of fast-track disparities.

¹⁰⁶ Other scholars have recently discussed fast-track programs as both a statistical factor and a policy factor in sentencing disparities. Most analysis of disparities related to fast-track sentencing programs relates to disparities between fast-track and non-fast-track districts. See, e.g., Bibas, *supra* note 8, at 145-46; Abe Cho, *Lowering Sentences for Illegal Immigrants: Why Judges Should Have Discretion to Vary from the Guidelines Based on Fast-Track Sentencing Disparities*, 43 COLUM. J.L. & SOC. PROBS. 447 (2010). However, this note will look for disparities within the five border districts, all authorized for fast-track programs in similar offenses.

¹⁰⁷ Although only the post-*Booker* sentencing data reports specifically on 5k3.1 departures (and the pre-*Booker* data does not), the percentages from the post-*Booker* reporting are useful to represent the year 2005 figures for several reasons. First, the pre-*Booker* reporting data is a smaller fraction of the year total data (it represents October 1, 2004 to January 11, 2005). Second, the percent of 5k3.1 motions given in the post-*Booker* period is, with the exception of Southern California, consistent with the following year's rates of 5k3.1 departures. Third, the category where 5k3.1 departures were reported in the pre-*Booker* data, "Other Government Downward Departures," is very similar in size to the percent in the post-*Booker* data. 2005 SENTENCING COMM'N SOURCEBOOK, *supra* note 15, at introduction. Moreover, 5k3.1 departures were the primary kind of departures recorded in this category. Finally, and most importantly, the decision in *Booker* did not directly change the ability of prosecutors to make 5k3.1 motions, and so should not directly impact the rate at which they were made. See *id.* (discussing the reason for separating the 2005 data, and characterizing the most significant change post-*Booker* as being that judges were instructed to merely consider the statutory guidelines, rather than considering them mandatory). Therefore, the post-*Booker* 2005 data used to indicate 2005 levels is a number useful for general discussion of larger disparities.

New Mexico and Southern Texas, and only 3 of 100 in the Western District of Texas.¹⁰⁸



Not only are there significant disparities between the border districts in the use of fast-track motions, but also the disparities likely cause significant variations in sentences of similar offenders across districts. In 2002, Linda Drazga Maxfield, former Acting Director of the Office of Policy Analysis at the Sentencing Commission, undertook a detailed examination of federal practices involving unlawful entry, the most common federal immigration offense, across the five border districts.¹⁰⁹ Her analysis concluded that, even controlling for differences in criminal history, unlawful reentry offenders with prior aggravated felony convictions received disparate sentences in the five districts in 1997.¹¹⁰ Maxfield identified “differential charging and plea practices across districts” as the source of the disparities.¹¹¹

Although fast-track programs had not been officially authorized at the time of Maxfield’s analysis, she noted their

¹⁰⁸ The District of Arizona reported fast-track motions for more than 50% of all sentenced cases in the district. The other districts all had rates at or below 40% for each of the years. The Western District of Texas, the district with the lowest rate of 5k3.1 departures, had consistently less than 5% of defendants receiving 5k3.1 motions. 2005 SENTENCING COMM’N SOURCEBOOK, *supra* note 15.

¹⁰⁹ Maxfield & Burchfield, *Immigration Offenses Involving Unlawful Entry*, *supra* note 8, at 260.

¹¹⁰ *Id.* at 263-65.

¹¹¹ *Id.*

ad hoc existence and contribution to the disparities.¹¹² Maxfield found that all of the districts were granting downward departures, of which 9 out of 10 required offenders to accept voluntary deportation (and waive a formal deportation hearing).¹¹³ However, the districts varied widely in how *many* of these downward departures were being given—in the District of Arizona downward departures were given to 97% of unlawful entry offenders, while in the Southern District of California they were given to only 14.2%.¹¹⁴

The use of fast-track motions after Maxfield's study underscores the impact of the local variation. In 2005, all five border districts were authorized for fast-track programs for the two most prosecuted immigration offenses (illegal reentry and improper entry).¹¹⁵ However, as discussed above, the districts had widely disparate use of the fast-track programs. Based on the data, it appears that some of the border districts continued to use the fast-track charge bargaining Maxfield noted, rather than fast-track motions, to process the high volumes of immigration offenders.

Interestingly, the disparities in use of fast-track motions do not correspond to comparatively reduced sentences. Although the District of Arizona had the highest rate of fast-track motions (by far) in the years 2005-2008, it also had the highest median immigration sentence of the border districts in each of those same years.¹¹⁶ The Western District of Texas, the district with the lowest rate of fast-track motions, had median immigration sentences for the years 2005-2008 very close to the average of the median immigration sentences over the five districts.¹¹⁷ Although this is a small sample set, it is clear that increased rates of fast-track motions do not necessarily cause lower median immigration sentences, and decreased rates of fast-track motions do not necessarily cause higher median immigration sentences.

¹¹² *Id.* at 263. Maxfield noted that downward departures were the most common reason for the differences in sentence length, but did not alone explain the sentencing patterns. *Id.*

¹¹³ *Id.* at 262-63.

¹¹⁴ *Id.* at 262.

¹¹⁵ *See supra* Parts I.B, II.B.

¹¹⁶ For the years 2005-2008, the District of Arizona had median immigration sentences of 26, 26, 21, and 23, respectively. SENTENCING COMM'N SOURCEBOOKS 2005-2008, *supra* note 15. The average median of the five districts for those years was 18, 18, 16, and 14, respectively. *Id.*

¹¹⁷ For the years 2005-2008, the Western District of Texas had median immigration sentences of 18, 18, 18, and 10, respectively. *Id.*

Although fast-track motions have only been officially used and tracked for the last several years, the data available shows a clear disparity in how the border districts use fast-track motions. The next section will suggest and analyze possible sources for the disparity.

B. Step 2: Possible Sources of the Disparities

There are several possible reasons for the disparities in rates of fast-track motions. A logical reason for the disparities is the fact that certain districts are authorized for fast-track programs in more offense categories than are other districts or divisions. A second possibility is that some districts simply process higher volumes of defendants who are eligible for fast-track programs. Another reason is that charge bargaining—the practice of prosecutors bargaining for pleas using variations in what crime to charge in the first place, rather than what sentence to ask for—plays a large role in some districts and a lesser role (or no role) in others.

One reason for the differences in the use of fast-track motions could be differences in the fast-track programs for which each district received authorization. In order to use fast-track departures, a district must be authorized for a fast-track program for the charged offenses.¹¹⁸ The Justice Department authorized the District of Arizona for two more fast-track programs than the other districts, meaning that the District of Arizona could use fast-track departures for two more offense types than the other districts.¹¹⁹

However, the District of Arizona used more fast-track departures than the other districts by a substantial margin. Moreover, the District of Arizona was not authorized for “drug offenses along the border,” an authorization received by the Southern District of California, Western District of Texas (in 2004), and the Laredo Division of the Southern District of Texas.¹²⁰ Although differing authorization for fast-track procedures could contribute to some variation among the five districts, the wide disparity between the District of Arizona

¹¹⁸ See *supra* Part I.B.

¹¹⁹ See *supra* Part I.B. New Mexico was also authorized for drug backpacking. Comey Memo, *supra* note 78.

¹²⁰ Filing by the United States in *United States v. Medrano-Duran*, 386 F. Supp. 2d 943 (2005), reprinted in 21 FED. SENT. REP. 339, 339-40, 342-43, 347-48 (2009).

(with consistent rates over 50%)¹²¹ and Western District of Texas (with consistent rates under 10%)¹²² rates of fast-track motions seems too substantial to be attributed fully to differing district authorization.

A second reason for the disparity could be that higher-rate districts simply process more fast-track-eligible defendants. Illegal reentry, the offense for which fast-track is “the norm,”¹²³ is a frequent offense in each of the border districts. Logically, comparing the proportion of illegal reentry offenses on the dockets of the highest and lowest rate fast-track motion districts should show correspondingly high or low proportions of illegal reentry offenders, or significant levels of fast-track offenses that explain the disparity.

In 2005, 53% of offenders in the District of Arizona received fast-track departures, and only 4% did in the Western District of Texas.¹²⁴ In that same year, just under a quarter of Arizona’s docket involved illegal reentry cases.¹²⁵ Similarly, the Western District of Texas’s docket was just under 24% illegal reentry cases.¹²⁶ In other words, each district had roughly the same proportion of illegal reentry cases on its criminal docket, but the districts had widely disparate rates of fast-track motions. Therefore, the proportion of illegal reentry offenders on the districts’ dockets does not account for the disparate use of fast-track motions.

The explanation for the disparity that seems most in line with the evidence is differing practices or policies employed by the respective U.S. Attorney’s offices in the border districts. Maxfield theorized that much of the disparity she found in

¹²¹ See *supra* Figure 1.

¹²² *Id.*

¹²³ Gorman, *supra* note 9, at 314.

¹²⁴ 2005 SENTENCING COMM’N SOURCEBOOK, *supra* note 15.

¹²⁵ According to Sentencing Commission data, in 2005, 50.3% of Arizona’s docket was immigration offenders. 2005 SENTENCING COMM’N SOURCEBOOK, *supra* note 15. According to TRAC, just under 50% of the immigration offenders Arizona processed were illegal reentry offenders. *Immigration Convictions by Lead Charge*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (2005), <http://trac.syr.edu/tracins/findings/05/criminal/district/arizona/arizonaglaw05.html>. Although the Sentencing Commission and TRAC collect their data from different sources, the percents are useful for highly generalized comparison.

¹²⁶ According to Sentencing Commission data, in 2005, 43.9% of the Western District of Texas’s docket was immigration offenders. 2005 SENTENCING COMM’N SOURCEBOOK, *supra* note 15. Of the immigration offenders, TRAC data shows that just under 60% were illegal reentry. *Immigration Convictions by Lead Charge*, *supra* note 125. Therefore, loosely calculated, approximately 26% of Texas West’s docket was illegal reentry offenders.

sentences stemmed from differing charge bargaining practices.¹²⁷ Under the mandatory regime, the Guidelines themselves were, as Kate Stith observed, “powerful bargaining chips for prosecutors.”¹²⁸ Even without the mandatory framework, prosecutors still have “broad charging discretion.”¹²⁹ Charge bargaining is an example of one way in which different prosecutors’ offices could collectively—through official or unofficial office policy—use their discretion to employ differing means to deal with the same fast-track eligible offenders.

The type of charge bargaining Maxfield noted is the practice where the prosecutor allows the defendant to plead to a lesser crime in exchange for the defendant’s early disposition of the case. For example, a prosecutor might allow a defendant to plead to reentry of an illegal alien¹³⁰—carrying a fine and two-year maximum imprisonment, or both, rather than reentry of an illegal alien convicted of a crime or previously deported¹³¹—carrying a fine and ten-year maximum. In a hypothetical charge bargaining scenario, there is no need for a motion to lower the sentence because the defendant has pleaded to a lesser crime.¹³² Therefore, prosecutors in the Western District of Texas could be using charge bargaining to process offenders more quickly, but not be making fast-track motions. Under this scenario, prosecutors in the District of Arizona might hypothetically be more likely to charge the higher offense, yet make a fast-track motion so that the sentencing court makes a departure for early disposition.

The comparison between the Western District of Texas and the District of Arizona reinforces the inference from the districts’ disparate use of fast-track motions that districts processing the same high proportion of fast-track eligible offenders are not processing those offenders in the same way. The comparison suggests that some districts might be achieving the effects of a fast-track motion (an ultimately lowered sentence) without actually making the fast-track motion.

¹²⁷ Maxfield & Burchfield, *Immigration Offenses Involving Unlawful Entry*, *supra* note 8, at 263-65.

¹²⁸ Stith, *supra* note 88, at 1444.

¹²⁹ *Id.* at 1423.

¹³⁰ 8 U.S.C. § 1326(a) (2008).

¹³¹ *Id.* § 1326(b).

¹³² Charge bargaining essentially mimics the ad hoc programs of the mid-1990s, Gorman, *supra* note 9, at 312-13, and is allowed by the Attorney General, subject to several qualifications and restrictions. *See* Ashcroft Memo, *supra* note 74.

In sum, differences in fast-track authorization and volume of fast-track-eligible offenders may play a part in the disparate use of fast-track motions in the border districts. However, charge bargaining by prosecutors is a more likely source of much of the disparity.

C. *Step 3: Different Districts, Unjustifiably Different Systems*

Differing prosecutorial strategies for dealing with the large numbers of immigration-related offenders could be strategic decisions or merely “local culture”—habits that developed over time into accepted practice. Professor Bibas accepted—and even lauded—local practices developed as tactical responses to local crime problems.¹³³ He acknowledged, for example, that “a sudden rash of shootings . . . may require a swift and severe response.”¹³⁴ Moreover, local law enforcement agents and prosecutors may have local knowledge about how some crimes are being committed.¹³⁵

However, according to Bibas, local variations lacking such particular justifications can carry significant costs.¹³⁶ Indeed, unjustified variations “make the law seem arbitrary, undercutting its perceived fairness and legitimacy.”¹³⁷ Bibas identifies disparities due to federal district policy disagreements as unjustified and especially troubling because of the federal system’s aim to “address national problems and enforce them with one voice.”¹³⁸ Bibas’ concern seems especially pertinent to the border districts, where all five districts work to implement national policy goals relating to one overarching localized crime problem.

Congress created official fast-track programs in order to limit unchecked discretion in the sentencing process.¹³⁹ As several scholars point out, the aim of the amendments officially creating fast-track motions was to allow for closer tracking of downward departures for purposes of monitoring both judicial and prosecutorial discretion.¹⁴⁰ A sentence resulting from a

¹³³ Bibas, *supra* note 8, at 141.

¹³⁴ *Id.* at 139.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 140.

¹³⁹ See *supra* Part I.B.

¹⁴⁰ See, e.g., Gorman, *Rereading Congressional Intent*, *supra* note 68, at 5-6; Schanzenbach, *supra* note 8, at 8-9.

charge bargain is reflected in the sentencing data as a “within Guidelines” sentence and the actual reasons for the lower sentence go unreported,¹⁴¹ thus defeating the Congressional goal of tracking (and monitoring) district sentencing practices through the Sentencing Commission’s data collection.

Allowing the discretion of prosecutors, who decide whether to “charge bargain” in each individual case, to go unmonitored arguably does more damage than simply defeat Congressional goals. If, as the data suggests, some districts are using a reported method and some are using an unreported method, efforts to track use of fast-track motions to note disparities or changing trends are much less effective. Therefore, prosecutorial plea bargain practices related to fast-track programs go unmonitored.¹⁴² The disparity in use of fast-track motions is troubling because it reveals that border districts are likely using very different systems for sentencing similar offenders.¹⁴³

III. ANALYSIS OF SUBSTANTIAL ASSISTANCE DEPARTURES

Although fast-track programs may be a recent “hot-spot” in sentencing, substantial assistance motions and the related sentencing disparities are a much-discussed¹⁴⁴ aspect of the United States Sentencing Guidelines. This Part analyzes substantial assistance departures in the border districts in 1996-2008. The first section analyzes the rates of substantial

¹⁴¹ The lack of reporting is due to the fact that a charge bargain, by its very nature, occurs in the “administrative criminal process” between the prosecutor and the offender, rather than in the courts. Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1411-12 (2003). In a charge bargaining scenario, negotiations are not only left out of relevant sentencing data, but are also completely shielded from public or judicial review. *See id.* (discussing lack of transparency in charge bargaining and its implications for the sound administration of criminal justice).

¹⁴² Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2008) (“[T]here are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion to bring charges, to negotiate pleas, or to set their office policies.”).

¹⁴³ The indication that districts using fast-track programs are using them disparately is even more troubling in light of the alleged disparities between districts using the program and districts that are not. Defendants in several districts have alleged a constitutional violation because they were not offered participation in a fast-track program. *See* Berman, *supra* note 101; Gorman, *Rereading Congressional Intent*, *supra* note 74, at 2-3 (describing a circuit split on whether the lack of a fast-track program and the related disparity in applicable sentence can be taken into account at a defendant’s sentencing).

¹⁴⁴ *See* Baer, *supra* note 52, at 7-8 (describing different themes of criticizing cooperation within the United States Sentencing Guidelines).

assistance departures and reveals that, while disparities existed in the past, the border districts are currently using substantial assistance departures at similarly low rates. The second section identifies several explanations for the sentencing patterns, including characteristics of immigration offenses that make them less likely to involve substantial assistance motions. The third section concludes that the substantial assistance patterns indicate that the border districts are dealing similarly with their shared experiences, although they may be sacrificing cooperation in the process.

A. *Step 1: From Disparity to “Uniformity”*

The Sentencing Commission data on substantial assistance departures reflects the number of sentences where the judge made a downward departure in sentencing after a government substantial assistance motion.¹⁴⁵ Nationally, district-level data shows wide disparity in the number and proportion of substantial assistance motions given to defendants in the federal districts.¹⁴⁶ These national disparities have been the source of significant scholarly criticism.¹⁴⁷ Although districts can also have disparate practices in the extent of departure recommended within the substantial assistance motions,¹⁴⁸ this analysis concerns only the percentage of total offenders receiving substantial assistance motions—not possible disparities in the resulting sentences.

In recent years the border districts have converged around a trend of substantial assistance rates notably lower than the national rate. Although in the 1990s the border districts used substantial assistance motions at disparate rates, the districts have gradually converged around relatively

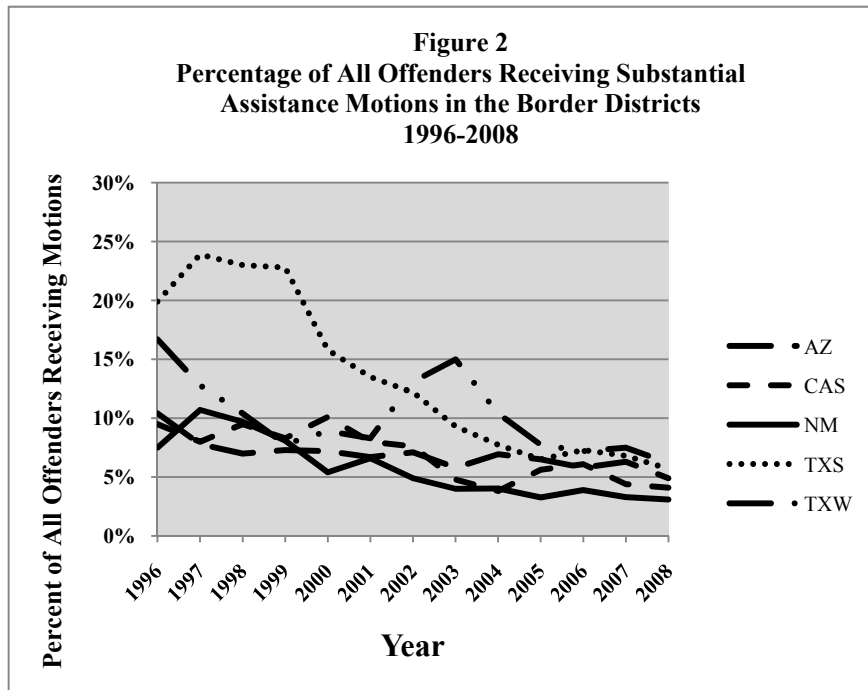
¹⁴⁵ This type of departure is allowed only upon a government motion, Maxfield, *EMPIRICAL YARDSTICK*, *supra* note 8, at 2 n.6, indicating that the defendant has provided “assistance to authorities in the investigation of criminal activities.” *Id.* at 3. Therefore, the rate at which sentencing courts depart for substantial assistance is essentially the same as the rate at which prosecutors make substantial assistance motions. Whether or not to make a motion is a unilateral government decision, not subject to judicial review except for constitutional violations. *Id.* Therefore, discussion of whether a defendant “received” a substantial assistance motion refers to the fact that the government made such a motion and the judge incorporated it into the defendant’s sentence.

¹⁴⁶ Simons, *supra* note 95, at 948.

¹⁴⁷ Baer, *supra* note 52, at 7. In fact, these disparities have been used as evidence of improper prosecutorial discretion, Simons, *supra* note 95, at 924, and as an indication of improper congressional policy choices, Bibas, *supra* note 8, at 138.

¹⁴⁸ Bibas, *supra* note 8, at 149-50.

similar rates.¹⁴⁹ Figure 2, plotting the rates of substantial assistance in the border districts over the years 1996-2008, illustrates this trend. The differing rates show that in 1996, 1 in 5 defendants in the Southern District of Texas received a substantial assistance motion, but only 1 in 10 defendants received such a motion in each of the districts of New Mexico, Southern District of California, and Arizona.¹⁵⁰ However, since 2004, all five border districts have had rates of substantial assistance motions between roughly 3-10%.¹⁵¹ These recent rates in the individual border districts are lower than the national rates of substantial assistance motions, which remained around 13-15% in the years 2004-2008.¹⁵²



¹⁴⁹ SENTENCING COMM'N SOURCEBOOKS 1996-2008, *supra* note 15.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* Although rates of substantial assistance departures were slightly more disparate in 2004 than in 2005, the overall substantial assistance trends in the border districts do not appear to have been impacted by the changes in applicability of the federal sentencing guidelines. In 2004, the substantial assistance rates of the districts ranged between 3.8% and 10.4%. 2004 SENTENCING COMM'N SOURCEBOOK, *supra* note 15. In 2005, they ranged from 3.3% to 7.7%. *Id.*

¹⁵² SENTENCING COMM'N SOURCEBOOKS 1996-2008, *supra* note 15.

B. Step 2: A Downward Uniform Trend

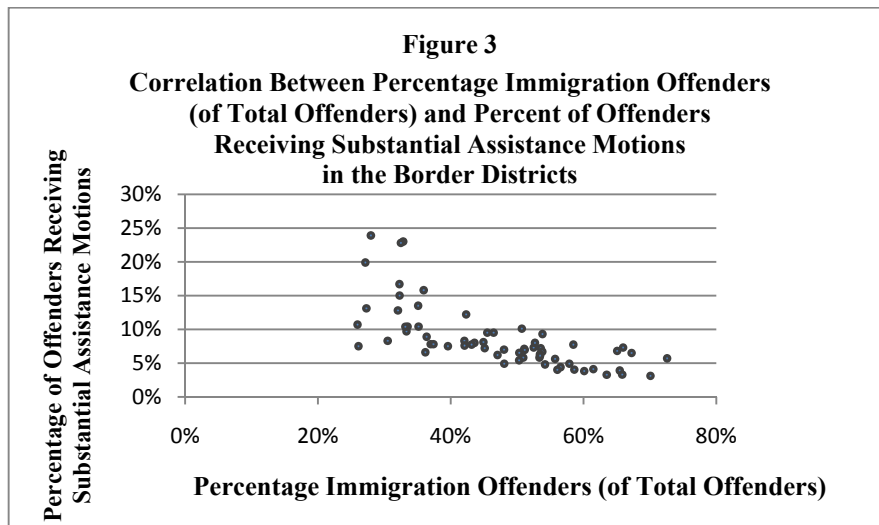
The low (and dropping) rates of substantial assistance in the border districts correlate to high (and rising) numbers of immigration cases on the district dockets. This correlation can be explained in several ways. First, it can be explained by characteristics of immigration offenders and of the immigration offenses themselves. Second, it can be explained by immigration offenders' high rates of participation in fast-track programs.

Statistical analysis reveals a fairly strong correlation between the number of immigration cases sentenced in a district and the number of downward departures based on substantial assistance motions. Figure 3 shows a linear regression of the percentage immigration offenses on a district's docket per year, and the percentage of cases receiving substantial assistance motions.¹⁵³ Each data point on the regression is a district in a given year. Figure 3 shows that, generally speaking,¹⁵⁴ as the percent of the docket composed of immigration offenders increases (on the *x* axis), the percent of offenders receiving substantial assistance motions (on the *y* axis) goes down. Although this correlation does not prove *causation* between the two occurrences, it shows that there is a fairly strong relationship between how much of a district's docket is immigration crimes and how many substantial assistance motions that district's prosecutors make per year.¹⁵⁵

¹⁵³ This linear regression has a negative slope. This shows a "negative correlation," or a tendency for large values of *y* to go with small values of *x*, and small values of *y* to go with high values of *x*. FREUND, *supra* note 94, at 501.

¹⁵⁴ Typical linear regression analysis assumes that the independent variables will be normally distributed, or sharing an error distribution around a mean point. *Testing the Assumptions of Linear Regression*, DUKE.EDU, <http://www.duke.edu/~rnau/testing.htm> (last visited Nov. 16, 2010). In this case, the independent variables are themselves proportions (percentages). Lack of normal distribution can compromise the estimation of coefficients, such as the correlation coefficient discussed herein. *Id.* However, because this analysis does not involve the calculation of a correlation coefficient, but merely the illustration of a generalized correlation trend, this note's analysis proceeds without normally distributed independent variables.

¹⁵⁵ Linear regression of the overall U.S. data 1996-2008 reveals a correlation of $R^2=0.9$ between the percent immigration offenders of total U.S. offenders and the percent of offenders receiving a substantial assistance motion, a very high statistical correlation. In other words, as the proportion of immigration offenders in the United States rose, the proportion of offenders receiving substantial assistance motions declined. However, the use of only 12 data points (the 12 years) suggests that this correlation is useful, but may overemphasize the correlation that would exist if all of the district data points (each U.S. district by year) were included in the regression.



Close examination of data from one particular district, the Southern District of Texas, supports this correlation. The district had noticeably higher rates of substantial assistance than the other districts in the years 1996-2002.¹⁵⁶ However, the steady decline in rate of substantial assistance motions in the district over that period corresponds to a rise in the proportion of immigration offenses on the district's docket.¹⁵⁷

There are several qualities of an immigration offense that explain why defendants in immigration cases do not often receive substantial assistance motions. Cooperation aids prosecutors and law enforcement officials in the detection of other crimes or co-conspirators in a defendant's crime.¹⁵⁸ Unlike drug trafficking offenses, which "by their very nature, involve chains of accomplices, associates, and co-conspirators,"¹⁵⁹ immigration offenders may be less likely to have co-conspirators to testify against.

¹⁵⁶ SENTENCING COMM'N SOURCEBOOKS 1996-2008, *supra* note 15.

¹⁵⁷ In 1996, the Southern District of Texas's docket was 50% drug trafficking cases, and, in 2002, declined to just under 40%. *Id.* By 2008, the proportion of drug trafficking offenders on the district's docket had decreased to 18%. *Id.* The decrease in proportion of drug trafficking offenses is due to the increase in immigration offenses. In 1996, the district's docket was 27% immigration offenders; by 2002 it was 42%. *Id.* This proportion rose fairly steadily (evening out for the years 2005-2007 around 65%), reaching 72% in 2008. *Id.*

¹⁵⁸ Baer, *supra* note 52, at 12-15.

¹⁵⁹ Simons, *supra* note 95, at 938.

Another reason immigration offenders might not cooperate is that prosecutors are generally without authority to offer them temporary deportation immunity, even if they are cooperating witnesses.¹⁶⁰ Therefore, immigration offenders will have little incentive to cooperate because they will potentially gain little from any bargain. Moreover, knowing that this restriction exists might potentially chill prosecutors from pursuing potential cooperators in the first place.

Increased use of fast-track programs is another reason for the decrease in substantial assistance motions in each district. Use and official sanction of fast-track motions¹⁶¹ increased during the same period as the decline of substantial assistance motions. Although the corresponding timeframe does not definitively show causation, characteristics of fast-track sentencing support the argument for at least some correlation between the two trends. For example, fast-track deals usually preclude substantial assistance cooperation because they rely on “the premise that a defendant who promptly agrees to participate in [fast-track sentencing] has saved the government significant and scarce resources that can be used in prosecuting other defendants.”¹⁶² Fast-track disposition is a somewhat “truncated procedure,”¹⁶³ resulting in fast wholesale processing of cases, rather than case-by-case prosecutorial discretion.¹⁶⁴ Although this does not summarily preclude the possibility of substantial assistance, it would logically seem to make it less likely that the prosecutor would have the time to engage in the process of evaluating a defendant’s potential for substantial assistance and taking a proffer.

¹⁶⁰ 28 C.F.R. § 0.197 (2007) (“The Immigration and Naturalization Service (Service) shall not be bound . . . through plea agreements, cooperation agreements, or other agreements with or for the benefit of alien defendants, witnesses, or informants, or other aliens cooperating with the United States Government, except by the authorization of the Commissioner of the Service or the Commissioner’s delegate.”); see also Rachel Frankel, Note, *Sharks and Minnows: Using Temporary Alien Deportation Immunity to Catch the Big Fish*, 77 GEO. WASH. L. REV. 431, 433 (2009). Although Frankel argues that this regulation de-incentivizes cooperation by lawful permanent residents charged with minor crimes, *id.* at 432, the illustration of her argument (and many of her subsequent arguments) focuses on cooperation related to crimes other than immigration crimes, *id.* at 431.

¹⁶¹ See *supra* Part I.A.

¹⁶² Memorandum from John Ashcroft, Att’y Gen., U.S. Dep’t of Justice, to All U.S. Attorneys on Department Principles for Implementing an Expedited Disposition or “Fast Track” Prosecution Program in a District (Sept. 22, 2003).

¹⁶³ Bibas, *supra* note 8, at 146.

¹⁶⁴ *Id.*

C. *Step 3: Low Rates as a Justified Trend*

Although the border district data shows converging rates of substantial assistance departures and a correlation between the rates of substantial assistance and the proportion of immigration offenders on the district dockets, the dockets of the border districts are not composed of the same proportions of immigration cases. In theory, the correlation between immigration offenders and lowered rates of substantial assistance motions should suggest that a district with lower rates of immigration offenders would have higher rates of substantial assistance motions. However, because the districts have different proportions of immigration cases on their dockets, it is more likely the factors associated with immigration offenders, such as citizenship of offenders and the districts' increasing caseloads, correlate most directly to the decrease in substantial assistance rates.

For example, the Western District of Texas has a low proportion of immigration cases on its docket in relation to the other border districts, but has similar rates of substantial assistance departures. In 2005, the Western District of Texas's docket was only 43% immigration offenders, and it gave 7.7% of offenders a substantial assistance motion.¹⁶⁵ The district had the highest rate of substantial assistance in the five border districts, but it could be argued that, given the relatively low proportion of immigration offenses on its caseload,¹⁶⁶ the percent of substantial assistance motions should have been higher. However, the district had a comparatively high proportion of drug trafficking offenders on its docket—41%, as compared to between 20-30% in the other border districts.¹⁶⁷ Given that drug trafficking is usually a “high-cooperation crime,” this difference suggests that the Western District of Texas has a disproportionately infrequent use of substantial assistance motions as compared to the other four districts.

However, as discussed above, the citizenship of offenders on a district's docket can have a great impact on the rates of substantial assistance motions.¹⁶⁸ Moreover, the decreased use of

¹⁶⁵ 2005 SENTENCING COMM'N SOURCEBOOK, *supra* note 15.

¹⁶⁶ In 2005, New Mexico had a caseload of 63.5% immigration offenders, and the Southern District of Texas had a caseload of 67.2%. The other two districts were also above 50%. *Id.*

¹⁶⁷ SENTENCING COMM'N SOURCEBOOKS 1996-2008, *supra* note 15.

¹⁶⁸ See *supra* Part III.B.

substantial assistance motions came at roughly the same time as the overall increase in each district's criminal docket. Both factors—non-citizenship of offenders and increased caseloads—likely relate to the lowered rates in the districts.

This trend seems in line with the sort of response to “localized crime problems” Professor Bibas deems presumptively justifiable.¹⁶⁹ The fact that the districts are all being influenced by the factors they are experiencing—large volume of non-citizen offenders, immigration offenders, increase in criminal defendants—indicates that this trend is not based on district-level policy disagreements. In other words, this downward trend does not implicate the unfettered or arbitrary prosecutorial discretion Bibas condemns.¹⁷⁰ This trend does indicate, however, that prosecutors' “self-interest in disposing of cases quickly”¹⁷¹ may be causing the border districts to make less frequent use of cooperators.

CONCLUSION

This note undertakes an admittedly generalized analysis¹⁷² of the border districts' sentencing practices. However, the data reveals two very interesting general trends: the districts are experiencing different rates of fast-track motions and low rates of substantial assistance motions. The rise of immigration offenders in the districts can be linked to both of these trends: the sharp increase of immigration offenders—leading to hefty increases in the overall dockets—led the districts to adopt different mechanisms for processing the high volumes of criminal defendants, and also led to overall lowered rates of substantial assistance motions.

Fast-track programs are justified by supporters as programs borne of the necessity to deal with increasing volumes of immigration offenders. This note's analyses reveal this justification to be based on fact. As discussed in Part I.A.,

¹⁶⁹ Bibas, *supra* note 8, at 141; *see also supra* Part I.C.

¹⁷⁰ Bibas, *supra* note 8, at 151.

¹⁷¹ *Id.*

¹⁷² This note's analyses did not control for other sentencing factors such as criminal history, or offender characteristics, such as age, method of disposition, or race. For a description of a process for analyzing downward departures by creating “dummy” models to control for those variables, see Schanzenbach, *supra* note 8, at 17-19; *see also* Maxfield & Burchfield, *Immigration Offenses Involving Unlawful Entry*, *supra* note 8, at 261-62 (controlling for Criminal History Category in analyzing border district sentencing practices on unlawful entry immigration offenses).

the border districts have growing dockets, largely due to notable increases in the number and proportion of immigration offenders. However, another way to look at the justification for fast-track programs is one of priorities: border districts processing a high volume of cases can boast of “high stats” and perhaps assuage public outcry for increased border security.¹⁷³ However, this note’s analysis suggests that focusing on high-volume processing may lead to less cooperation and disparate fast-track practices. In other words, the border districts may be “throwing the baby out with the bathwater”—that is, working toward goals of high-volume, speedy dockets rather than effective law enforcement or fair sentencing practices.

The sentencing data from the border districts hardly shows disparities akin to vigilante justice meted out by sheriffs or gunslingers. Although the districts are using some sentencing mechanisms differently, they are united by the effort to deal with the high volume of offenders on their criminal dockets. However, examination of sentencing trends in the border districts shows that the chaotic violence in the border districts, reminiscent of the “Old West,” has played out in federal sentences and should be a closely monitored aspect of federal efforts in the border states.

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¹⁷³ Apollonio et al., *supra* note 23, at 6.

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