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## A CRACKED REMEDY: THE ANTI-DRUG ABUSE ACT OF 1986 AND RETROACTIVE APPLICATION OF THE FAIR SENTENCING ACT OF 2010\*

“[L]et’s not make the punishment for crack cocaine that much more severe than the punishment for powder cocaine when the real difference between the two is the skin color of the people using them.”<sup>1</sup>

### I. INTRODUCTION

The emergence of crack cocaine in Los Angeles gave rise to what the public and the media viewed as an epidemic of alarming proportions.<sup>2</sup> As crack cocaine began to proliferate throughout the country in the 1980s, public fear of the devastating new drug, instigated by sensationalist media coverage, was widespread.<sup>3</sup> The political dialogue surrounding the crack epidemic was equally

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1. Senator Barack Obama, Remarks During the 140th Howard University Opening Convocation (Sept. 28, 2007), <http://www.howard.edu/newsroom/news/2007/071001RemarksOfSenatorBarackObama.htm>.

2. See LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J. GENDER RACE & JUST. 375, 381–82 (2011) (examining the media’s extensive coverage of crack cocaine prior to the passage of the Anti-Drug Abuse Act of 1986); Mary Beth Lipp, *A New Perspective on the “War on Drugs”: Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979, 990 (2004) (noting how the war on drugs only exacerbated the sensationalist rhetoric surrounding national drug issues); see also Alyssa L. Beaver, Note, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2538 (2010) (indicating that crack cocaine was created in Los Angeles in 1981 and, “[b]y 1985, crack cocaine was available in nearly every major city”).

3. See *United States v. Clary*, 846 F. Supp. 768, 783 (E.D. Mo.) (noting between 1985 and 1986 media networks broadcasted over four hundred reports on crack cocaine, which stereotyped a crack dealer “as a young black male, unemployed, gang affiliated, gun toting, and a menace to society”), *rev’d*, 34 F.3d 709 (8th Cir. 1994); Davis, *supra* note 2, at 387 (discussing the “crack baby” hysteria surrounding the crack debates, and the fear that crack would lead to an urban “‘bio-underclass’ of (sub)human drones”); Richard Dvorak, *Cracking the Code: “De-Coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 649 (2000) (noting that from late 1985 until the passage of the Anti-Drug Abuse Act in October 1986 “more than one thousand stories were written that featured crack prominently”); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 264 (2009) (observing that “politicians and the media focused on the putative effects of crack in inner-city neighborhoods—although many of those effects were subsequently proven to have been greatly exaggerated or just plain wrong”); Sarah Hyser, Comment, *Two Steps Forward, One Step Back: How Federal Courts Took the “Fair” Out of the Fair Sentencing Act of 2010*, 117 PENN ST. L. REV. 503, 507–08 (2012) (discussing the sensationalism

sensationalistic.<sup>4</sup> Public frenzy surrounding crack cocaine peaked in June 1986, when Len Bias—a basketball superstar at the University of Maryland—died of a tragic overdose just two days after the Boston Celtics drafted him second overall in the NBA draft.<sup>5</sup> Congress recognized the legitimate public health and safety concerns raised by crack cocaine shortly after Bias died, and a bipartisan consensus emerged to craft a legislative response—the Anti-Drug Abuse Act of 1986 (ADAA).<sup>6</sup>

In less than a decade, the United States Sentencing Commission (Sentencing Commission) concluded that the ADAA was premised on faulty assumptions about crack,<sup>7</sup> produced anomalous disparities in federal cocaine sentencing, and had a vastly disproportionate impact on African Americans.<sup>8</sup> Despite mounting concerns about the ADAA sentencing regime,<sup>9</sup> the ADAA mandatory minimums remained federal cocaine sentencing policy for twenty-four years, until Congress passed the Fair Sentencing Act of 2010 (FSA).<sup>10</sup> Through the FSA, Congress prospectively amended the ADAA mandatory minimums by increasing the threshold drug quantity required to trigger the

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associated with the crack epidemic and the ensuing “national media frenzy”); see also Jane Gross, *A New, Purified Form of Cocaine Causes Alarm as Abuse Increases*, N.Y. TIMES, Nov. 29, 1985, at A1 (referring to crack as the “wave of the future” and highlighting the medical complications associated with crack use, as well as the vulnerable populations, particularly upper-middle-class adolescents, that were endangered by the “epidemic”).

4. For instance, six weeks before the passage of the Anti-Drug Abuse Act, in a joint public speech at the White House by President Reagan and the First Lady, titled “Just Say No,” First Lady Reagan stated, “[D]rug criminals are ingenious. They work everyday to plot a new and better way to steal our children’s lives, just as they’ve done by developing this new drug, crack. For every door that we close, they open a new door to death.” President Ronald Reagan & First Lady Nancy Reagan, *Just Say No: Words to the Nation* (Sep. 14, 1986), <http://www.ibiblio.org/sullivan/CNN/RWR/album/speechmats/nancy.html>. As explained by Michelle Alexander in *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, “[T]he drug war from the outset had little to do with public concern about drugs and much to do with public concern about race.” MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 49 (2010). “By waging a war on drug users and dealers, Reagan made good on his promise to crack down on the racially defined ‘others’—the undeserving.” *Id.* “Practically overnight the budgets of federal law enforcement agencies soared. . . . By contrast, funding for agencies responsible for drug treatment, prevention, and education was dramatically reduced.” *Id.* at 49–50.

5. Adam M. Acosta, Comment, *Len Bias’ Death Still Haunts Crack-Cocaine Offenders After Twenty Years: Failing to Reduce Disproportionate Crack-Cocaine Sentences Under 18 U.S.C. § 3582*, 53 HOW. L. J. 825, 827 n.4 (2010) (noting that in Senate subcommittee hearings on crack cocaine, Bias’s death was cited eleven times, despite the fact that he died from an overdose of powder cocaine).

6. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. §§ 841–904 (2012)); see also Davis, *supra* note 2, at 382 (noting that House Speaker Tip O’Neal, whose Congressional district represented Boston, was impacted by Bias’s death and made passing a new antidrug statute a legislative priority).

7. See *infra* Part II.A.4 for a discussion of the Sentencing Commission’s reports to Congress challenging the utility of the 100-to-1 sentencing ratio.

8. See *infra* Part II.A.2 for a discussion of the disparate racial impact associated with the 100-to-1 sentencing ratio.

9. See *infra* Part II.A.1 for a discussion of the ADAA and the 100-to-1 sentencing disparity.

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

statutory minimums—replacing the 100-to-1 sentencing ratio with an 18-to-1 ratio.<sup>11</sup> The FSA also directed the Sentencing Commission to promulgate emergency amendments to the Sentencing Guidelines (Guidelines) to reflect the new, comparatively lenient FSA power-to-crack quantity ratio.<sup>12</sup> The Sentencing Commission promulgated these amendments and subsequently decided to apply them retroactively.<sup>13</sup> The retroactive amendments allowed for Guidelines offenders—that is, prisoners sentenced to Guidelines sentences above or below the ADAA mandatory minimums—to obtain minor sentence reductions pursuant to 18 U.S.C. § 3582(c)(2).<sup>14</sup>

Although the Sentencing Commission applied the newly promulgated Guidelines retroactively, Congress did not include an express statement of retroactivity in the FSA to apply the newly enacted mandatory minimums retroactively.<sup>15</sup> Unless it was the “fair implication” of Congress to apply the FSA retroactively, the saving statute triggers a legal presumption that the remedial amendments to the ADAA mandatory minimums apply prospectively.<sup>16</sup> Because the Sentencing Commission lacks authority to alter the statutory minimums, and the FSA does not contain an express statement of retroactivity, prisoners currently serving ADAA *mandatory minimum* sentences—unlike their counterparts serving *Guidelines* sentences—are ineligible for retroactive sentence reductions based on the newly enacted FSA mandatory minimums.<sup>17</sup>

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11. Under the ADAA sentencing scheme, possessing 100 grams (or over 3 ounces) of powder cocaine—the derivative source of crack—was considered equivalent to possessing only 1 gram of crack, despite the pharmacological identity of both substances. *Dorsey v. United States*, 132 S. Ct. 2321, 2327 (2012). The FSA decreased that equivalency from 100 grams of powder cocaine to 18 grams. *Id.* at 2329.

12. See *infra* Part II.B for a discussion of the passage of the FSA and the ameliorative provisions of the Act that affected the sentencing Guidelines.

13. See *infra* notes 148–53 and accompanying text for a summary of the Sentencing Commission’s post-FSA amendments to the Sentencing Guidelines.

14. See *infra* Part II.C.1 for a discussion of the requirements for a prisoner to obtain a sentence reduction under § 3582(c)(2) and the discretion vested in district judges to deny sentence reduction motions for various reasons. See *infra* note 161 for the text of § 3582(c)(2).

15. Jeff Lazarus, *Making the Fair Sentencing Act Retroactive: Just Think of the Savings . . . Clause*, 61 CLEV. ST. L. REV. 713, 719 (2013).

16. 1 U.S.C. § 109 (2012). The general saving statute was enacted in 1871 to reverse the common law presumption that the repeal of, or a remedial amendment to, a criminal statute would “abate all nonfinal convictions under the repealed or amended statute.” *Dorsey*, 132 S. Ct. at 2339 (Scalia, J., dissenting). The Supreme Court has permitted retroactive application of a later-in-time ameliorative statute, without an express declaration of Congress, when it was the “necessary implication,” the “clear implication,” or the “fair implication,” of Congress to apply the new Act retroactively. See *id.* at 2331–32 (noting that these phrases are used interchangeably). See *infra* notes 178–181 and accompanying text for further discussion of the saving statute and the presumption against implied repeals of criminal statutes.

17. Hypothetically, Defendant X was arrested and sentenced prior to the FSA for possessing 50 grams of crack and thus received a 120-month mandatory minimum sentence. Defendant Y was arrested prior to the FSA with 150 grams and was subject to the same 120-month mandatory minimum. Now let’s say, due to the increased drug quantity involved in the offense (or for any other reason) the judge sentences Defendant Y to a 138-month Guidelines sentence, 18 months above the otherwise applicable statutory minimum. In this scenario, following the passage of the FSA,

To further complicate this legal landscape, in 2012, the Supreme Court held that the FSA is, in a sense, partially retroactive, in that the Act's mandatory minimums apply to crack offenders arrested before but sentenced after the passage of the FSA.<sup>18</sup> Nonetheless, the prevailing interpretation of the FSA, unanimously endorsed by the federal circuit courts of appeals, is that the FSA mandatory minimums do not apply retroactively for the purpose of discretionary sentence-modification proceedings under § 3582(c)(2).<sup>19</sup> Courts addressing the issue of retroactivity—most notably the en banc Sixth Circuit in *United States v. Blewett (Blewett II)*<sup>20</sup>—have expressed serious constitutional concerns about categorically denying ADAA mandatory minimum offenders the opportunity to obtain sentence reductions while allowing similarly situated Guidelines offenders to obtain the same relief.<sup>21</sup>

This Comment provides an in-depth overview of federal cocaine sentencing policy and analyzes the practical and constitutional concerns raised by the prevailing interpretation of the FSA mandatory minimums. This Comment contends that permitting the remedial amendments to the ADAA mandatory minimums to apply retroactively at discretionary sentence-modification proceedings would further the six purposes of the FSA—as evidenced by the legislative history of the FSA, overwhelming congressional opposition to pre-FSA cocaine sentencing policy, and secondary policy considerations. It further argues that courts denying discretionary retroactive effect to the FSA mandatory minimums have undermined the policy objectives of the FSA by misguidedly breathing life into the discriminatory 100-to-1 sentencing ratio for purposes of sentence-modification proceedings. This Comment concludes that the FSA's mandatory minimums should be applied retroactively at discretionary sentence-modification proceedings because the failure to do so is inconsistent with the

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Defendant X would be ineligible for a sentence reduction pursuant to § 3582(c)(2), while Defendant Y, the “worse” criminal who was arrested with three times as much crack, would be eligible for an 18-month sentence reduction. See *infra* Part III.C.2 for an argument that such disparate treatment of similarly situated offenders is irrational and arbitrary.

18. See *infra* Part II.D for a discussion of the significance of the Supreme Court's holding in *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

19. See *infra* Part II.E for a discussion of how the federal circuit courts of appeals have addressed the retroactivity of the FSA in the context of § 3582(c)(2).

20. 746 F.3d 647 (*Blewett II*) (6th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1779 (2014). Thought-provoking scholarship has been published recently addressing retroactive application of the FSA. See, e.g., Harvey Gee, *Striving for Equal Justice: Applying the Fair Sentencing Act of 2010 Retroactively*, 49 WAKE FOREST L. REV. 207 (2014); Hilary E. LaBar, *The Fair Sentencing Act Isn't All It's "Cracked" Up to Be: How Recent Congressional Action on Federal Crack Cocaine Sentencing Schemes Failed to End the Disparity Between Crack and Powder Cocaine Offenses*, 64 SYRACUSE L. REV. 313 (2014); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL'Y 241 (2014).

21. U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT tbl.9 (2011) [hereinafter 2011 RETROACTIVITY REPORT] (noting that 6,728 motions for reduction of sentence have been denied on ineligibility grounds; 2,408 of those were denied, without a ruling on the merits, on the ground that the corresponding ADAA mandatory minimum is controlling).

recent overhaul of federal drug sentencing policy and constitutional principles of equal protection.

## II. OVERVIEW

As crack cocaine began to proliferate throughout the country in the 1980s, public fear of the devastating new drug was widespread.<sup>22</sup> Lawmakers were especially concerned that the influence of crack cocaine would expand beyond urban areas.<sup>23</sup> On September 15, 1986, President Reagan proposed the Drug-Free America Act of 1986 to Congress.<sup>24</sup> With the 1986 congressional elections less than two months away, both Republicans and Democrats sought to show the electorate that they had responded urgently and adequately to the crack epidemic.<sup>25</sup> Despite the fact that the legislation drastically changed federal drug policy, no congressional committee analyzed the key provisions of the pending legislation or “produced [any] reports related to the 1986 Act.”<sup>26</sup> The resulting legislation was accordingly drafted and enacted by Congress in what District Judge Clyde S. Cahill later described as “an extraordinarily hasty and truncated legislative process.”<sup>27</sup> In the end, less than two weeks before the 1986 elections, Congress passed the ADAA.<sup>28</sup>

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22. See *supra* notes 2–3 for sources discussing the hysteria surrounding the crack epidemic.

23. See Dvorak, *supra* note 3, at 654–58 for an argument that the racially coded language used during the crack debates suggests that a large motivation for the ADAA was public fear that crack would move from urban ghettos into white, suburban areas. For instance, Senator Howell Thomas Heflin stated during the debates, “For many years this war [on drugs] was fought . . . in the burned out, abandoned buildings of our large metropolitan areas. But now, the battleground has moved into middle-class neighborhoods, into glass skyscrapers, and even into school playgrounds.” *Id.* at 654–55.

24. President Ronald Reagan, Message to the Congress Transmitting Proposed Legislation to Combat Drug Abuse and Trafficking (Sept. 15, 1986), <http://www.presidency.ucsb.edu/ws/index.php?pid=36417>.

25. See Davis, *supra* note 2, at 382 (indicating that in 1986 Democratic House Speaker Tip O’Neill sought to “reposition the Democratic Party to lead the war on drugs” in response to public alarm regarding the growing dangers of crack abuse); Beaver, *supra* note 2, at 2545 n.121 (noting that in response to Speaker O’Neill’s decision to hold a meeting to address the issue of drug abuse, Minority Leader Robert H. Michel quickly got the Republicans involved in the drug issue out of a fear it would be “co-opted” by Democrats in the pending elections).

26. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 23–24 (2011) [hereinafter 2011 MANDATORY MINIMUM REPORT] (“Because of the heightened concern and national sense of urgency surrounding drugs generally and crack cocaine specifically, Congress bypassed much of its usual deliberative legislative process. As a result Congress held no committee hearings and produced no reports related to the 1986 Act . . .”). See Dvorak, *supra* note 3, at 652, for commentary on the variety of now-dispelled myths that were used to support the rushed passage of the ADAA.

27. *United States v. Clary*, 846 F. Supp. 768, 784 (E.D. Mo.) (arguing that the “‘frenzied’ state of Congress” in enacting crack legislation “led members to depart from normal and substantive procedures that are *routinely* considered a part of the legislative process”), *rev’d*, 34 F.3d 709 (8th Cir. 1994); see also 132 CONG. REC. 26,434 (daily ed. Sept. 26, 1986) (statement of Sen. Robert Dole) (“I have been reading editorials saying we are rushing a judgment on the drug bill and I think to some extent they are probably correct.”); 132 CONG. REC. 22,658 (daily ed. Sept. 10, 1986) (statement of Rep. Trent Lott) (“In our haste to patch together a drug bill . . . we have run the risk of ending up with a patch-work quilt . . .”); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV.

Shortly after Congress enacted the ADAA,<sup>29</sup> it became increasingly clear that enforcement of the Act had an overwhelmingly disproportionate impact on African Americans.<sup>30</sup> Despite the widely acknowledged disproportionate impact the ADAA had on a constitutionally protected class of individuals, facially neutral laws enacted without a discriminatory purpose do not violate the equal protection guarantees of the U.S. Constitution.<sup>31</sup> For over a decade the Sentencing Commission took the lead in calling for a revision of federal cocaine sentencing policy.<sup>32</sup> The Sentencing Commission argued in numerous reports to Congress that the drastically different treatment of crack and powder cocaine under federal cocaine sentencing policy was not supported by pharmacological evidence and lacked a penological justification.

Almost twenty-five years after passing the ADAA, Congress took action and passed the FSA.<sup>33</sup> The FSA amended the drug quantities required to trigger mandatory minimum sentences—replacing the 100-to-1 sentencing ratio with an 18-to-1 ratio.<sup>34</sup> The Sentencing Commission incorporated the new drug-quantity ratio into the Guidelines and subsequently voted to make these changes retroactively applicable.<sup>35</sup> This allowed for some prisoners—including those sentenced to Guidelines sentences above the ADAA mandatory minimums—to obtain minor sentence reductions pursuant to 18 U.S.C. § 3582(c)(2).<sup>36</sup> Prisoners currently serving ADAA mandatory minimum sentences, however, are ineligible for retroactive sentence reductions because the Sentencing Commission does not have the authority to alter the statutory minimums, and the FSA does not contain an express statement of retroactivity.<sup>37</sup> To complicate things further, the Supreme Court held recently that the FSA's mandatory minimums apply to crack offenders arrested before but sentenced after the passage of the FSA.<sup>38</sup>

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1283, 1297 (1995) (concluding “[t]he legislative history [of the ADAA] offers no explanation” for congressional selection of the 100-to-1 sentencing disparity).

28. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. §§ 841-904 (2012)).

29. See *infra* Part II.A.1 for a discussion of the ADAA and the 100-to-1 sentencing disparity.

30. See *infra* Part II.A.2 for a discussion of the disproportionate racial impact of the ADAA.

31. See *infra* Part on II.A.3 for a discussion of the Supreme Court's disparate impact jurisprudence.

32. See *infra* Part II.A.4 for a discussion of the role of the Sentencing Commission and its various calls to change the 100-to-1 sentencing regime.

33. See *infra* Part II.B for a discussion of the passage of the FSA and its ameliorative effects on federal cocaine sentencing.

34. Pub. L. No. 111-220, § 2(a), 124 Stat. 2372 (2010) (codified at 21 U.S.C. §§ 841(b)(1)(A)(iii), (b)(1)(B)(iii) (2012)).

35. See *infra* notes 148-53 and accompanying text for a discussion of the Sentencing Commission's decision to apply the post-FSA Guidelines amendments retroactively.

36. See *infra* Part II.C.1 for a discussion of the requirements to obtain a sentence reduction under § 3582(c)(2).

37. See *infra* Part II.C.2 for an explanation of why ADAA mandatory minimum prisoners are ineligible for discretionary sentence reductions based on the FSA mandatory minimums.

38. See *infra* Part II.D for a discussion of the Supreme Court's holding in *Dorsey v. United States*, 132 S. Ct. 2321 (2012), allowing for partial retroactive application of the FSA despite the lack of an express statement of retroactivity from Congress.

The consensus view among the federal circuit courts, however, is that the FSA mandatory minimums do not apply retroactively for the purpose of discretionary sentence-modification proceedings under § 3582(c)(2).<sup>39</sup> This Section provides an in-depth overview of federal cocaine sentencing policy.

A. *Congress Enacts the Anti-Drug Abuse Act in Response to the Crack Epidemic*

1. The Legislative Solution: The 100-to-1 Sentencing Ratio

The ADAA prescribed a variety of mandatory minimum sentences applicable to federal drug offenders based on the amount and type of drug involved in the underlying offense.<sup>40</sup> The ADAA's approach to tackling the crack epidemic was to create a sentencing disparity between "cocaine base"<sup>41</sup> and cocaine powder.<sup>42</sup> Under the ADAA sentencing scheme, despite the pharmacological equivalence of the two substances, possessing 100 grams (or over 3 ounces) of powder cocaine—the derivative source of crack—was considered the equivalent of possessing only 1 gram of crack cocaine.<sup>43</sup> Accordingly, an offender convicted under the ADAA of possessing with intent to distribute 5000 grams (or 11 pounds) of powder cocaine would be subject to the same 60-month mandatory minimum as a similarly situated offender with 50 grams (approximately 2 ounces) of crack cocaine.<sup>44</sup> While a similar bill introduced on behalf of the Reagan administration called for a 20-to-1 ratio,<sup>45</sup>

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39. See *infra* Part II.E for a discussion of how various circuit courts have resolved the retroactivity issue in context of § 3582(c)(2) sentence-modification proceedings.

40. In light of drug policies of the 1970s, this legislative approach to curbing drug abuse was a drastic change in federal drug policy. For instance, the Comprehensive Drug Abuse Prevention and Control Act of 1970 repealed almost all mandatory minimum penalties for drug offenses. Pub. L. No. 91-513, 84 Stat. 1236 (1970). In the 1970s, "Congress believed that changes in the existing penalties, 'particularly through elimination of mandatory minimum sentences,' would establish 'a more realistic, more flexible, and thus more effective system of punishment and deterrence of violations of the federal narcotics laws.'" 2011 MANDATORY MINIMUM REPORT, *supra* note 26, at 22–23 (quoting H. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566).

41. Under the ADAA, the 100-to-1 sentencing ratio distinguished between offenses involving powder cocaine and "cocaine base." 21 U.S.C. § 841(b)(1)(A)(ii)–(iii) (2012). This term applies to a variety of cocaine derivatives, including freebase and crack. In 2011, the Supreme Court had to grapple with what Congress meant by "cocaine base," holding that, in the context of the Controlled Substances Act, cocaine base is cocaine in its "chemically basic form." *DePierre v. United States*, 131 S. Ct. 2225, 2232 (2011); *see also* *Kimbrough v. United States*, 552 U.S. 85, 94 (2007) (observing that "[c]rack and powder cocaine are two forms of the same drug" and that "[t]he active ingredient in powder and crack cocaine is the same").

42. *See Dorsey*, 132 S. Ct. at 2327 (discussing the legislative sentencing disparity implemented by the ADAA); *Kimbrough*, 552 U.S. at 94–95 (discussing the ADAA's disparate treatment of crack and powder cocaine).

43. *Dorsey*, 132 S. Ct. at 2327.

44. *Id.*

45. Dvorak, *supra* note 3, at 651 n.212; *see* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 7–8 (2002) [hereinafter 2002 COCAINE SENTENCING REPORT].

the ratio was ultimately increased to 100-to-1 in what has been described as a “process of political one-upsmanship.”<sup>46</sup>

In 1988, Congress amended the ADAA to include a five-year mandatory minimum sentence for simple possession of crack.<sup>47</sup> This was the first piece of federal legislation to impose mandatory minimum sentences on first-time, low-level drug offenders.<sup>48</sup> In 2009, Senator Arlen Specter described the fallacy of this approach as follows: “It takes about \$14,000 worth of powder cocaine compared to only about \$150 of crack to trigger the 5-year mandatory minimum penalty. Given that crack and cocaine powder are the same drug—just in different forms—why should we impose the same 5-year sentence . . . ?”<sup>49</sup> In addition to these mandatory penalties, Congress allocated funds for drug treatment and prevention, public education, and recovery programs.<sup>50</sup>

Congress articulated five justifications to support the 100-to-1 sentencing disparity.<sup>51</sup> Each justification was premised primarily on the notion that crack cocaine was “significantly more dangerous than powder cocaine.”<sup>52</sup> Congress determined that crack was one hundred times worse than powder cocaine based on (1) the highly addictive nature of crack; (2) the belief that crack users were more likely to be violent and prone to crime; (3) the perception that crack was more harmful than powder cocaine, especially to children exposed by their mothers during pregnancy; (4) the fear that teenagers were especially likely to use and distribute crack; and (5) the combination of the high potency and low cost of crack that contributed to its widespread proliferation.<sup>53</sup> In the ensuing years, these evidentiary foundations for the sentencing disparity have proved to be speculative and fallacious.<sup>54</sup>

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46. Davis, *supra* note 2, at 383; *see also* United States v. Clary, 846 F. Supp. 768, 784 (E.D. Mo.) (suggesting that what began as a 50-to-1 ratio in the House Subcommittee’s bill, “arbitrarily doubled simply to symbolize redoubled Congressional seriousness”), *rev’d*, 34 F.3d 709 (8th Cir. 1994).

47. *See* 2002 COCAINE SENTENCING REPORT, *supra* note 45, at 11.

48. *See id.* (describing the five-year mandatory minimum for simple possession of crack as “the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance”).

49. 155 CONG. REC. S10493 (daily ed. Oct. 15, 2009) (statement of Sen. Arlen Specter).

50. *See* Beaver, *supra* note 2, at 2547 (categorizing the three-pronged approach to the federal government’s war on drugs: interdiction, treatment, and prevention). It is beyond doubt that the primary focus of the ADAA was enforcement rather than treatment or prevention. Michelle Alexander observes, “Practically overnight the budgets of federal law enforcement agencies soared. . . . By contrast, funding for agencies responsible for drug treatment, prevention, and education was dramatically reduced.” ALEXANDER, *supra* note 4, at 49–50.

51. *Kimbrough v. United States*, 552 U.S. 85, 95–96 (2007).

52. *Id.*

53. *Id.*; 2002 COCAINE SENTENCING REPORT, *supra* note 45, at 9–10 (examining the justifications for the 100-to-1 the sentencing disparity).

54. *See* 2002 COCAINE SENTENCING REPORT, *supra* note 45, at 93–97 (disputing the underlying evidence about the comparative dangers of crack cocaine that justified for the 100-to-1 sentencing disparity).



2. Enforcement of the Anti-Drug Abuse Act Had an Overwhelmingly Disproportionate Impact on African Americans

The 100-to-1 sentencing ratio began to have a disparate impact on African Americans shortly after the enactment of the ADAA.<sup>55</sup> Although African Americans constituted a minority of regular crack users in the 1990s and the first decade of the twenty-first century, more than 80% of federal crack defendants were African American.<sup>56</sup> Between 1986 and 1995, there were zero white crack defendants prosecuted in Boston, Denver, Chicago, Miami, Dallas, and Los Angeles.<sup>57</sup> During that time, only one white defendant was convicted under the ADAA in California, two in Texas, three in New York, and two in Pennsylvania.<sup>58</sup> Comparatively, in 1993, 88.3% of all crack offenders were black, while only 4.1% were white.<sup>59</sup> This racial disparity has not changed significantly.<sup>60</sup> Of the nearly 30,000 federal prisoners serving crack sentences in 2011, more than 80% percent of them were black.<sup>61</sup>

Furthermore, federal crack sentencing drastically increased the racial sentencing disparity average among individuals incarcerated in the United States for drug offenses.<sup>62</sup> Prior to the passage of the ADAA, the average federal drug sentence was 11% higher for black prisoners than it was for white prisoners.<sup>63</sup> This disparity rose to 49% four years after the ADAA was passed.<sup>64</sup> Consequently, it has been argued by the NAACP Legal Defense Fund that

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55. Sklansky, *supra* note 27, at 1289 (“From October 1991 through September 1992, more than 91 percent of all federal crack defendants were black; only 3 percent were white.”).

56. 155 CONG. REC. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Richard Durbin) (noting during his floor speech introducing the FSA that, although “African Americans constitute less than 30 percent of crack users, they make up 82 percent of those convicted of Federal crack offenses”); *id.* at S10493 (statement of Sen. Arlen Specter) (“African Americans, who make up approximately 12.3 percent of the population in the U.S., comprise 80.6 percent of the Federal crack offenders.”); *see also* Dan Weikel, *War on Crack Targets Minorities over Whites*, L.A. TIMES, May 21, 1995, available at [http://articles.latimes.com/1995-05-21/news/mn-4468\\_1\\_crack-cocaine](http://articles.latimes.com/1995-05-21/news/mn-4468_1_crack-cocaine) (citing a National Institute on Drug Abuse study showing that, “[f]rom 1988 to 1993, whites accounted for roughly two-thirds of all those who had ever tried crack cocaine”).

57. Weikel, *supra* note 56.

58. *Id.*

59. U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY xi (1995) [hereinafter 1995 COCAINE SENTENCING REPORT].

60. *See* 155 CONG. REC. S10491 (statement of Sen. Arlen Specter) (indicating that in 2008 “80.6 percent of crack offenders were African American, while only 10.2 percent were white”); *see also* United States v. Blewett (*Blewett I*), 719 F.3d 482, 485 (6th Cir.) (indicating that “[m]ore than 80 percent of federal prisoners serving crack cocaine sentences are black”), *rev’d en banc*, 746 F.3d 647 (6th Cir. 2013).

61. *Blewett I*, 719 F.3d at 485 (citing U.S. SENTENCING COMM’N, 2011 ANNUAL REPORT 37 (2011)).

62. *See* Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Defendants-Appellants, at 5, United States v. Blewett, 746 F.3d 647 (6th Cir. 2013) (*en banc*) (Nos. 12-5226 & 12-5582), 2013 WL 5304321 (noting that “African Americans have been subject to longer federal prison sentences because of the 100:1 ratio”).

63. *Id.*

64. *Id.*

African American defendants sentenced under the 100-to-1 sentencing scheme were disproportionately affected by practical consequences of incarceration, such as “exclusion from labor markets, voting disenfranchisement, civic disengagement and damage to familial and social networks.”<sup>65</sup>

In 2012, the Supreme Court observed that “the public had come to understand sentencing embodying the 100-to-1 ratio as reflecting unjustified race-based differences.”<sup>66</sup> In light of this racially disparate impact, the 100-to-1 sentencing disparity has raised equal protection concerns.<sup>67</sup>

### 3. Disparate Impact Alone Does Not Violate the Equal Protection Guarantees of the Fifth and Fourteenth Amendments

While the drastic disproportionate racial impact of the 100-to-1 cocaine sentencing disparity undoubtedly motivated Congress’s eventual decision to enact the FSA, that racial impact alone does not render the 100-to-1 ratio unconstitutional. A facially neutral law with a disproportionate impact on a protected class of individuals does not violate the Equal Protection Clause unless it was enacted with discriminatory intent.<sup>68</sup> In the past, the Supreme Court has demonstrated a willingness to strike down facially neutral laws that have an overwhelmingly disproportionate impact on a specific group or people.<sup>69</sup> This changed in 1976, when the Supreme Court held in *Washington v. Davis*<sup>70</sup> that a law or government policy must reflect a discriminatory purpose to violate the equal protection guarantees of the Constitution.<sup>71</sup> This remains true even if the law in question has a racially discriminatory impact that can be established with

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65. *Id.*

66. *Dorsey v. United States*, 132 S. Ct. 2321, 2328 (2012).

67. See e.g., *United States v. Clary*, 846 F. Supp. 768, 782 (E.D. Mo.) (arguing while the requisite discriminatory intent “may not have entered Congress’ enactment” of the ADAA, “its failure to account for a foreseeable disparate impact which would effect black Americans in grossly disproportionate numbers would, nonetheless, violate the spirit and letter of equal protection”), *rev’d*, 34 F.3d 709 (8th Cir. 1994); *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (holding as a matter of state constitutional law that the legislative disparity between crack and powder is unconstitutional because it fails to satisfy rational basis review under the Minnesota Constitution); *Davis*, *supra* note 2, at 391–97 (arguing that equal protection jurisprudence should take the disparate impact of criminal laws—especially the crack laws—into account, even if those laws were enacted without a discriminatory intent). See *infra* Part III.C for an argument that the prevailing interpretation of the FSA in the context of discretionary sentence-modification proceedings raises serious constitutional concerns.

68. *Washington v. Davis*, 426 U.S. 229, 239–41 (1976).

69. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (holding unconstitutional, as administered, a local ordinance “directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, *whatever may have been the intent of the ordinances as adopted*, they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws”) (emphasis added).

70. 426 U.S. 229 (1976).

71. *Davis*, 426 U.S. at 239–42 (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justified only by the weightiest of considerations.”).

statistical evidence.<sup>72</sup> As such, it has been argued that the effect of *Davis* was to make disparate impact theory “essentially not applicable to constitutional claims.”<sup>73</sup>

The following year, the Supreme Court reaffirmed the purposeful discrimination requirement.<sup>74</sup> The Court noted that evidence of a disproportionate impact on a protected class is relevant, but discriminatory intent remains the touchstone of equal protection claims under the Constitution.<sup>75</sup> The Court then set out various factors that can point to circumstantial evidence of purposeful discrimination.<sup>76</sup>

In later cases, the Supreme Court clarified that a discriminatory purpose must imply more than an “awareness of consequences.”<sup>77</sup> In *Personnel Administrator of Massachusetts v. Feeney*,<sup>78</sup> the Court stated that a discriminatory purpose must “impl[y] that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>79</sup> Accordingly, a challenge to the constitutionality of a law with a disproportionate racial impact must show that lawmakers had knowledge of that effect, and that effect was the purpose of the legislative enactment.<sup>80</sup> Practically speaking, however, there is a logical relationship between intentional discrimination and disparate impact, because “normally the actor is presumed to have intended the natural consequences of his deeds.”<sup>81</sup>

The intentional discrimination requirement has been a substantial barrier to equal protection challenges to laws that disproportionately impact a specific constitutionally protected class of individuals.<sup>82</sup> The Supreme Court has

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72. *Id.* at 239–40. Some scholars argue the intentional discrimination requirement for laws with a disparate racial impact reflects a misplaced utopian desire for a “post-racial” America. *E.g.*, Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-race Equal Protection?*, 98 *GEO. L.J.* 967, 977 (2010).

73. Barnes et al., *supra* note 72, at 993 (noting that disparate impact theory is still available for statutory claims, such as Title VII employment discrimination and Fair Housing Act claims).

74. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”).

75. *Id.*

76. These factors include the following: (1) adverse racial impact, (2) history of the decision, (3) events leading to the challenged decision, (4) departures from normal procedure, (5) substantive departure from routine decisions, and (6) contemporary statements by members of decision-making body. *Id.* at 266–68.

77. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

78. 442 U.S. 256 (1979).

79. *Pers. Adm’r of Mass.*, 442 U.S. at 279.

80. Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 *BERKELEY J. EMP. & LAB. L.* 108, 125 (1998) (stating that the Supreme Court has “rejected the theory that knowledge of a disparate impact alone can suffice to show a constitutionally prohibited motive”).

81. *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

82. *Davis*, *supra* note 2, at 375 (discussing the injustice of the Supreme Court’s disparate impact jurisprudence in the crack context given that “the crack cocaine laws’ disparate impact on blacks is

affirmatively rejected the notion that statistics demonstrating a disparate impact alone can satisfy the purposeful discrimination requirement.<sup>83</sup> In *McCleskey v. Kemp*,<sup>84</sup> the challenger attempted unsuccessfully to prove unconstitutional discrimination by pointing to overwhelming statistical evidence of Georgia's racially biased administration of the death penalty.<sup>85</sup> Justice Scalia's dissent in *Dorsey v. United States*<sup>86</sup> reiterates the discriminatory intent requirement as applied to crack offenders sentenced under the FSA: "Although many observers viewed the 100-to-1 crack-to-powder ratio . . . as having a racially disparate impact, only *intentional* discrimination may violate the equal protection component of the Fifth Amendment's Due Process Clause."<sup>87</sup>

The purposeful discrimination requirement for constitutional race-based discrimination claims is grounded in Justice Harlan's articulation of a "color-blind" Constitution in his dissent from the infamous *Plessy v. Ferguson*<sup>88</sup> decision.<sup>89</sup> Opposition to the discriminatory purpose requirement in modern equal protection jurisprudence can be best surmised by Professor Laurence Tribe's assertion that "minorities can also be injured when the government is 'only' indifferent to their suffering or 'merely' blind to how prior official discrimination contributed to it and how current acts will perpetuate it."<sup>90</sup> Also, many argue that this approach to equal protection allows legislatures to engage in more subtle forms of discrimination, given that "[t]oday most legislation would not contain overtly racist referrals and . . . would eliminate the slightest allusion to racial factors in the words of the legislation itself."<sup>91</sup> Although courts cannot rely on equal protection principles to strike down laws that were not

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legally irrelevant because that impact was not originally rooted in (or at least influenced by) discriminatory intent by Congress").

83. *McCleskey v. Kemp*, 481 U.S. 279, 353–56 (1987) (Blackmun, J., dissenting) (highlighting various statistics that purportedly proved a racially discriminatory application of the death penalty in Georgia, including: (1) cases involving white victims were eleven times more likely to result in a death sentence than black-victim cases; (2) black defendants were more likely to be sentenced to death than white defendants in white-victim cases; (3) "black-defendant/white-victim cases advanced to the penalty trial at nearly five times the rate of the black-defendant/black-victim cases . . . and over three times the rate of white-defendant/black-victim cases"; and (4) "because [the defendant] was charged with killing a white person he was 4.3 times as likely to be sentenced to death as he would have been had he been charged with killing a black person").

84. 481 U.S. 279 (1987).

85. *McCleskey*, 481 U.S. at 286–87, 297–99.

86. 132 S. Ct. 2321 (2012).

87. *Dorsey*, 132 S. Ct. at 2344 (Scalia, J., dissenting) (citation omitted). See *infra* Part II.D for a discussion of *Dorsey*.

88. 163 U.S. 537 (1896).

89. *Plessy*, 163 U.S. at 559 (1896) (Harlan, J., dissenting) (rejecting the infamous doctrine of "separate but equal").

90. *State v. Russell*, 477 N.W.2d 886, 888 n.2 (Minn. 1991) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1518–19 (2d ed. 1988)).

91. *United States v. Clary*, 846 F. Supp. 768, 774 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994); see also *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (noting that despite it being "possible to discern the objective 'purpose' of a statute . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task").

enacted with discriminatory purpose, Congress possesses legislative authority to address present or past discrimination that is less than purposeful by providing statutory remedies not available to the courts.<sup>92</sup>

#### 4. The Sentencing Commission Opposes the 100-to-1 Ratio and Promulgates Retroactive Amendments to the Guidelines

The bipartisan Sentencing Commission<sup>93</sup> has been vocally opposed to the 100-to-1 sentencing disparity since the 1990s.<sup>94</sup> Given the immediate impact that the 100-to-1 ratio had on the integrity of the criminal justice system, the Sentencing Commission sought to eliminate the disparity less than a decade after the passage of the ADA.<sup>95</sup> In 1995, the Sentencing Commission proposed amendments to the Guidelines<sup>96</sup> that would have replaced the 100-to-1 ratio with a 1-to-1 ratio.<sup>97</sup> Congress rejected this proposal.<sup>98</sup> In addition, that year the

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92. In a case that was subsequently overruled, the Court described the source of this still-existing power as derived from the fact that “Congress [is] . . . charged by the Constitution with the power to ‘provide for the . . . general Welfare of the United States’ and ‘to enforce, by appropriate legislation,’ the equal protection guarantees of the Fourteenth Amendment.” *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 563 (1990) (omission in original), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The most prominent example of the disparate impact theory of discrimination is the disparate impact provision of Title VII of the Civil Rights Act. *See Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009) (discussing the relationship between disparate treatment and disparate impact discrimination, and calling into question the future of Title VII disparate impact cases); *id.* at 594 (Scalia, J., concurring) (“Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.”). There are numerous instances where Congress has enacted legislation to remedy discrimination premised on a disparate impact theory. *See, e.g.*, 42 U.S.C. § 3030c-2(d) (2012) (“If the Assistant Secretary finds that there is a disparate impact upon low-income or minority older individuals . . . the Assistant Secretary shall take corrective action to assure that such service are provided to all older individuals without regard to the cost sharing criteria.”); *see also* Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. §§ 1989b–1989b-9 (2012)) (apologizing and granting reparations to Japanese Americans interned by the U.S. government during World War II).

93. The purposes of the Sentencing Commission are set forth in 28 U.S.C. § 991(b) (2012). The Sentencing Commission is statutorily described as “an independent commission in the judicial branch of the United States.” *Id.* § 991(a). “The Commission is charged with the ongoing responsibilities of evaluating the effects of the sentencing guidelines on the criminal justice system, recommending to Congress appropriate modifications of substantive criminal law and sentencing procedures, and establishing a research and development program on sentencing issues.” U.S. SENTENCING COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2012).

94. 1995 COCAINE SENTENCING REPORT, *supra* note 59, at iv (recommending that “Congress revisit the 100-to-1 quantity ratio as well as the penalty structure for simple possession”).

95. *Id.* at xiv (“Congress’s objectives with regard to punishing crack cocaine trafficking can be achieved more effectively without relying on the current federal sentencing scheme for crack cocaine offenses that includes the 100-to-1 quantity ratio.”).

96. In 2005, the Supreme Court rendered the Guidelines advisory rather than mandatory, allowing judges to depart from the Guidelines at sentencing. *United States v. Booker*, 543 U.S. 220, 245–46 (2005).

97. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,075–77 (May 10, 1995).

Sentencing Commission issued its first statutorily mandated Cocaine and Federal Sentencing Policy report to Congress.<sup>99</sup> The report challenged the evidence and reasoning that originally supported the 100-to-1 ratio and acknowledged the “racial disparity” caused by the sentencing scheme.<sup>100</sup> Two years later, the Sentencing Commission again noted that sentences “appear to be harsher and more severe for racial minorities than others as a result of this law.”<sup>101</sup>

After the proposed 1-to-1 ratio was rejected, the Sentencing Commission suggested a 5-to-1 ratio in its 1997 report to Congress.<sup>102</sup> This report stated resolutely that the Sentencing Commission was “unanimously in agreement that the current penalty differential for federal powder and crack cocaine cases should be reduced by changing the quantity levels that trigger mandatory minimum penalties.”<sup>103</sup> In 2002, the Sentencing Commission again called on Congress to reduce the sentencing ratio, finding it to be based on erroneous assumptions about crack cocaine.<sup>104</sup> The Commission further noted in its 2002 report that an “overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000.”<sup>105</sup>

Eventually, the Supreme Court was called upon to address the sentencing disparity. In *Kimbrough v. United States*,<sup>106</sup> the Court held that the Sentencing Guidelines based on the 100-to-1 ratio could result in a sentence “greater than necessary” for a crack-cocaine offender.<sup>107</sup> The Court concluded that it was not an abuse of discretion for a district court judge to sentence a crack offender below the advisory Guideline range based on the 100-to-1 ratio.<sup>108</sup> In so holding, the Court summarized the Sentencing Commission’s assessment of the three

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98. *Kimbrough v. United States*, 552 U.S. 85, 99 (2007) (noting that “Congress, acting pursuant to 28 U.S.C. § 994(p), rejected the amendments”) (footnote omitted).

99. See 1995 COCAINE SENTENCING REPORT, *supra* note 59.

100. *Id.* at xi–xii (indicating that “Blacks accounted for 88.3 percent of federal court for crack cocaine distribution convictions in 1993, Hispanics 7.1 percent, Whites 4.1 percent, and others 0.5 percent”).

101. U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (1997).

102. See *id.* at 2.

103. *Id.* The Commission also noted that while there is no evidence of racial bias in the passage of the ADA, it is perceived as unjust by the public, and “nearly 90 percent of the offenders convicted in federal court for crack cocaine distribution are African-American while the majority of crack cocaine users is white.” *Id.* at 8.

104. 2002 COCAINE SENTENCING REPORT, *supra* note 45, at vii–ix, 93–97.

105. *Id.* at 102.

106. 552 U.S. 85 (2007).

107. *Kimbrough*, 552 U.S. at 110; see also 18 U.S.C. § 3553(a) (2012) (“The court shall impose a sentence sufficient, but not greater than necessary . . .”).

108. *Kimbrough*, 552 U.S. at 111; see also *Spears v. United States*, 555 U.S. 261, 265–66 (2009) (per curiam) (“[D]istrict courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.”). See D. Patrick Huyett, Comment, *The Potential Power of Federal Child Pornography Sentencing Disparities*, 86 TEMP. L. REV. 629, 631 (2014) for an argument that Congress enacted the FSA at least in part to address the sentencing disparities among similarly situated crack defendants that had developed due to the enhanced judicial discretion the Court afforded district courts with *Kimbrough*.

primary problems with the sentencing disparity. First, the ratio “rested on assumptions about ‘the relative harmfulness of the two drugs . . . that more recent research and data no longer support.’”<sup>109</sup> Second, the 100-to-1 disparity was at odds with the ADAA’s objective of punishing high-level drug traffickers and resulted in “retail crack dealers get[ting] longer sentences than the wholesale drug distributors who supply them” with powder cocaine.<sup>110</sup> Lastly, the sentencing disparity “fosters disrespect for and lack of confidence in the criminal justice system.”<sup>111</sup>

In 2007, prompted by Congress’s refusal to act on its repeated calls for cocaine sentencing reform, the Sentencing Commission took affirmative steps to provide crack offenders an avenue of relief from the draconian ADAA sentencing regime.<sup>112</sup> Pursuant to its authority under 28 U.S.C. § 994(p), the Sentencing Commission adopted Amendment 706 to the Guidelines, thereby reducing the base-offense level associated with each drug quantity.<sup>113</sup> Specifically, Amendment 706 reduced the base-offense level by two in cases involving crack offenses where the drug quantity was above and below the mandatory minimum threshold.<sup>114</sup> In promulgating Amendment 706, the Sentencing Commission explained that “the problems associated with the 100-to-1 drug quantity ratio are so urgent and compelling” that the Amendment was a necessary “interim measure.”<sup>115</sup> In December 2007, the Sentencing Commission voted to promulgate Amendment 713, which made Amendment 706 retroactively applicable as of March 3, 2008.<sup>116</sup>

These amendments allowed some incarcerated crack offenders sentenced above the mandatory minimums to receive minor sentence reductions.<sup>117</sup> The Sentencing Commission noted, however, that without corresponding legislative action from Congress, the Amendment was “only . . . a partial remedy,” since defendants are still subject to the statutory mandatory minimums for each drug

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109. *Kimbrough*, 552 U.S. at 97 (quoting 2002 COCAINE SENTENCING REPORT, *supra* note 45, at 91).

110. *Id.* at 98 (quoting 1995 COCAINE SENTENCING REPORT, *supra* note 59, at 174).

111. *Id.* (quoting 2002 COCAINE SENTENCING REPORT, *supra* note 45, at 103).

112. *See* 2011 RETROACTIVITY REPORT, *supra* note 21, at 1.

113. Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28558, 28571–72 (May 21, 2007); *see also* U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9–10 (2007) [hereinafter 2007 COCAINE SENTENCING REPORT].

114. *Kimbrough*, 552 U.S. 85 at 100 (noting that the ameliorating amendment “reduces the base offense level associated with each quantity of crack by two levels”).

115. U.S. SENTENCING COMM’N, 2011 FEDERAL SENTENCING GUIDELINES MANUAL app. C at 230 (2011) [hereinafter 2011 GUIDELINES MANUAL].

116. 2011 RETROACTIVITY REPORT, *supra* note 21, at 1.

117. *Id.* (“As a result [of Amendment 713], some incarcerated offenders are eligible to receive a reduction of their sentence under 18 U.S.C. § 3582(c)(2) pursuant to Amendment 706.”); *see* 2011 GUIDELINES MANUAL, *supra* note 115, at app. C at 419 (indicating that in 2011 “approximately 25,500 offenders have requested a sentence reduction pursuant to retroactive application of the 2007 crack cocaine amendments and approximately 16,500 of those requests have been granted”). Those statistics are in large part due to the tireless efforts of federal defenders throughout the country.

category under the Guidelines.<sup>118</sup> This is because only Congress has the authority to alter mandatory minimum sentences, which, as creatures of statute, are independent from the Guidelines.<sup>119</sup>

By 2010, authorities recognized that the 100-to-1 sentencing disparity was premised on faulty assumptions and resulted in unjust and indefensible racial disparities in federal drug sentencing.<sup>120</sup> While serving as Attorney General, Eric Holder testified before the Senate Judiciary Committee that “the racial implications of the crack-powder disparity . . . has bred disrespect for our criminal justice system.”<sup>121</sup> In a letter to the House Judiciary Committee, twenty-seven federal judges called upon Congress to revisit and eradicate the disparity.<sup>122</sup> Meanwhile, in fiscal year 2010, almost four thousand defendants received federal mandatory minimum crack sentences based on the 100-to-1 ratio.<sup>123</sup>

### *B. Congress Enacts the Fair Sentencing Act to Eliminate the 100-to-1 Sentencing Ratio*

In 2009, after over a decade of calls for reform by the Sentencing Commission and various public interest groups, Senator Richard Durbin introduced the FSA.<sup>124</sup> The legislative proposal originally called for a complete

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118. 2007 COCAINE SENTENCING REPORT, *supra* note 113, at 10; See UNITED STATES SENTENCING GUIDELINES MANUAL § 5G1.1(b) (2011) (“Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.”).

119. *Dorsey v. United States*, 132 S. Ct. 2321, 2327 (2012) (observing that mandatory minimums “trump[] the Guidelines,” therefore “no matter what range the Guidelines set forth, a sentencing judge must sentence an offender to at least the minimum prison term set forth in a statutory mandatory minimum”).

120. See 2007 COCAINE SENTENCING REPORT, *supra* note 113, at B1–B24 (summarizing the public testimony calling for reform to federal cocaine sentencing policy from federal judges, the Department of Justice, the Fraternal Order of Police, criminal defense practitioners, drug treatment specialists, the academic and research communities, and various community outreach organizations).

121. 155 CONG. REC. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Richard Durbin).

122. Beaver, *supra* note 2, at 2555. Judge Reggie B. Walton, United States District Judge for the District of Columbia, testified regarding “the agony of having to enforce a law that one believes is fundamentally unfair and disproportionately impacts individuals who look like me.” 155 CONG. REC. S10491 (statement of Sen. Richard Durbin) (internal quotation marks omitted).

123. U.S. SENTENCING COMM’N, 2010 FEDERAL SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.43 (2010); see also *Blewett I*, 719 F.3d 482, 85 (6th Cir.), *rev’d en banc*, 746 F.3d 647 (6th Cir. 2013). That year, only “17.8 percent of all crack offenders were convicted of offenses not subject to the [ADAA’s] minimums.” *Dorsey*, 132 S. Ct. at 2334.

124. 155 CONG. REC. S10490 (daily ed. Oct. 15, 2009) (statement of Sen. Richard Durbin) (introducing the Fair Sentencing Act of 2009); see also *id.* at S10492 (statement of Sen. Patrick Leahy) (indicating the proposed legislation was supported by the American Bar Association, the ACLU, the NAACP, Families Against Mandatory Minimums, the Sentencing Project, and the United Methodist Church, as well as many others); 156 CONG. REC. H6197 (daily ed. July 28, 2010) (statement of Rep. Robert C. Scott) (noting “the Federal Law Enforcement Officers Association, the National District Attorneys Association, the National Association of Police Officers, the Council of Prison Locals, and several conservative religious organizations such as Prison Fellowship and the National Association of Evangelicals” support the passage of the Fair Sentencing Act).



abolition of the 100-to-1 ratio.<sup>125</sup> Senator Durbin noted the goals of the legislation were to “restore fairness to drug sentencing” and “focus our limited Federal resources on the most effective way to end violent drug trafficking.”<sup>126</sup> During his floor remarks, Senator Durbin also drew attention to the racially disparate impact of the sentencing ratio and the tremendous financial burden the disparity imposed on taxpayers and the federal prisons system.<sup>127</sup> Chairman of the Senate Judiciary Committee, Senator Patrick Leahy, stated that the 100-to-1 ratio is “one of the most notorious symbols of racial discrimination in the modern criminal justice system.”<sup>128</sup> In a hearing before the Senate Subcommittee on Crime and Drugs, the Department of Justice acknowledged that “the current cocaine sentencing disparity is difficult to justify based on the facts and science” and “has fueled the belief . . . that Federal cocaine laws are unjust.”<sup>129</sup> Vice President Joe Biden, who helped write the ADAA, stated that “[e]ach of the myths upon which we based the disparity has since been dispelled or altered.”<sup>130</sup>

In July 2010, Congress ultimately passed the FSA.<sup>131</sup> Due to the persistent belief that crack is more dangerous than powder,<sup>132</sup> the proposed 1-to-1 ratio was rejected in favor of an 18-to-1 powder-to-crack ratio.<sup>133</sup> This legislative alteration still had the ameliorative effect of substantially increasing the quantity of crack required to trigger the existing mandatory minimum sentences.<sup>134</sup> The FSA raised the amount of crack required to trigger the five-year mandatory sentence from 5 grams to 28 grams (an ounce), and raised the threshold quantity required to trigger the ten-year mandatory minimum from 50 grams to 280 grams (or 10 ounces).<sup>135</sup>

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125. See 155 CONG. REC. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Richard Durbin) (calling for a 1-to-1 sentencing ratio).

126. *Id.* at S10490.

127. *Id.* at S10491 (noting that while “African Americans constitute less than 30 percent of crack users, they make up 82 percent of those convicted of Federal crack offenses,” and estimating that elimination of the sentencing disparity could save \$510 million over fifteen years).

128. 156 CONG. REC. S1683 (daily ed. Mar. 17, 2010) (statement of Sen. Patrick Leahy); see *Blewett I*, 719 F.3d 482, 485 (6th Cir.), *rev'd en banc*, 746 F.3d 647 (6th Cir. 2013) (discussing the legislative history of the FSA).

129. *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcommittee on Crime and Drugs of the Senate Committee on the Judiciary*, 111th Cong. 5 (Apr. 29, 2009) (statement of Lanny Breuer, Assistant Attorney General, Criminal Division, U.S. Department of Justice).

130. 155 CONG. REC. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Richard Durbin) (quoting Vice President Joseph Biden).

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

132. See, e.g., 155 CONG. REC. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Jeff Sessions) (supporting a change to the 100-to-1 disparity due to the unfairness of the existing scheme, while at the same time opposing a flat out elimination of the disparity because “people who use crack cocaine, as opposed to powder cocaine, tend to be paranoid and violent”).

133. *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012).

134. *Id.* at 2329.

135. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372 (2010), 124 Stat. 2372 (2010) (codified at 21 U.S.C. § 841 (2012)); see also Tyler B. Parks, Note, *The Unfairness of the*

Congress also eliminated the mandatory minimum for simple possession of crack cocaine.<sup>136</sup> Additionally, section 8 of the FSA gave the Sentencing Commission “emergency authority” to promulgate Guidelines amendments consistent with the FSA, “necessary to achieve consistency with other guideline provisions and applicable law.”<sup>137</sup> The FSA took effect on August 3, 2010, when President Obama signed the Act into law.<sup>138</sup> Despite widespread congressional acknowledgement that the ADAA’s mandatory minimums were unfair and unduly harsh, Congress did not include an express provision in the FSA that allowed for the new mandatory minimums to be extended retroactively to crack offenders convicted and sentenced prior to August 3, 2010.<sup>139</sup>

The Obama administration has continued to express concerns about federal cocaine sentencing policy since the passage of the FSA. As the legislative history of the FSA makes clear, “the Justice Department and [the Obama] administration support completely eliminating the crack/powder disparity.”<sup>140</sup> In fact, President Obama recently commuted the sentences of eight crack convicts—six of whom had received life sentences based on the ADAA mandatory minimum sentencing regime.<sup>141</sup> President Obama stated, in 2013, “we must ensure that our taxpayer dollars are spent wisely, and that our justice system keeps its basic promise of equal treatment for all.”<sup>142</sup> These extraordinary executive measures were aimed at taking symbolic yet meaningful steps toward correcting the everlasting effects of the pre-FSA sentencing regime.<sup>143</sup> In April 2014, the Department of Justice followed up on President Obama’s symbolic efforts by undertaking a new clemency initiative that prioritizes nonviolent, low-level drug offenders who are “currently serving a federal sentence and . . . likely would have received a substantially lower sentence if convicted of the same offense(s) today.”<sup>144</sup> As this initiative shows, despite the prospective relief

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*Fair Sentencing Act of 2010*, 42 U. MEM. L. REV. 1105, 1109–12 (2012) (explaining, with examples, the practical impact that the FSA has had on federal cocaine sentencing).

136. Pub. L. No. 111-220, § 3, 124 Stat. 2372 (2010) (amending 21 U.S.C. § 844(a)).

137. *Id.* § 8.

138. *Dorsey*, 132 S. Ct. at 2326.

139. Lazarus, *supra* note 15, at 719 (noting that “[a]ll circuits concluded . . . the FSA does not contain any express statement of retroactivity”).

140. 155 CONG. REC. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Richard Durbin); *see also id.* at S10493 (statement of Sen. Arlen Specter) (“The White House and the Department of Justice have asked Congress to eliminate this unfair sentencing disparity.”).

141. Charlie Savage, *Obama Commutes Sentences for 8 in Crack Cocaine Cases*, N.Y. TIMES, Dec. 20, 2013, at A1 (“The [ADAA] policies fueled an 800 percent increase in the number of prisoners in the United States. They also carried a racial charge: Offenses involving crack, which was disproportionately prevalent in impoverished black communities, carried far more severe penalties than those for powder cocaine, favored by affluent white users.”).

142. *Id.*

143. *See id.*

144. Press Release, Dep’t of Justice, Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants (Apr. 23, 2014), <http://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new>.

provided by Congress through the FSA, there are still thousands of prisoners that could benefit from discretionary, retroactive application of the FSA's mandatory minimums.<sup>145</sup>

In addition to these remedial efforts, the Department of Justice has begun the process of overhauling its approach to federal drug prosecution. Prosecutors are moving away from recommending mandatory minimum sentences for nonviolent drug offenses in favor of a more flexible approach to federal drug sentencing.<sup>146</sup> Former Attorney General Eric Holder noted this new policy “start[s] by fundamentally rethinking the notion of mandatory minimum sentences for drug-related crimes.”<sup>147</sup>

Following the passage of the FSA, the Sentencing Commission also took swift action to ameliorate the impact of the 100-to-1 sentencing regime by amending the Sentencing Guidelines. The Sentencing Commission promulgated various amendments designed to incorporate the newly enacted 18-to-1 ratio into the Guidelines.<sup>148</sup> Amendment 748—the temporary emergency amendment mandated by section 8 of the FSA—adjusted the crack quantity tables of the Guidelines to correspond with the FSA mandatory minimums.<sup>149</sup> On November

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145. For instance, an article in the *New York Times* noted that the recipients of the commuted sentences include Reynolds Wintersmith, who was sentenced to life in prison for dealing crack at the age of seventeen. Savage, *supra* note 141, at A1. Stephanie George, who at the age of twenty-seven received a life sentence for hiding a boyfriend's stash of crack at her house, will receive a commuted sentence. “In both cases, the [sentencing] judges criticized the mandatory sentences they were required to impose, calling them unjust.” *Id.*

146. See Rafael Lemaitre, *Real #DrugPolicyReform: DOJ's Change in Mandatory Minimum Policies*, WHITE HOUSE OFF. OF NAT'L DRUG CONTROL POL'Y (Aug. 12, 2013, 1:00 PM), <http://www.whitehouse.gov/blog/2013/08/12/real-drugpolicyreform-doj-s-change-mandatory-minimum-policies> (“The Attorney General has instructed prosecutors to (1) decline to pursue charges that would trigger a mandatory minimum sentence in the case of certain low-level, non-violent drug offenses; (2) in these cases, consider recommending a below-guidelines sentence to the court; and (3) decline to charge an enhancement that would double the sentences of certain second-time drug offenses unless the defendant is involved in conduct that makes the case appropriate for severe cases.”).

147. Eric Holder, Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>. Holder further explained, “[S]tatutes that mandate inflexible sentences . . . reduce the discretion available to prosecutors, judges, and juries. Because they often generate unfairly long sentences, they breed disrespect for the [justice] system.” *Id.* Opposition to mandatory minimums cuts across party lines. Senator Rand Paul, a 2016 Republican presidential candidate, testified before the Senate Committee of the Judiciary advocating for an end to federal mandatory minimum drug sentences. Jacob Sullum, *Rand Paul: 'I Am Here to Ask that We Begin the End of Mandatory Minimum Sentencing'*, FORBES (Sep. 18, 2013, 1:31 PM), <http://www.forbes.com/sites/jacobsullum/2013/09/18/rand-paul-i-am-here-to-ask-that-we-begin-the-end-of-mandatory-minimum-sentencing/>. Senator Paul testified, “If I told you that one out of three African-American males is [prohibited] by law from voting, you might think I was talking about Jim Crow, 50 years ago. Yet today a third of African-American males are still prevented from voting because of the war on drugs.” *Id.* (alteration in original).

148. See U.S. SENTENCING COMM'N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT FAIR SENTENCING ACT 1–2 (2013) [hereinafter 2013 RETROACTIVITY REPORT] (explaining Amendments 748, 750, and 759).

149. *Id.*

1, 2011, Amendment 750 went into effect and permanently implemented Amendment 748—effectively making the FSA’s 18-to-1 ratio a permanent part of the Guidelines.<sup>150</sup> On the same day, Amendment 759 was voted into effect by the Sentencing Commission, which allowed for the changes to the Guidelines effectuated by Amendment 750 “to be considered for retroactive application.”<sup>151</sup> Amendment 750, however, allows only for sentence reductions based on the revised Sentencing Guidelines; g “it does not make any of the statutory changes in the Fair Sentencing Act of 2010 retroactive.”<sup>152</sup> While only Congress possesses the authority to retroactively apply the FSA mandatory minimums, Congress did not object—and thus appears to have acquiesced—to the Sentencing Commission’s decision to make the amended Guidelines based on the FSA’s 18-to-1 ratio retroactively applicable to pre-FSA offenders.<sup>153</sup>

C. *After the Passage of the Fair Sentencing Act, Offenders Sentenced Under the Anti-Drug Abuse Act Seek Sentence Reductions Pursuant to 18 U.S.C. § 3582(c)(2)*

1. Sentence-Modification Proceedings Under 18 U.S.C. § 3582(c)(2)

The Sentencing Commission’s retroactive amendments to the Guidelines reflecting the 18-to-1 ratio allowed crack offenders sentenced to Guidelines sentences (as opposed to mandatory minimum sentences) to seek relief from their ADAA sentences pursuant to 18 U.S.C. § 3582(c)(2).<sup>154</sup> Subject to stringent criteria, 18 U.S.C. § 3582(c)(2) allows an incarcerated individual to seek a reduction or modification of his or her sentence.<sup>155</sup> The ultimate decision to modify a sentence pursuant to § 3582(c)(2) is a discretionary judgment that permits a district judge to deny a requested sentence modification based on any of the sentencing factors set out by Congress in 18 U.S.C. § 3553(a).<sup>156</sup> District

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150. *Id.* As explained by the Third Circuit, “[A]fter Congress adopted the FSA to remedy the disparity between crack and powder cocaine penalties, it directed the Sentencing Commission to promulgate emergency amendments to conform the guidelines to the statutory changes.” *United States v. Savani*, 733 F.3d 56, 67 (3d Cir. 2013). After promulgating the emergency amendments, the Sentence Commission promulgated Amendment 750, which “retroactively lowered the crack cocaine base offense levels in § 2D1.1 to reflect the reduced 18:1 ratio between powder and crack cocaine adopted by the FSA.” *Id.*

151. 2011 GUIDELINES MANUAL, *supra* note 115, at app. C at 419.

152. *Id.*

153. U.S. SENTENCING COMM’N, ANALYSIS OF THE IMPACT OF GUIDELINE IMPLEMENTATION OF THE FAIR SENTENCING ACT OF 2010 IF THE AMENDMENT WERE APPLIED RETROACTIVELY 8 n.24 (2011) (“All of the amendments promulgated by the Commission in the 2010-2011 amendment cycle were submitted to Congress on April 28, 2011, and will become effective on November 1, 2011, unless Congress acts affirmatively within 180 days to modify or disapprove them.”).

154. *Savani*, 733 F.3d at 57.

155. 18 U.S.C. § 3582(c)(2) (2012) (stating the requirements to obtain a modification of a term of imprisonment).

156. *Id.* Specifically, § 3553(a) requires that “the court shall impose a sentence sufficient, but not greater than necessary . . . [and] shall consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant”; (2) the need for the sentenced imposed to, among

courts *must* take public safety into account before granting a sentence reduction and “consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction.”<sup>157</sup> Sentencing courts are also barred from retroactively applying an amendment to the Guidelines unless the Sentencing Commission expressly permits such retroactive application.<sup>158</sup> The structure of § 3582(c)(2) is indicative of congressional intent “to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding.”<sup>159</sup> Accordingly, mere eligibility to receive a sentence modification under § 3582(c)(2) does not entitle a prisoner to a reduction of sentence—in other words, neither the Constitution nor federal statutory law mandates the reduction of an otherwise final sentence.<sup>160</sup>

To be eligible for a discretionary sentence reduction under § 3582(c)(2), three requirements must be satisfied.<sup>161</sup> First, the Sentencing Commission must have amended a Guidelines range and authorized retroactive application of that amendment.<sup>162</sup> Second, the original sentence must have been “based on” that since-amended Guidelines range.<sup>163</sup> Third, the requested sentence reduction must be consistent with applicable policy statements of the Sentencing Commission.<sup>164</sup> The policy statement governing sentence modifications requires that application of the amended Guidelines range “have the effect of lowering

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other things, reflect the seriousness of the offense and to further sentencing goals of deterrence, to protect the public, and to provide the defendant with correctional training; (3) “the kinds of sentences available”; (4) the sentences and sentencing ranges for “the applicable category of offense committed by the applicable category of defendant”; (5) any Sentencing Commission policy statement; (6) the need to avoid sentencing disparities among similarly situated defendants; and (7) “the need to provide restitution to” victims of the offense. *Id.* § 3553(a).

157. 2011 GUIDELINES MANUAL, *supra* note 115, at app. C at 419–20.

158. U.S. SENTENCING COMM’N, ANALYSIS OF THE IMPACT OF AMENDMENT TO THE STATUTORY PENALTIES FOR CRACK COCAINE OFFENSES MADE BY THE FAIR SENTENCING ACT OF 2010 AND CORRESPONDING PROPOSED PERMANENT GUIDELINE AMENDMENT IF THE GUIDELINE AMENDMENT WERE APPLIED RETROACTIVELY 5 (2011) [hereinafter 2011 MEMORANDUM ANALYZING FSA RETROACTIVITY].

159. *Dillon v. United States*, 560 U.S. 817, 826 (2010).

160. *Id.* at 828 (stating that sentence-modification proceedings “are not constitutionally compelled”); *see also* 18 U.S.C. § 3582(c)(2) (stating that if all of the requirements are met “the court may reduce the term of imprisonment”) (emphasis added).

161. Section 3582(c)(2) provides:

[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2).

162. *Id.*; *see also* *Blewett II*, 746 F.3d 647, 665 (6th Cir. 2013) (en banc) (Moore, J., concurring in the judgment) (articulating the three requirements to be eligible for a sentencing reduction pursuant to § 3582(c)(2)), *cert. denied*, 134 S. Ct. 1779 (2014).

163. 18 U.S.C. § 3582(c)(2).

164. *Id.*; *see* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 (2011) (policy statement).

the defendant's applicable guideline range."<sup>165</sup> If the district court entertaining the § 3582(c)(2) motion is satisfied that the defendant has met the statutory requirements, only then may it exercise its discretion to determine whether the defendant should receive a sentence reduction.<sup>166</sup>

Prior to the passage of the FSA, the Supreme Court upheld the constitutionality of the Sentencing Commission's binding policy statement. This holding effectively prevents a sentencing court from reducing a sentence below an amended Guidelines range during sentence-modification proceedings.<sup>167</sup> This conclusion was reached despite a prior landmark decision in *United States v. Booker*<sup>168</sup> that rendered the Sentencing Guidelines advisory because mandatory Guidelines violated the Sixth Amendment.<sup>169</sup> In distinguishing a binding policy statement from binding Guidelines, the Court stressed the "fundamental differences" between an initial sentencing and a sentence-modification proceeding.<sup>170</sup> Under § 3582(c)(2), sentence-modification proceedings provide a "narrow exception to the rule of finality" in sentencing, and "represent[] a congressional act of lenity."<sup>171</sup> Therefore, the Court concluded that there is no constitutional entitlement to a sentence reduction pursuant to § 3582(c)(2) and there is no constitutional requirement of retroactivity.<sup>172</sup>

In dissent, Justice Stevens concluded that he would have applied the Court's remedial holding in *Booker* to sentence-modification proceedings.<sup>173</sup> Because the policy statement removes the discretion of district judges to depart from the Guidelines, Justice Stevens argued, "the Government will continue to spend more than \$25,000 a year to keep Dillon behind bars until his release date. . . . I can scarcely think of a greater waste of this Nation's precious resources."<sup>174</sup> As Justice Stevens's dissent in *Dillon* exemplifies, while many district judges

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165. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a)(2)(B); *Blewett II*, 746 F.3d at 665 (Moore, J., concurring in the judgment).

166. *See, e.g.*, *United States v. Flemming*, 617 F.3d 252, 257 (3d Cir. 2010) (stating that only if the requirements of § 3582(c)(2) are satisfied may the district court exercise its discretion to modify a sentence).

167. *Dillon v. United States*, 560 U.S. 817, 819 (2010). The Court noted that "[o]nly if the sentencing court originally imposed a term of imprisonment below the Guidelines range does § 1B1.10 [the policy statement] authorize a court proceeding under § 3582(c)(2) to impose a term 'comparably' below the amended range." *Id.* at 827.

168. 543 U.S. 220 (2005).

169. *Booker*, 543 U.S. at 245–46. In *Dillon*, the Court concluded that the binding nature of the policy statement under § 3582(c)(2) "do[es] not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt." *Dillon*, 560 U.S. at 828.

170. *Dillon*, 560 U.S. at 830.

171. *Id.* at 827–28 (holding the policy statement governing sentence-modification proceedings prevents a sentencing court from reducing a sentence below the minimum amended Guidelines range). *But see id.* at 833–34 (Stevens, J., dissenting) (questioning the constitutionality of a binding policy statement by the Sentencing Commission in light of the Court's holding in *Booker*, which rendered the Guidelines advisory under the Sixth Amendment).

172. *Id.* at 828 (majority opinion) ("[P]roceedings authorized by § 3582(c)(2) are not constitutionally compelled.").

173. *Id.* at 834 (Stevens, J., dissenting).

174. *Id.* at 850.

acknowledge the unfairness of pre-FSA drug sentences, they are often stifled by the technical requirements of the § 3582(c)(2) and the binding policy statement when they seek to remedy that unfairness at sentence-modification proceedings.<sup>175</sup>

2. Crack Offenders Sentenced to Anti-Drug Abuse Act Mandatory Minimums Are Ineligible for Discretionary Sentence Reductions Under § 3582(c)(2)

There is a consensus among the circuit courts of appeals that federal crack offenders sentenced to pre-FSA mandatory minimums based on the 100-to-1 ratio are ineligible to benefit from the FSA's comparatively lenient mandatory minimums through § 3582(c)(2) motions.<sup>176</sup> Circuit precedent, the saving statute, and the technical requirements of § 3582(c)(2) therefore prevent thousands of federal inmates sentenced under the old, since-repudiated mandatory minimums from being eligible for sentence reductions.<sup>177</sup> There are multiple rationales for treating the FSA mandatory minimums as purely prospective.

First, this prospective approach to the FSA mandatory minimums is due to the lack of an express statement of retroactivity in the FSA.<sup>178</sup> Under the general saving statute, it is presumed that remedial amendments to criminal statutes do not apply retroactively without an express statement of retroactivity.<sup>179</sup> Any

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175. Justice Stevens noted that, at the defendant's original sentencing, the judge was required to impose a 322-month sentence, despite feeling the sentence was "entirely too high for the crime [he] committed." *Id.* at 832 (alteration in original). At sentencing, the district judge stated, "I personally don't believe that you should be serving 322 months. But I feel I am bound by those Guidelines," further acknowledging, "I don't think they are fair." *Id.* at 849 (internal quotation marks omitted).

176. See, e.g., *Blewett II*, 746 F.3d 647, 652 (6th Cir. 2013) (en banc) (listing opinions from the circuit courts of appeals holding that the FSA mandatory minimums are not retroactively applicable), *cert. denied*, 134 S. Ct. 1779 (2014); *United States v. Hammond*, 712 F.3d 333, 336 (6th Cir.) (holding the FSA is not retroactive to defendants who were sentenced prior to the enactment of the FSA), *cert. denied*, 134 S. Ct. 248 (2013); *United States v. Reevey*, 631 F.3d 110, 111 (3d Cir. 2010) (holding that the FSA's amended mandatory sentences are not retroactively applicable to inmates sentenced before the FSA's effective date); see also 2011 RETROACTIVITY REPORT, *supra* note 21, at tbl.9 (indicating that 6,728 motions for reduction of sentence have been denied on ineligibility grounds, 2,408 of those were denied—without a ruling on the merits—on the ground that the ADAA mandatory minimum is controlling).

177. Through 2011, nearly five thousand offenders were sentenced at the statutory minimum and that minimum did not change as a result of Amendment 706—the pre-FSA remedial amendment to the Guidelines. 2011 MEMORANDUM ANALYZING FSA RETROACTIVITY, *supra* note 158, at 12.

178. "The changes made by the FSA to the statutory penalty structure for crack cocaine offenses were not made retroactive by the Act. Therefore, the statutory mandatory minimum sentences applicable to these offenders have not changed." *Id.* at 12 n.33.

179. 1 U.S.C. § 109 (2012). The general saving statute was enacted in 1871 to reverse the common law presumption that the repeal of, or a remedial amendment to, a criminal statute would "abate all nonfinal convictions under the repealed or amended statute." *Dorsey v. United States*, 132 S. Ct. 2321, 2339 (2012) (Scalia, J., dissenting); see also *Warden v. Marrero*, 417 U.S. 653, 660 (1974) (clarifying that the word "repeal" also applies to cases where a new statute reduces the penalties imposed by an older statute). The saving statute states in part that

[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly

analysis of the FSA thus begins with the presumption that, in 2010, Congress did not intend for the newly enacted mandatory minimums based on the 18-to-1 ratio to apply retroactively to offenders already sentenced to ADA A mandatory minimums based on the 100-to-1 ratio. This presumption against implied repeals is subject to rebuttal: even in the absence of an express statement of retroactivity, the presumption of the saving statute can be rebutted if it was the “fair implication” of Congress to apply the FSA retroactively when it passed the Act in 2010.<sup>180</sup> Despite the potential for rebuttal, federal appellate courts have found that the saving statute weighs against retroactive application of the FSA mandatory minimums at sentence-modification proceedings.<sup>181</sup>

Second, the prevailing view—that prisoners sentenced to ADA A mandatory minimums are ineligible for discretionary sentence reductions—is due to the highly technical language of § 3582(c)(2) and the corresponding policy statement governing sentence modifications.<sup>182</sup> Because the Sentencing Commission’s binding policy statement effectively prevents a sentencing court from reducing an offender’s sentence below his or her applicable Guidelines range,<sup>183</sup> offenders serving mandatory minimum sentences are categorically ineligible to benefit from the Sentencing Commission’s retroactive Guidelines

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provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109.

180. While the language of the saving statute requiring an express statement of retroactivity by Congress appears absolute, the Supreme Court has long held that the statutory demands are in fact less strenuous than the plain language suggests. *Dorsey*, 132 S. Ct. at 2332. The Supreme Court has permitted retroactive application of a later-in-time ameliorative statute, without an express declaration of Congress, when it was the “necessary implication,” the “clear implication,” or the “fair implication,” of Congress to apply the new Act retroactively. *See* *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908) (stating that “the section [of the existing law] must be enforced unless, either by express declaration or necessary implication, arising from the terms of the [new] law as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions”); *Hertz v. Woodman*, 218 U.S. 205, 218 (1910) (stating that “if [new legislation] necessarily, or by clear implication, conflicts with the general rule [of the saving statute], the latest expression of the legislative will must prevail”); *Marrero*, 417 U.S. at 660, n.10 (noting that only if a new statute “can be said by fair implication or expressly to conflict with [the saving statute] . . . would there be reason to hold that it supersede[s]” the saving statute). The Supreme Court has observed that these three phrases are used interchangeably. *Dorsey*, 132 S. Ct. at 2332. The allowance of repeal by implication is premised on the unchallenged notion that an earlier Congress cannot encroach on the legislative powers of a future Congress. *See Fletcher v. Peck*, 10 U.S. 87, 135 (1810) (asserting the principle “that one legislature is competent to repeal any act which a former legislature was competent to pass”). Given this uncontroverted principle of law, the implied will of the legislative body that passed the new statute is controlling, not the general principle of the saving statute.

181. *See, e.g., Blewett II*, 746 F.3d at 664 (holding the general saving statute “resolves this silence in favor of purely prospective application” of the FSA’s more lenient mandatory minimums).

182. *See supra* notes 161–66 and accompany text for the statutory requirements of § 3582(c)(2).

183. *Blewett II*, 746 F.3d at 665 (Moore, J., concurring in the judgment) (explaining that the policy statement requires that “the new guideline range . . . actually ‘have the effect of lowering the defendant’s applicable guideline range’”).



amendments.<sup>184</sup> As explained by the Third Circuit: “A defendant is not assigned a new offense level or criminal history category by operation of the mandatory minimum. Rather, the guideline range that is applicable to that offense level and criminal history category is simply trumped by the mandatory minimum sentence.”<sup>185</sup> Accordingly, ADAA mandatory minimum offenders are also denied retroactive relief because their sentences are not “based on” the Sentencing Commission’s amendments to the Guidelines, as required by § 3582(c)(2).<sup>186</sup>

While these rationales for denying discretionary relief to mandatory minimum offenders make sense as a matter of statutory interpretation, by this same logic, crack offenders sentenced to Guidelines sentences above the applicable statutory minimum—often for possession of a higher quantity of drugs—remain eligible for § 3582(c)(2) relief.<sup>187</sup> Despite this potentially anomalous result, in reaffirming its holding that the FSA “d[oes] not apply retroactively to . . . defendants who committed their crimes and who were sentenced before the [Fair Sentencing] Act was enacted,” the Third Circuit noted, “[i]n doing so, we joined every Court of Appeal to consider the issue.”<sup>188</sup>

Given this legal landscape, district judges have denied offenders sentenced to the 100-to-1 mandatory minimums relief under § 3582(c)(2) on ineligibility grounds—holding specifically that the ADAA mandatory minimum sentences

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184. The following example explains the interplay between mandatory minimum sentences and the Guidelines range otherwise applicable to an offender: If a defendant sentenced in Criminal History Category I possesses more than 5 grams of crack and no other Guidelines provision impacts the defendant’s base offense level, the otherwise-applicable Guidelines range for that offender would be 51-63 months. Due to the fact, however, that there is a statutory minimum 60-month sentence, § 5G1.1(c)(2) of the sentencing guidelines dictates that the guideline range becomes 60–63 months—“the portion of the otherwise applicable guideline range (51 to 63) that is at or above the statutory mandatory minimum.” 2011 MEMORANDUM ANALYZING FSA RETROACTIVITY, *supra* note 158, at 4 n.10.

185. *United States v. Savani*, 733 F.3d 56, 63 n.5 (3d Cir. 2013).

186. *See, e.g., In re Sealed Case*, 722 F.3d 361, 366 (D.C. Cir. 2013) (“Where a defendant actually receives a mandatory minimum sentence . . . [that] sentence is not ‘based on’ his guideline range, and he is ineligible for § 3582(c)(2) relief.”); *see also* 18 U.S.C. § 3582(c)(2) (2012) (applying only “in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission”).

187. *Blewett II*, 746 F.3d 647, 673 (6th Cir. 2013) (Cole, J., dissenting) (noting that everyone agrees “crack convicts sentenced above the 100-to-1 minimums” are eligible for § 3582(c)(2) proceedings), *cert. denied*, 134 S. Ct. 1779 (2014); *id.* at 687 (Rogers, J., dissenting) (“[N]ot permitting the § 3582 procedure to apply ‘makes matters worse’ . . . by giving retroactive relief only to those whose actions put them in guideline ranges higher than the mandatory minimums—i.e., the worse criminals.”).

188. *United States v. Dixon*, 648 F.3d 195, 199 n.3 (3d Cir. 2011). The Sentencing Commission has confirmed this to be the prevailing view on eligibility. 2011 MEMORANDUM ANALYZING FSA RETROACTIVITY, *supra* note 158, at 9 (stating that “the statutory mandatory minimum penalties in effect when these offenders were sentenced would continue to govern any modifications to the sentences imposed on these incarcerated offenders”).

are controlling.<sup>189</sup> In 2011, the Sentencing Commission found that 2408 federal crack defendants were held ineligible for discretionary sentence modifications because their mandatory sentences, which were based on the since-repudiated 100-to-1 ratio, still control.<sup>190</sup> This view suggests that Congress only intended to provide a partial remedy for the problems caused by the 100-to-1 sentencing disparity when it passed the FSA, while at the same time denying relief to thousands of offenders sentenced to the mandatory minimums based on that same ratio.

*D. The Supreme Court Permits Partial Retroactive Application of the Fair Sentencing Act Mandatory Minimums Without an Express Statement of Retroactivity*

In 2012, the Supreme Court held in *Dorsey v. United States*<sup>191</sup> that the FSA's more lenient mandatory minimums should apply in a partially retroactive manner—that is, the mandatory minimums apply to prisoners arrested before but sentenced after the passage of the Act.<sup>192</sup> The Court granted certiorari to resolve an evolving circuit split on the retroactive applicability of the FSA.<sup>193</sup> Specifically, the Court held that the FSA's amended penalty provisions should apply to offenders who committed their underlying offense prior to August 3, 2010—the effective date of the FSA—but who were not sentenced until after that date.<sup>194</sup> Prior to *Dorsey*, circuits that rejected this notion of partial retroactivity had held that the intent of Congress in passing the FSA was not sufficient to overcome the saving statute.<sup>195</sup> On the other hand, numerous circuits held—and the Supreme Court ultimately agreed—that the fair implication of Congress in passing the FSA was to have it apply to all defendants sentenced after the FSA was enacted.<sup>196</sup>

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189. Ineligibility, rather than a discretionary judgment on the merits of a request for a sentence reduction, has been the primary justification for denial of § 3582(c)(2) relief for crack offenders. 2011 RETROACTIVITY REPORT, *supra* note 21, at tbl.9.

190. *Id.*

191. 132 S. Ct. 2321 (2012).

192. *Dorsey*, 132 S. Ct. at 2335; *see also* *United States v. Holcomb*, 657 F.3d 445, 446–47 (7th Cir. 2011), *cert. granted and judgment vacated*, 133 S. Ct. 62 (2012), *remanded*, 476 F. App'x 90 (7th Cir.) (“If the [FSA] is retroactive, then it applies to all pending cases no matter how far they have got in the judicial system; if it is not retroactive, then it applies only to crimes committed on or after August 3, 2010. Nothing depends on the sentencing date, which reflects how long it took to catch a criminal, and the state of the district judge’s calendar, rather than principles of deterrence or desert”). *See Lazarus, supra* note 15, at 726–27 (discussing Chief Judge Frank Easterbrook’s opinion dissenting from denial of rehearing en banc in *Holcomb*, a pre-*Dorsey* case deciding the retroactivity of the FSA in the context of offenders arrested before but sentenced after the Act).

193. *Dorsey*, 132 S. Ct. at 2330; *see also* Hyser, *supra* note 3, at 516–23 (examining the circuit split in detail and the Supreme Court’s ultimate resolution of the question in *Dorsey*).

194. *See Dorsey*, 132 S. Ct. at 2331.

195. *See, e.g., United States v. Tickles*, 661 F.3d 212, 215 (5th Cir. 2011) (holding the FSA does not apply to pre-FSA offenders); *United States v. Sidney*, 648 F.3d 904, 909 (8th Cir. 2011) (same).

196. *See, e.g., United States v. Dixon*, 648 F.3d 195, 203 (3d Cir. 2011) (holding the FSA applies to crack defendants arrested before but sentenced after August 3, 2010); *United States v. Douglas*, 644

The Supreme Court held that Congress intended the FSA to apply retroactively to these offenders despite the lack of an express statement of retroactivity.<sup>197</sup> The Court stated affirmatively that an alternative holding would “involve imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found in the [FSA] that such a sentence was unfairly long.”<sup>198</sup> *Dorsey* involved two petitioners, Corey Hill and Edward Dorsey, who were both arrested before but sentenced after the FSA was enacted pursuant to the harsher ADAA mandatory minimums.<sup>199</sup> Both the government and the petitioners asserted that the FSA’s new mandatory minimums were applicable.<sup>200</sup> The Court began by noting that due to the presumption against implied repeals, interpretive principles mandate a presumption that “Congress did *not* intend those penalties [of the FSA] to apply unless it clearly indicated to the contrary.”<sup>201</sup> Despite the presumption, the Court cited six considerations that led to the conclusion that Congress clearly intended for the FSA to apply to pre-FSA crack defendants sentenced after the FSA became effective.<sup>202</sup> In so holding, however, the Court reiterated the principle that “in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.”<sup>203</sup> Nonetheless, it has been argued that the majority in *Dorsey* “broke new ground” by allowing implied retroactive application of the FSA.<sup>204</sup>

In dissent, Justice Scalia argued that the presumption of the saving statute prevents retroactive application of the FSA mandatory minimums, regardless of when an offender was sentenced.<sup>205</sup> Writing for the four dissenting justices, he observed that the Court must conclude that the “plain import” of the FSA directly conflicts with the presumption against implied repeals of criminal statutes to overcome the saving statute by implication.<sup>206</sup> The dissent contended

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F.3d 39, 43 (1st Cir. 2011) (same); *see also Holcomb*, 657 F.3d at 455 (“Congress did not need to say in the Fair Sentencing Act, ‘this Act applies to any person sentenced hereafter for crack cocaine offenses, even if the conduct giving rise to conviction took place before this Act’s passage,’ for it to apply in all sentencings thereafter. That would be one way to do it. But the Supreme Court does not require it.”); *id.* at 451–52 (“[W]hat’s fair about condemning someone sentenced on August 2 to more time in prison than a person sentenced the next day . . . ?”).

197. *Dorsey*, 132 S. Ct. at 2335 (“[W]e conclude that Congress intended the Fair Sentencing Act’s new, lower mandatory minimums to apply to the post-Act sentencing of pre-Act offenders. That is the Act’s ‘plain import’ or ‘fair implication.’”).

198. *Id.* at 2333.

199. *Id.* at 2329–30.

200. *Id.* at 2330.

201. *Id.* at 2326. *See supra* notes 178–81 and accompanying text for a discussion of the saving statute.

202. *See infra* note 261 for the six indicators of congressional “fair implication” announced in *Dorsey*.

203. *Dorsey*, 132 S. Ct. at 2335.

204. *See Lazarus, supra* note 15, at 724–30 (applying and modifying the considerations listed in *Dorsey* to offenders sentenced to pre-FSA mandatory minimums seeking § 3582(c) sentence reductions).

205. *Dorsey*, 132 S. Ct. at 2340 (Scalia, J., dissenting).

206. *Id.*

that the majority's six considerations "do not come close" to satisfying the exacting standard required to rebut the presumption.<sup>207</sup> Although not addressed by the majority, the dissent also rejected the Petitioners' equal protection arguments premised on the rule of lenity and the constitutional avoidance doctrine.<sup>208</sup> The dissent rejected the existence of a fair congressional implication of retroactivity and concluded that FSA mandatory minimums should not apply at post-FSA sentencing of pre-FSA offenders.<sup>209</sup>

In the aftermath of *Dorsey*, the circuit courts have unanimously rejected the contention that the opinion should be extended to make the FSA mandatory minimums applicable through discretionary sentence-modification proceedings for offenders sentenced *before* the FSA went into effect. A consensus therefore exists that, despite the holding in *Dorsey* that it was the "fair implication" of Congress to apply the FSA in a partially retroactive manner, the saving statute prohibits the FSA mandatory minimums from being applied retroactively to prisoners currently serving ADAA mandatory minimum sentences.<sup>210</sup>

E. *United States v. Blewett and the Debate Over Retroactive Application of the Fair Sentencing Act to Offenders Sentenced Before the Passage of the Act*

To date, the only circuit court of appeals to hold—albeit briefly—that offenders subject to the since-repealed ADAA mandatory minimums are eligible for § 3582(c)(2) relief was the Sixth Circuit in *United States v. Blewett (Blewett I)*.<sup>211</sup> However, a heavily divided en banc Sixth Circuit vacated and subsequently disagreed with the original panel decision.<sup>212</sup> In doing so, the Sixth Circuit joined the rest of the federal courts of appeals in holding that neither § 3582(c)(2) nor the Constitution provides a vehicle for retroactive application of the FSA's

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207. *Id.*

208. *Id.* at 2343–44.

209. *Id.* at 2342–43.

210. *See, e.g.,* *United States v. Berry*, 701 F.3d 374, 378 (11th Cir. 2012) ("The Supreme Court in *Dorsey* carefully confined its application of the FSA to pre-Act offenders who were sentenced after the Act's effective date."); *United States v. Turlington*, 696 F.3d 425, 428 (3d Cir. 2012) (holding that the Supreme Court's opinion in *Dorsey* "does not address, or disturb, the basic principle that the FSA does not apply to those defendants who were both convicted and sentenced prior to the effective date of the FSA"); *see also Blewett II*, 746 F.3d 647, 652 (6th Cir. 2013) (en banc) (concluding that "[e]very other federal court of appeals . . . has followed this path"), *cert. denied*, 134 S. Ct. 1779 (2014).

211. 719 F.3d 482 (6th Cir.), *rev'd en banc*, 746 F.3d 647 (6th Cir. 2013). The dissenting judge on the panel noted "that my panel colleagues have sua sponte set sail into the constitutional sea of equal protection without any legal ballast to keep the analysis afloat." *Id.* at 494 (Gilman J., dissenting).

212. *Blewett II*, 746 F.3d at 660. Nine judges joined the majority opinion penned by Judge Sutton. *Id.* at 649. Judge Moore concurred in the judgment, while expressing serious constitutional concerns. *See id.* at 661 (Moore, J., concurring). In addition, there were five separate dissenting opinions, four of which were joined by at least one other member of the Sixth Circuit. *Id.* at 649 (majority opinion). Needless to say, the issues presented in *Blewett* struck a chord with the Sixth Circuit.

amended mandatory minimums.<sup>213</sup> The case involved two cousins, sentenced in 2005 to 120-month mandatory minimums based on the 100-to-1 ratio, who sought sentence reductions on the grounds that neither would have been subject to a statutory minimum sentence if they had been sentenced after the passage of the FSA.<sup>214</sup>

In the original panel opinion, the two-judge majority invoked the principle of constitutional avoidance, arguing that grave equal protection concerns arise if judges categorically refuse to apply the FSA's more lenient mandatory minimums retroactively.<sup>215</sup> Accordingly, the panel majority in *Blewett I* argued, "if we continue now with a construction of the statute that perpetuates the discrimination, there is no longer any defense that the discrimination is unintentional."<sup>216</sup> To avoid this constitutional issue, the panel majority held that defendants sentenced to the pre-FSA mandatory minimums were eligible for discretionary sentence reductions under § 3582(c)(2).<sup>217</sup> In so holding, the original panel decision invoked the rule of lenity, the remedial purpose canon, and the constitutional avoidance principle.<sup>218</sup>

The panel's equal protection holding and reliance on the principle of constitutional avoidance were rejected by a majority of the en banc Sixth Circuit, which stated, "a weak constitutional argument and a weak statutory argument do not add up to a strong constitutional avoidance argument."<sup>219</sup> The majority in *Blewett II* relied on *Dorsey* and held that each of the six *Dorsey* considerations

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213. *Id.* at 650 ("In our view: (1) the Fair Sentencing Act's new mandatory minimums do not apply to defendants sentenced before it took effect; (2) § 3582(c)(2) does not provide a vehicle for circumventing that interpretation; and (3) the Constitution does not provide a basis for blocking it.").

214. *Blewett I*, 719 F.3d at 484–85.

215. *Id.* at 487.

216. *Id.* at 488; *id.* at 494 (stating that "[t]he old crack cocaine statutory minimums are racially discriminatory as the legislative history of the Fair Sentencing Act makes clear . . . . Perpetuation of such racially discriminatory sentences by federal courts is unconstitutional and therefore the sentencing guidelines must be interpreted to eliminate such a result"); *see also* U.S. *ex rel* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."); ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 247 (2012) (discussing the constitutional avoidance principle).

217. *Blewett I*, 719 F.3d at 484. The panel's use of the constitutional avoidance principle was defended by the NAACP Legal Defense Fund's amicus brief in *Blewett II*:

"The concept of equal justice under law requires the State to govern impartially. The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." The Government's interpretation of the FSA conflicts with these principles, and the Panel properly rejected it in an appropriate exercise of constitutional avoidance.

Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Defendants-Appellants, at 20, *United States v. Blewett*, 746 F.3d 647 (6th Cir. 2013) (en banc) (Nos. 12-5226 & 12-5582), 2013 WL 5304321 at \*20 (quoting *Lehr v. Robertson*, 463 U.S. 248, 265 (1983)).

218. *Id.* at 490 n.8.

219. *Blewett II*, 746 F.3d 647, 660 (6th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1779 (2014).

weighed against applying the FSA mandatory minimums retroactively.<sup>220</sup> The majority further held that a solely prospective interpretation of the FSA was constitutional because prospective application of the FSA mandatory minimums rationally furthered the government's interest in the finality of sentencing.<sup>221</sup> Alternatively, the lead dissent applied the *Dorsey* considerations and found that each of those considerations weighed in favor of retroactively applying the FSA.<sup>222</sup> Various dissents passionately argued that the majority's approach—which prevails in all circuits—raised serious equal protection concerns under the U.S. Constitution. Despite these constitutional arguments, the Sixth Circuit sitting en banc in *Blewett II* rejected attempts to use an equal protection framework to resolve the question of § 3582(c)(2) eligibility for ADAA mandatory minimum offenders and reaffirmed the consensus view that prisoners sentenced to ADAA mandatory minimums are ineligible for § 3582(c)(2) sentence reductions.<sup>223</sup>

### III. DISCUSSION

The ineligibility of the offenders in *Blewett II* to obtain discretionary sentence reductions demonstrates the irrationality of the prevailing interpretation of the FSA and § 3582(c)(2).<sup>224</sup> In 2004, cousins Cornelious and Jarreous Blewett received ten-year mandatory minimum sentences for possession of less than one ounce of crack cocaine.<sup>225</sup> If the Blewetts had been sentenced after August 3, 2010—the FSA's effective date—they would have received Guidelines sentences and would not have been subject to a mandatory minimum sentence.<sup>226</sup> Additionally, and confusingly, if the Blewetts had received Guidelines sentences above the applicable mandatory minimum when originally sentenced, they would have been eligible for sentence reductions.<sup>227</sup> In this scenario, they would be eligible for sentence reductions under § 3582(c)(2) because their sentences would have been “based on a sentencing range that has

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220. *Id.* at 650–651.

221. *Id.* at 651. See *infra* notes 275–280 and accompanying text for a critique of the Sixth Circuit's reliance on finality.

222. *Id.* at 685–689 (Rogers, J., dissenting). See *infra* note 261 for the six considerations announced in *Dorsey* that, taken together, indicate it was the fair implication of Congress to apply the FSA in a partially retroactive manner.

223. See *id.* at 660 (majority opinion) (“[T]he language of the relevant statutes . . . and the language of the relevant decisions (*Dorsey*, *Davis* and *Harmelin*) leave us no room to grant that relief here. Any request for a sentence reduction must be addressed to a higher tribunal (the Supreme Court) or to a different forum altogether (the Congress and the President).”).

224. See *supra* Part II.E for a discussion of *Blewett I* and *Blewett II*.

225. Cornelious Blewett was convicted for possessing 19.65 grams of crack, while Jarreous Blewett was convicted for possessing 26.92 grams. Brief for Appellee at 3, *Blewett I*, 719 F.3d 484 (6th Cir. 2013) (Nos. 12-5226 & 12-5582), 2012 WL 4471953. The applicable five-year mandatory minimum sentence for possession of 5 grams of crack for these offenses was doubled to ten years under the enhancement provision for a prior conviction. *Id.*; see also 21 U.S.C. § 851 (2012).

226. *Blewett II*, 746 F.3d at 656–57 (observing that Guidelines Amendment 750 “today would give Cornelious 63–78 months and Jarreous 70–87 months”).

227. *Blewett II*, 746 F.3d at 673 (Cole, J., dissenting).

subsequently been lowered by the Sentencing Commission.”<sup>228</sup> Because they were sentenced to mandatory minimums, however, the Sixth Circuit’s construction of § 3582(c)(2), the saving statute, and the FSA rendered the Blewetts categorically ineligible to petition the court for modest, discretionary sentence reductions.<sup>229</sup>

Like the Blewetts, thousands of crack offenders sentenced above the otherwise applicable mandatory minimums have already received sentence reductions under § 3582(c)(2).<sup>230</sup> This includes offenders with extensive criminal histories and underlying weapons offenses.<sup>231</sup> The practical absurdity of this result was explained by Judge Merritt Jr. as follows: “The government’s view of retroactivity would give major kingpins the greatest benefit of retroactivity because their amended guideline range is above the mandatory minimum while hundreds of more petty, less culpable offenders like the Blewetts remain in prison without any benefit of the revised law.”<sup>232</sup> Categorically denying § 3582(c)(2) relief to the Blewetts and thousands of others currently serving since-repealed ADAA mandatory minimums while granting relief to offenders who had the “good fortune” of receiving a comparatively higher Guidelines sentence fails to satisfy even a minimal standard of rationality.<sup>233</sup>

This Section argues that serious constitutional concerns are raised by the purely prospective interpretation of the FSA mandatory minimums. As the legislative history makes clear, there are six primary policy objectives underlying the passage of the FSA, each of which would be furthered by retroactively applying the newly enacted mandatory minimums at discretionary sentence-modification proceedings.<sup>234</sup> Furthermore, secondary considerations regarding sentencing finality and the discretionary nature of § 3582(c)(2) proceedings mollify the concerns about retroactivity raised by the *Blewett II* majority.<sup>235</sup> Equal protection concerns are raised by the racially disparate impact of the cocaine sentencing disparity, the arbitrary application of § 3582(c)(2) relief to

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228. 18 U.S.C. § 3582(c)(2) (2012).

229. *Blewett II*, 746 F.3d at 649–50 (noting that, in 2005, the Blewetts got the “lowest sentence possible under the law,” yet the district court was still required to deny their requests for sentence reductions based on the FSA); see also *United States v. Liberse*, 688 F.3d 1198, 1201 (11th Cir. 2012) (quoting *United States v. Glover*, 686 F.3d 1203, 1206 (11th Cir. 2012)) (“[A] sentencing court lacks jurisdiction to consider a § 3582(c)(2) motion, even when an amendment would lower the defendant’s otherwise-applicable Guidelines sentencing range, if the defendant’s Guidelines range was, and remains, the statutory mandatory minimum under U.S.S.G. § 5G1.1(b).”).

230. 2011 GUIDELINES MANUAL, *supra* note 115, at app. C at 419 (observing that, as of 2011, “approximately 25,500 offenders have requested a sentence reduction pursuant to retroactive application of the 2007 crack cocaine amendments and approximately 16,500 of those requests have been granted”).

231. 2013 RETROACTIVITY REPORT, *supra* note 148, at tbl.6.

232. *Blewett I*, 719 F.3d 482, 492 (6th Cir.), *rev’d en banc*, 746 F.3d 647 (6th Cir. 2013).

233. See *infra* Part III.C for an argument that denying retroactive relief to ADAA mandatory minimum offenders is irrational and arbitrary due to the retroactive relief available to similarly situated individuals.

234. See *infra* Part III.A.

235. See *infra* Part III.B.

similarly situated crack offenders, and Congress's failure to provide a prospective remedy to ADAA mandatory minimum offenders.<sup>236</sup> In light of the unequal application of § 3582(c)(2), denying offenders sentenced to ADAA mandatory minimums the opportunity to obtain discretionary sentence reductions is inconsistent with the purposes of the FSA and constitutional guarantees of equal protection.

A. *The Policy Objectives Underlying the Fair Sentencing Act Would Be Furthered by Retroactively Applying the Act's Mandatory Minimums at Sentence-Modification Proceedings*

Allowing prisoners sentenced to the old, admittedly unjust ADAA mandatory minimums to obtain discretionary sentence reductions promotes the purposes of the FSA. The legislative history of the FSA strongly suggests that it was the “fair implication” of Congress, in passing the FSA and permitting retroactive application of the amended Guidelines, to permit prisoners subject to ADAA mandatory minimums to be eligible for sentence reductions under § 3582(c)(2).<sup>237</sup> In interpreting the retroactive effect of the remedial provisions of the FSA, it is important to keep in mind the purpose of the FSA and the overwhelming national consensus against the 100-to-1 ratio.<sup>238</sup> These policy considerations are not irrelevant. As noted by the Third Circuit, courts must be “cognizant of the general policies underlying the FSA and [Guidelines] Amendment 750” when interpreting the § 3582(c)(2) eligibility requirements.<sup>239</sup> The court further cautioned that it is important not to interpret the guidelines in a vacuum.<sup>240</sup> The Supreme Court's framing of the issue in *Dorsey*—“[t]he underlying question before us is one of congressional intent as revealed in the Fair Sentencing Act's language, structure, and basic objectives”—further suggests that the purposes underlying the FSA are relevant to any determination of whether Congress impliedly intended the new mandatory minimums to apply retroactively.<sup>241</sup>

The FSA was enacted to remedy a plethora of injustices created by the ADAA 100-to-1 sentencing disparity—in particular, the legislative history sheds light on six compelling policy objectives underlying the passage of the FSA.<sup>242</sup> The foremost purpose of the FSA was to remedy the unfairness associated with the 100-to-1 ratio and the corresponding mandatory minimum sentences. This is reflected in the Act's title, “An Act To restore fairness to Federal cocaine

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236. See *infra* Part III.C.

237. Cf. *Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012) (“[W]e conclude that Congress intended the Fair Sentencing Act's new, lower mandatory minimums to apply to the post-Act sentencing of pre-Act offenders. That is the Act's ‘plain import’ or ‘fair implication.’”).

238. See *supra* Part II.A.4 for a discussion of the opposition to the 100-to-1 ratio from the Sentencing Commission and the Department of Justice.

239. *United States v. Savani*, 733 F.3d 56, 67 (3d Cir. 2013).

240. *Id.* at 66–67.

241. *Dorsey*, 132 S. Ct. at 2326.

242. See e.g., Parks, *supra* note 135, at 1117 (noting that one of the primary reasons Congress passed the FSA was “the social discrimination fostered by the [100-to-1] cocaine ratio”).



sentencing.”<sup>243</sup> As stated by Senator Richard Durbin, who introduced the FSA, “[T]his legislation is about fixing an unjust law that has taken a great human toll.”<sup>244</sup> Requiring prisoners to continue serving since-repealed mandatory minimum sentences, while at the same time acknowledging that the sentences are unjust, smacks of unfairness. This unfairness is compounded by the fact that thousands of similarly situated crack offenders who were sentenced above the mandatory minimums have already received post-FSA sentence reductions.<sup>245</sup> Denying retroactive application of the FSA mandatory minimums through § 3582(c)(2) sentence-modification proceedings accordingly perpetuates the unfairness that Congress attempted to remedy through the passage of the FSA.

Second, the ameliorative provisions of the FSA—which raised the drug quantities required to trigger mandatory minimum sentences, eliminated the mandatory minimum for simple possession, and directed the Sentencing Commission to promulgate emergency amendments to the Guidelines<sup>246</sup>—demonstrate a clear attempt by Congress to effectuate a drastic overhaul of federal cocaine sentencing policy. A year after the passage of the FSA, Congress did not object to the Sentencing Commission’s promulgation of Amendments 750 and 759, which gave retroactive effect to the emergency Guidelines amendments mandated by Congress.<sup>247</sup> Both the remedial character of the legislation and congressional acquiescence to the retroactive Guidelines amendments indicate that Congress intended to put an end to the days where federal drug policy suggested that possession of less than two ounces of crack cocaine was the culpable equivalent of possessing over eleven pounds of powder cocaine. To deny § 3582(c)(2) motions on the ground that the infamous 100-to-1 mandatory minimums are controlling misguidedly breathes life into the admittedly unjust ratio for purposes of sentence-modification proceedings.

Third, the FSA was intended to remedy “the negative impact the crack/powder disparity has had on the criminal justice system.”<sup>248</sup> This negative impact was caused in part by the disproportionate harms that the sentencing disparity

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

244. 155 CONG. REC. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Richard Durbin).

245. 2013 RETROACTIVITY REPORT, *supra* note 148, at tbl.8.

246. See *supra* notes 132–37 and accompanying text for an overview of these provisions.

247. See *supra* notes 148–53 and accompanying text for a discussion of the effect of these amendments on the Guidelines.

248. 155 CONG. REC. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Richard Durbin) (noting that, given the United States has the highest per capita rate of prisoners, which is largely attributable to incarceration of African American drug offenders, pre-FSA drug policy raises “issues of fundamental human rights and justice our country must face”); see 156 CONG. REC. H6200 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee) (“The unwarranted sentencing disparity not only overstates the relative harmfulness of the two forms of the drug and diverts Federal resources from high level drug traffickers, but it also disproportionately affects the African-American community.”); 155 CONG. REC. S10493 (statement of Sen. Arlen Specter) (“I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does.”); *id.* at S10492 (statement of Senator Patrick Leahy) (“The Fair Sentencing Act . . . [will] address the racial disparity in cocaine sentencing.”).

has had on African American communities.<sup>249</sup> In light of the ratio's impact on social perceptions of the equality of the criminal justice system, continued judicial enforcement of the since-repudiated ADAA mandatory minimums at sentence-modification proceedings, based solely on a rigid interpretation of § 3582(c)(2) and the saving statute, undermines federal sentencing reform by placing form over substance.<sup>250</sup> Unfortunately, the prevailing interpretation of the FSA forestalls achievement of the beneficial effects the new mandatory minimums were designed to have on our criminal justice system and perpetuates the racial disparity that has become the hallmark of federal cocaine sentencing.<sup>251</sup>

Fourth, the FSA was aimed at ameliorating the “enormous burden on taxpayers and the prison system.”<sup>252</sup> Reducing ADAA mandatory minimum sentences would be economical and go a long way toward directing Department of Justice and Bureau of Prisons resources where they belong—punishing and prosecuting high-level, violent drug traffickers. The Sentencing Commission has noted that if the FSA mandatory minimums were retroactive, it could result in “an estimated total savings of 37,400 bed years over a period of several years.”<sup>253</sup> That would save billions of dollars for U.S. taxpayers. There is little doubt that denial of retroactive relief only increases the financial burden caused by the 100-to-1 sentencing regime and delays realization of the economic benefits envisioned by Congress in passing the FSA.

Fifth, given that the 100-to-1 sentencing disparity failed to sentence the most dangerous powder cocaine distributors more harshly than less culpable crack offenders, the Act was an attempt to “return the focus of Federal cocaine sentencing policy to drug kingpins, rather than street level dealers.”<sup>254</sup> This

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249. See *supra* Part II.A.2 for a discussion of the disproportionate effect the ADAA had on African Americans.

250. *Blewett I*, 719 F.3d 482, 490 (6th Cir.) (“In light of our new knowledge about the racial discrimination inherent in the old law . . . [w]e should not allow the government’s legalisms to undermine the purpose of the Fair Sentencing Act and its more lenient punishment system for crack cocaine.”), *rev’d en banc*, 746 F.3d 647 (6th Cir. 2013). See *supra* Part II.C.2 for the predominant rationales for denying discretionary, retroactive application of the FSA mandatory minimums through § 3582(c)(2).

251. *Blewett II*, 746 F.3d, 647, 671 (6th Cir. 2013) (Merritt, J., dissenting) (arguing that “the majority’s failure to allow review of the old mandatory sentences simply perpetuates the racial discrimination that the FSA was designed to change”), *cert. denied*, 134 S. Ct. 1779 (2014).

252. 155 CONG. REC. S10491 (statement of Sen. Richard Durbin) (noting that “eliminating this [crack-powder] disparity could save more than \$510 million in prison beds over 15 years”); see Peter Kerr, *War on Drugs Puts Strain on Prisons, U.S. Officials Say*, N.Y. TIMES, Sep. 25, 1987, at A1 (indicating, in 1987, a year after the ADAA was passed, “[t]he Federal prison system, with the capacity to hold 28,000 prisoners, now has 44,000,” while in 1981 “the Federal prisons held 26,000 inmates and were not considered overcrowded”).

253. *Blewett II*, 746 F.3d at 669 n.1 (Merritt, J., dissenting) (quoting *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Judiciary Comm.*, 113 Cong. 92 (Sept. 18, 2013) (statement of J. Patti B. Saris, Chair, U.S. Sentencing Comm’n)).

254. 155 CONG. REC. S10492 (statement of Sen. Patrick Leahy); see *also id.* at S10490 (statement of Sen. Richard Durbin) (“Our laws don’t focus on the most dangerous offenders. Incarcerating for 5 to 10 years people who are possessing five sugar packets’ worth of crack cocaine for the same period of

problem was noted by the Supreme Court in *Kimbrough*, where the Court observed that “[t]he 100-to-1 ratio can lead to the ‘anomalous’ result that ‘retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced.’”<sup>255</sup> It seems unquestionable that it is also “anomalous” to deny prisoners sentenced to decade-long mandatory minimums the opportunity to receive sentence reductions, while higher-quantity, comparatively worse crack offenders who are sentenced to lengthier Guidelines sentences remain eligible for those same reductions.

Lastly, the FSA’s reduction of the powder-to-crack sentencing disparity was based in part on a consensus that the five considerations that originally justified the 100-to-1 ratio were erroneous and unjustified.<sup>256</sup> Given congressional acknowledgement that the old ratio was based on fallacious premises and lacks a justification for continued enforcement, it is irrational and counterproductive to continue enforcing thousands of sentences based on that ratio without providing any avenue of retroactive relief.<sup>257</sup>

In sum, the legislative history of the FSA demonstrates an unambiguous congressional intent to remedy the injustices and unintended social and economic consequences of the 100-to-1 sentencing disparity. In light of the remedial purposes of the FSA, it is not a “fair implication”—as required to overcome the presumption against implied repeals—to assume that Congress expressly acknowledged the discriminatory effect of the ADAA, yet chose only to remedy the problem prospectively. The fair implication of the FSA is that Congress intended to remedy the entire sentence proportionality problem, not just part of it. A comprehensive legislative remedy to the harms caused by the ADAA requires that Congress afford prisoners serving ADAA mandatory minimums some form of retroactive relief, even if that relief is only

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time as those who are selling 500 sugar-size packets of powder cocaine is indefensible.”); *id.* at S10492 (statement of Sen. Jeff Sessions) (“I definitely believe that the current system is not fair and that we are not able to defend the sentences that are required to be imposed under the law today.”).

255. *Kimrough v. United States*, 552 U.S. 85, 98 (2007) (citing 1995 COCAINE SENTENCING REPORT, *supra* note 59, at 66–67).

256. See 155 CONG. REC. S10491 (statement of Sen. Richard Durbin) (“We now know the assumptions that led us to create this disparity were wrong.”); *id.* (noting that Joseph Biden, an author of the ADAA, has stated that “[e]ach of the myths upon which we based the disparity has since been dispelled or altered”) (internal quotation marks omitted); *id.* at S10493 (statement of Sen. Arlen Specter) (commenting that the belief “that crack was uniquely addictive and was associated with greater levels of violence than powder cocaine” has been dispelled by scientific research); 156 CONG. REC. H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee) (“This disparity made no sense when it was initially enacted and makes absolutely no sense today . . .”).

257. Congressional determination that crack was 100 times worse than powder was based on (1) the highly addictive nature of crack; (2) the belief crack users were more likely to be violent and prone to crime; (3) the perception that crack was more harmful than powder cocaine, especially with respect to children exposed to crack by their mothers during pregnancy; (4) fear that teenagers were especially likely to use and distribute crack; and (5) the combination of high potency and low cost of crack, which contributed to its widespread use. *Kimrough*, 552 U.S. at 95–96 (2007); see also *Blewett II*, 746 F.3d at 684 (Clay, J., dissenting) (arguing that the “discriminatory sentencing regime . . . is unsupported by penological or pharmacological evidence and does not pass constitutional muster”).

discretionary. Therefore, the prevailing view—that Congress intended for the FSA mandatory minimums to apply in a purely prospective manner—effectively undermines federal cocaine sentencing reform efforts and arguably turns the wrongs of the Congress that passed the ADAA into the wrongs of the Congress that passed the FSA.<sup>258</sup> Therefore, as the foregoing examination of the legislative history demonstrates, affording federal crack offenders subject to pre-FSA mandatory sentences the opportunity to have their discretionary § 3582(c)(2) motions heard by district courts—although not necessarily granted—would undoubtedly further public policies underlying the 2010 overhaul of federal cocaine sentencing policy.

*B. Secondary Considerations Weigh in Favor of FSA Retroactivity: Discretion and Finality*

The Supreme Court broke ground in *Dorsey* by holding that it was the “fair implication” of Congress to apply the FSA in a partially retroactive manner despite the lack of an express statement of retroactivity.<sup>259</sup> Under the saving statute, there must be evidence that Congress intended retroactive application of an ameliorative criminal statute by fair implication in order to override the presumption against implied repeals.<sup>260</sup> In *Dorsey*, the Supreme Court held that “[s]ix considerations, taken together, convince us that Congress intended the Fair Sentencing Act’s more lenient penalties to apply to those offenders whose crimes preceded August 3, 2010, but who are sentenced after that date.”<sup>261</sup> *Dorsey* accordingly stands for the proposition that the FSA can overcome the saving statute and be applied retroactively despite the absence of an express statement of retroactivity from Congress.

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258. *Blewett II*, 746 F.3d at 682 (Clay, J., dissenting) (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (“Adopting new mandatory minimums for the purpose of righting the racially discriminatory wrongs of the past and not extending the benefits . . . to the thousands of predominately African American individuals serving disproportionate sentences under a now-rejected statute violates equal protection because Congress has recognized and reaffirmed ‘its adverse effects’ upon the African American community.”).

259. *Dorsey v. United States*, 132 S. Ct. 2321, 2331–32 (2012) (“Without requiring an ‘express’ statement, the Court has described the necessary indicia of congressional intent by the terms ‘necessary implication,’ ‘clear implication,’ and ‘fair implication,’ phrases it has used interchangeably.”); see *Lazarus*, *supra* note 15, at 724 (arguing that *Dorsey* “broke new ground”).

260. *Id.* at 2339 (Scalia, J., dissenting). See also *supra* notes 178–81 and accompanying text for an overview of the saving statute.

261. *Dorsey*, 132 S. Ct. at 2331 (majority opinion). These six considerations of congressional intent include (1) the saving statute permits implied retroactivity; (2) the Sentencing Reform Act (SRA) endorses the principle that courts should consider the sentencing range “in effect the date the defendant is sentenced” when determining a sentence; (3) the language of the FSA, particularly section 8, implies Congress intended to follow the principle laid out in the SRA; (4) applying the ADAA minimums to offenders sentenced after the FSA would create the type of disparities that Congress enacted the FSA and the SRA to prevent; (5) not applying the FSA would make the disproportionate sentences worse, directly conflicting with congressional sentencing objectives of uniformity and proportionality; and (6) that there were no strong countervailing considerations against applying the new penalties to pre-Act offenders. *Id.* at 2331–35.

“The distinction between a full resentencing and a § 3582 proceeding highlights the difference between *Dorsey* and [*Blewett*].”<sup>262</sup> In *Blewett*, on the one hand, the majority opinion—joined by nine members of the en banc Sixth Circuit—argued that *each* of the six considerations in *Dorsey* illustrate that Congress intended only prospective application of the FSA mandatory minimums.<sup>263</sup> On the other hand, the lead dissent—joined by five judges—argued that *each* of the *Dorsey* considerations weighed in favor of permitting retroactive sentence reductions for prisoners subject to ADAA mandatory minimums.<sup>264</sup> The reason for the strongly divergent application of *Dorsey* is that both opinions treated the *Dorsey* Court’s considerations—while undoubtedly relevant—as if they were a six-part test, without realizing that they were attempting to fit square pegs into round holes.<sup>265</sup> The Court in *Dorsey* at no point stated it was articulating a generally applicable test to be applied in all cases involving the FSA or the retroactive application of criminal statutes.

In fact, the Court in *Dorsey* made clear that the test required to override the saving statute’s presumption against retroactivity is evidence of a “clear,” “necessary,” or “fair” “implication” of Congress to do so.<sup>266</sup> While the Court’s six considerations are useful when discerning the fair implication of Congress, they are not dispositive in different contexts, such as here, where the relief sought is entirely discretionary.<sup>267</sup> Unlike the categorical rule announced in *Dorsey*, sentence modifications under § 3582(c)(2) are granted entirely at the discretion of a district judge.<sup>268</sup> This is significant in light of the Court’s final factor in *Dorsey*—that there were “no strong countervailing considerations” against applying the new mandatory minimums retroactively to pre-FSA offenders.<sup>269</sup> Two considerations suggest that the Court’s statement applies with equal force in § 3582(c)(2) context.

First, opponents of retroactivity have suggested it will result in the immediate release of violent and dangerous criminals.<sup>270</sup> This “get-out-of-jail-free card” suggestion ignores the discretion § 3582(c)(2) grants district judges to deny sentence reduction motions based on the violent nature of an inmate.<sup>271</sup> In

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262. *Blewett II*, 746 F.3d at 696 (White, J., dissenting).

263. *Id.* at 650–51 (majority opinion).

264. *Id.* at 685–88 (Rogers J., dissenting).

265. *Id.* at 651 (majority opinion) (referring to “*Dorsey*’s outcome and six-factor test”).

266. *Id.* at 2331–32.

267. See Lazarus, *supra* note 15, for a thorough pre-*Blewett II* application of the six *Dorsey* considerations to ADAA mandatory minimum offenders.

268. See *Blewett II*, 746 F.3d at 696 (White, J., dissenting).

269. *Dorsey v. United States*, 132 S. Ct. 2321, 2334–35 (2012).

270. Editorial, *Toward Drug Case Justice*, N.Y. TIMES, Feb. 9, 2008, at A14 (quoting the sensationalist rhetoric of former Attorney General Michael Mukasey, which is reminiscent of the crack debates in the mid-1980s, who argued that Congress should narrow eligibility for retroactive relief because “1,600 convicted crack dealers, many of them violent gang members, will be eligible for immediate release into communities nationwide”).

271. Hundreds of § 3582(c)(2) motions have been denied due to post-sentencing or post-conviction conduct, and concerns regarding public safety. 2011 RETROACTIVITY REPORT, *supra* note 21, at tbl.9.

fact, § 3582(c)(2) expressly “requires the district court to consider the § 3553(a) factors when it determines whether to grant a reduction, as well as the extent of the reduction.”<sup>272</sup> This point was reiterated by the Sentencing Commission, which noted, “public safety will be considered in every case” where a defendant seeks a sentence reduction, because the court is required “to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction.”<sup>273</sup> It is accordingly important to stress that holding that ADAA mandatory minimum prisoners are eligible for retroactive sentence reductions based on the FSA minimums will only allow § 3582(c)(2) motions to be heard on the merits; it will not automatically entitle violent prisoners to have their sentences reduced. Unlike the Blewetts, offenders who have § 3582(c)(2) motions denied on the merits will have no legitimate grievance or claim of unfairness—the unfairness stems from their categorical ineligibility for relief.

Second, prisoners sentenced before the FSA to Guidelines sentences—including offenders sentenced *above* the ADAA statutory minimums—are entitled to sentence reductions under the Sentencing Commission’s retroactive amendments to the Guidelines.<sup>274</sup> In holding that their counterparts serving ADAA mandatory minimum sentences are ineligible for sentence reductions, the majority in *Blewett II* argued unpersuasively that countervailing considerations weighed against providing § 3582(c)(2) relief.<sup>275</sup> The en banc majority stated that “[t]his case involves a ‘countervailing consideration’ of the weightiest sort: the government’s interest in the finality of its sentences.”<sup>276</sup> The court used finality to rationalize its refusal to apply the FSA retroactively to ADAA mandatory minimum offenders, yet it ignored the fact that the finality of the sentences of thousands of pre-FSA Guidelines offenders who received sentence reductions had already been disturbed.<sup>277</sup> This finality rationale for prospective application of the FSA also neglects the fact that both the FSA and § 3582(c)(2) are legislative exceptions to the rule of finality.<sup>278</sup> The Sixth Circuit’s reliance on finality also overlooks the fact that Congress acquiesced in

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272. *Dillon v. United States*, 560 U.S. 817, 848 (2010) (Stevens, J., dissenting) (stressing that § 3582(c)(2) requires the district court to consider the § 3553(a) factors when it determines whether to grant a reduction and the extent of a reduction). See *supra* note 156 for the § 3553(a) sentencing factors.

273. 2011 GUIDELINES MANUAL, *supra* note 115, at app. C at 419–20.

274. 18 U.S.C. § 3582(c)(2) (2012); see 2013 RETROACTIVITY REPORT, *supra* note 148, at tbl.8.

275. *Blewett II*, 746 F.3d 647, 651 (6th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1779 (2014).

276. *Id.*

277. 2013 RETROACTIVITY REPORT, *supra* note 148, at tbl.8 (listing the number of cases by jurisdiction in which there was a decrease in an offender’s sentence due to retroactive application of a crack cocaine Guidelines amendment); see *Blewett II*, 746 F.3d at 673 (Cole, J., dissenting) (noting that denying relief to mandatory minimum offenders “all in the name of finality—finality that has already been set aside . . . is irrational” and “does not rationally further finality”). *But see id.* at 659 (majority opinion) (“It is eminently rational for Congress to decide the retroactivity of its creations [the statutory minimums] and to allow the Commission to decide the retroactivity of its creations [the Guidelines].”).

278. *Dillon v. United States*, 560 U.S. 817, 824 (2010) (“Section 3582(c)(2) establishes an exception to the general rule of finality . . .”).

the Sentencing Commission's decision to promulgate retroactive amendments to the Guidelines to reflect the FSA's reduced 18-to-1 ratio.<sup>279</sup> As a result of these amendments, many crack offenders sentenced above the mandatory minimums received sentence reductions based on the 18-to-1 Guidelines, thus disturbing the finality of their sentences. It is a perversion of justice, fairness, and logic to say that finality is a compelling interest weighing against retroactive relief for some crack offenders, while numerous similarly situated offenders have already been granted retroactive sentence reductions.<sup>280</sup>

Furthermore, two of the express purposes of the FSA are to "restore fairness to Federal cocaine sentencing" and to remedy the racial and other social injustices caused by the ADAA<sup>281</sup>—objectives that undoubtedly run contrary to the government's interest in the finality of ADAA mandatory minimums. Given the remedial nature of the FSA, the government's interest in finality of pre-FSA sentences must be looked at in the context of the "stark and wildly disproportionate" effects that the old mandatory minimums have had on African Americans and the decision of Congress to acknowledge and remedy this disparity.<sup>282</sup> It is dubious to presume that Congress intended to provide only a prospective remedy when it possessed ample ability to provide for a discretionary, retroactive remedy through § 3852(c)(2).

Given the acknowledged unfairness of the 100-to-1 sentencing scheme, it undermines basic notions of fairness and justice to categorically deny ADAA mandatory minimum offenders sentence-modification eligibility rather than allow judges to make informed judgments as to whether reductions are warranted. Therefore, these secondary considerations, coupled with the six policy objectives that underlie the FSA,<sup>283</sup> strongly evince a congressional intent—by "fair implication"—for ADAA mandatory minimum prisoners to be eligible for discretionary § 3582(c)(2) sentence modifications based on the comparatively lenient FSA minimums.

### C. *Interpreting the Fair Sentencing Act to Render Pre-Act Mandatory Minimum Offenders Ineligible for Retroactive Relief Raises Constitutional Concerns*

Categorically denying retroactive relief to crack offenders subject to pre-FSA mandatory minimum sentences while granting it to similarly situated offenders sentenced to Guidelines sentences raises serious constitutional

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279. See *supra* notes 148–53 and accompanying text for a discussion of the Sentencing Commission's emergency amendments to the Guidelines and the response of Congress.

280. See *Blewett II*, 746 F.3d at 684 (Clay, J., dissenting) ("The State cannot proffer any legitimate penological or pharmacological reason for the continued incarceration of those who were subjected to extended sentences under the unjust 100-to-1 ratio.").

281. *Id.* at 669–70 (Merritt, J., dissenting). See *supra* notes 242–57.

282. *Id.* at 667 (Moore, J., concurring in the judgment) (noting that since the passage of the ADAA, African Americans "have constituted eighty to ninety-five percent of federal crack-cocaine defendants while continuing to be a minority of crack-cocaine users").

283. See *supra* Part III.A for an overview of the six primary policy objectives underlying the FSA and an argument that those objectives are undermined by the prevailing interpretation of the FSA and § 3582(c)(2).

concerns.<sup>284</sup> Yet the prevailing interpretation of the FSA endorses the view that Congress implicitly refused to provide retroactive relief to ADAA mandatory minimum offenders when it passed the FSA, despite approving that relief to similarly situated Guidelines offenders, solely to preserve the finality of the old mandatory minimums.<sup>285</sup> Constitutional concerns are raised by the basic premise of this interpretation—that is, the assumption that Congress chose to provide only a prospective remedy to the numerous problems caused by the ADAA, while categorically denying a retroactive remedy to countless prisoners still serving sentences based on the 100-to-1 ratio.<sup>286</sup>

As stated by Judge Eric L. Clay's dissent in *Blewett II*:

Congress' lack of clear expression on the issue can be interpreted in at least two different ways: either Congress chose to apply the new mandatory minimums retroactively, finally rectifying a racial disparity that is unsupported by any penological or pharmacological justification, or Congress deliberately chose to deny relief to those individuals currently incarcerated under what is now recognized as an unjust, unequal, and unconstitutional sentencing scheme.<sup>287</sup>

As illustrated by Judge Clay's concerns with the en banc majority's approach in *Blewett II*, this interpretation of § 3582(c)(2) and the FSA raises two substantial constitutional issues.

First, there is a credible argument that due to congressional acknowledgement that the 100-to-1 ratio had and continues to have a disparate impact on African Americans, its decision to provide only a prospective remedy to that disparity violates the equal protection component of the Fifth Amendment.<sup>288</sup> It makes little sense to keep people in prison serving sentences acknowledged to be racially discriminatory by a substantial majority of Congress. Highlighting the exceptional circumstances surrounding the passage of the FSA, Judge Merritt observed, "Congress does not often acknowledge that it passed a racially discriminatory law and then try to redress its own prior mistake."<sup>289</sup> Ultimately, this equal protection theory encounters a significant roadblock given

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284. Prior to the passage of the FSA, Chairman of the Senate Judiciary Committee Senator Patrick Leahy stated, "the criminal justice system has unfair and biased cocaine penalties, that undermine the Constitution's promise for equal treatment of all Americans." 155 CONG. REC. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy).

285. See *supra* Part II.E. for an overview of the Sixth Circuit's various opinions in *Blewett*.

286. While the ADAA was admittedly not unconstitutional at the time of its inception, or prior to the passage of the FSA, the constitutional calculus changed when Congress expressly acknowledged and partially remedied the multitude of problems created by their prior legislative action.

287. *Blewett II*, 746 F.3d at 682 n.5 (Clay, J., dissenting).

288. While the Fifth Amendment does not contain an express guarantee of equal protection, the Equal Protection Clause of the Fourteenth Amendment has been incorporated into the Fifth Amendment and applies with equal force to actions of the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

289. *Blewett I*, 719 F.3d 482, 487 n.6 (6th Cir.), *rev'd en banc*, 746 F.3d 647 (6th Cir. 2013).



that facially neutral laws with a discriminatory impact must be purposely discriminatory to violate the equal protection guarantees of the Constitution.<sup>290</sup>

Second, the prevailing interpretation of eligibility—which allows more culpable Guidelines offenders to receive sentence reductions while at the same time categorically denying relief to similarly situated mandatory minimum offenders—is arbitrary and fails to rationally further the government’s alleged interest in finality.<sup>291</sup> Given the fact that thousands of higher-quantity crack offenders sentenced to Guidelines sentences above the applicable statutory minimums have already received post-FSA sentence reductions, it is unconstitutionally arbitrary and irrational to classify a small subset of lower-quantity offenders categorically ineligible to obtain the same relief.<sup>292</sup>

1. Race-Based Equal Protection Concerns Raised by Continued Application of the 100-to-1 Ratio at Sentence-Modification Proceedings

There are strong arguments—as seen through the numerous dissents in *Blewett II*—that continued perpetuation of the ADAA mandatory minimums after the passage of the FSA raises equal protection concerns in light of the sentencing regime’s wildly disparate racial impact.<sup>293</sup> Nonetheless, the failure of Congress to make the FSA’s mandatory minimums fully retroactive does not amount to intentional discrimination, which is required to demonstrate a violation of equal protection under the Constitution.<sup>294</sup> The Supreme Court’s disparate impact jurisprudence, therefore, stands in the way of successful race-based challenges to Congress’s (implied) decision to categorically deny discretionary retroactive relief to ADAA mandatory minimum prisoners.<sup>295</sup>

In the since-overruled *Blewett I* decision, the two-judge majority held that, due to the racially discriminatory impact of ADAA, the government’s

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290. See *supra* Part II.A.3 for a discussion of the Supreme Court’s disparate impact jurisprudence.

291. *Blewett II*, 746 F.3d at 673 (Cole, J., dissenting) (“[A] district court still must apply the racially discriminatory, unjustified, repealed minimums to deny a full reduction to the new guidelines, all in the name of finality . . . . This approach is irrational; it does not rationally further finality. Applying the minimums in this way would fail basic rational basis scrutiny.”).

292. *Id.* at 684 (Clay, J., dissenting) (“Although finality has previously been recognized as a legitimate state interest . . . no one has cited a single case that says finality can support criminal convictions and overly onerous sentences based upon a premise that Congress has overwhelmingly and demonstrably acknowledged to be false as of the day it was passed.”) (citation omitted).

293. *Id.* at 671 (Merritt, J., dissenting) (“[T]he majority’s failure to allow review of the old mandatory sentences simply perpetuates the racial discrimination that the FSA was designed to change.”).

294. *Dorsey v. United States*, 132 S. Ct. 2321, 2344 (2012) (Scalia, J., dissenting) (“Although many observers viewed the 100-to-1 crack-to-powder ratio . . . as having a racially disparate impact, only *intentional* discrimination may violate the equal protection component of the Fifth Amendment’s Due Process Clause.”) (citation omitted).

295. This Comment does not concede that Congress consciously made this decision to categorically deny retroactive relief to these prisoners. The prevailing interpretation of § 3582(c)(2), however, as evidenced by the majority opinion in *Blewett II*, suggests this choice was made.

interpretation of eligibility would constitute “federal judicial perpetuation” of a discriminatory sentence, and thereby violate the equal protection component of the Fifth Amendment’s Due Process Clause.<sup>296</sup> While there are many enlightening aspects of the opinion—especially its utilization of the constitutional avoidance principle, its articulation of the practical absurdity of the government’s interpretation of the FSA, and its discussion of the role of judges in furthering the Constitution’s guarantees of equal protection—the panel opinion is patently inconsistent with the Supreme Court’s disparate impact jurisprudence.<sup>297</sup> In evaluating the constitutionality of facially neutral laws that have a disproportionate impact on a suspect classification of people, the touchstone inquiry is whether Congress intended to discriminate on the basis of race.<sup>298</sup> The congressional record demonstrates that Congress was not acting with the overt intent to discriminate against African Americans when the ratio was enacted in 1986 or when the FSA was passed in 2010.<sup>299</sup>

As posited by the majority in *Blewett II*, “Is it really possible that the same Congress that was deeply concerned about racial justice when looking at future sentences suddenly became racist when contemplating past sentences?”<sup>300</sup> Additionally, even if Congress chose not to apply the FSA mandatory minimums retroactively with clear knowledge that the old scheme had a discriminatory effect, there is no evidence that Congress denied retroactivity “because of” that effect.<sup>301</sup> Despite the overwhelming statistical evidence indicating the ADAA’s disproportionate racial impact,<sup>302</sup> the Supreme Court has rejected the notion that statistics alone are sufficient proof of intentional discrimination in the equal protection context.<sup>303</sup> The Court noted that “[s]tatistics at most may show only a likelihood that a particular factor entered into some decisions.”<sup>304</sup>

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296. *Blewett I*, 719 F.3d 482, 484 (2013), *rev’d en banc*, 746 F.3d 647 (6th Cir. 2013). The opinion was written by the Honorable Gilbert S. Merritt Jr. and joined by the Honorable Boyce F. Martin Jr. *Id.* at 482.

297. See *supra* Part II.A.3 for a survey of Supreme Court disparate impact case law.

298. *Washington v. Davis*, 426 U.S. 229, 239–41 (1976). The problem with the intentional discrimination requirement is best explained by Professor Laurence Tribe’s assertion that “minorities can also be injured when the government is ‘only’ indifferent to their suffering or ‘merely’ blind to how prior official discrimination contributed to it and how current acts will perpetuate it.” *State v. Russell*, 477 N.W.2d 886, 888 n.2 (Minn. 1991) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1518–19) (2d ed. 1988)).

299. See, e.g., 156 CONG. REC. H6202 (daily ed. July 28, 2010) (statement of Rep. Daniel E. Lungren) (noting that Congress enacted the 100-to-1 ratio “thinking we were doing the right thing at the time”); 155 CONG. REC. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Richard Durbin) (“Those of us who supported the law establishing this disparity had good intentions.”); *id.* at S10493 (2009) (statement of Sen. Specter) (“I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does.”).

300. *Blewett II*, 746 F.3d 647, 659 (6th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1779 (2014).

301. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

302. See Part II.A.2 for a discussion of the racial impact of the ADAA sentencing regime.

303. *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987).

304. *Id.* This interpretation of the Supreme Court’s disparate impact jurisprudence was alluded to by the majority in the since-overruled panel decision in *Blewett I*, which noted, “on first glance

Alternatively, under the standard required to overcome the saving statute, is it really a “fair” implication that the same Congress that passed the FSA intend only to partially remedy the problems caused by the 100-to-1 ratio that they were set on fixing through the FSA? This is undoubtedly an unfair implication, yet it is the view endorsed in all circuit courts.<sup>305</sup> Given that the old sentences are unjustifiably severe, the means for correction are readily available and are being employed for other similarly situated offenders, and offenders still subjected to unjustifiably severe sentences are disproportionately African American, isn’t it possible to infer that a deliberate congressional refusal to fully correct the sentencing disparity is purposely discriminatory? And if not discriminatory, isn’t this deliberate indifference inexplicable?

Constitutional considerations aside, from a practical perspective, a constitutional argument resting on the racial impact of the FSA encounters various barriers to widespread acceptance. First, endorsement of a race-based equal protection theory requires judicial acceptance of the argument that failure to apply the FSA retroactively amounts to overt, purposeful discrimination on behalf of the entire Congress.<sup>306</sup> This notion imports bad faith to the legislative branch of government—not based on its passage of the ADAA, but based on its (partially) remedial legislative actions from five years ago. Moreover, such a theory logically supports the proposition that judges who perpetuate these sentences by denying sentence modifications also discriminate on the basis of race.<sup>307</sup>

Second, in concluding that “[t]he Act should apply to all defendants, including those sentenced prior to its passage,” the panel decision in *Blewett I* seems to mandate that all § 3582(c)(2) motions be granted, regardless of any countervailing consideration.<sup>308</sup> This would seem to remove the discretion of district judges to deny § 3582(c)(2) motions on the merits after weighing a variety of factors—especially those related to public safety.<sup>309</sup> Lastly, as indicated by the lone dissenter in *Blewett I*, a serious question is raised by endorsement of this approach: if the disparate impact of the old law violates equal protection, why “is a 100-to-1 ratio—but not an 18-to-1 ratio—an equal protection violation?”<sup>310</sup>

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[*McCleskey* and *Feeney*] might appear to sanction the discrimination at issue here.” *Blewett I*, 719 F.3d 482, 488 (6th Cir.), *rev’d en banc*, 746 F.3d 647 (6th Cir. 2013).

305. See, e.g., *Blewett II*, 746 F.3d at 652; *United States v. Dixon*, 648 F.3d 195, 198 n.3 (3d Cir. 2011).

306. *Blewett II*, 746 F.3d at 659.

307. *Id.* at 671 (Merritt, J., dissenting).

308. *Blewett I*, 719 F.3d at 482, 484.

309. 18 U.S.C. § 3582(c)(2) (2012); see also *id.* § 3553(a) (listing factors courts must consider before granting a § 3582(c)(2) motion).

310. *Blewett I*, 719 F.3d at 496. This question is raised only if the race-based equal protection theory is endorsed. Under a rational basis theory, the problem does not arise from the specifics of the ratio itself, but from the fact that Congress acquiesced in the decision to have the 18-to-1 ratio retroactively apply to Guidelines offenders but not mandatory minimum offenders. See *supra* Part III.C.2.

While an argument based on the racial impact of the ADAA in coordination with the constitutional avoidance principle presents a plausible argument for retroactivity, such an argument faces practical barriers to widespread acceptance and fails to adequately address the purposeful discrimination requirement. The strongest constitutional argument for retroactivity does not rely on the stark racial impact of the ADAA; instead, this result can be achieved by highlighting the utter irrationality of holding that ADAA mandatory minimum prisoners are ineligible for discretionary sentence reductions based on the FSA.

2. Denying Retroactive Relief to Mandatory Minimum Crack Offenders While Providing Relief to Similarly Situated Guidelines Offenders Is Irrational and Arbitrary

It would be unconstitutionally arbitrary and irrational for Congress to have intentionally classified an entire subset of less serious, similarly situated offenders ineligible for discretionary relief while at the same time permitting thousands of their more serious counterparts to obtain sentence reductions.<sup>311</sup> In light of the purposes and history of the FSA, how is it possibly rational to interpret the Act in a manner that allows more serious offenders to receive retroactive sentence reductions and prevents lower-quantity crack offenders from obtaining the same relief? Classifying this small subset of similarly situated offenders, like the Blewetts, ineligible for relief fails to satisfy even rational basis review.<sup>312</sup> As applied to this class of offenders—ineligible for relief because they are serving ADAA mandatory minimum sentences—the requirements of § 3582(c)(2) should be interpreted to avoid this constitutional infirmity. Plainly put, it makes no sense for courts to continue to interpret the relevant statutes—the saving statute, the FSA, and § 3582(c)(2)—in a manner that supposes that

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311. *Blewett II*, 746 F.3d at 673 (Cole, J., dissenting) (arguing that the majority's approach "fail[s] basic rational basis scrutiny"). See *supra* note 17 for a hypothetical example of two similarly situated crack offenders in which only one—the comparatively worse offender—is eligible for a sentence reduction under § 3582(c)(2).

312. Equal protection scrutiny requires (at a minimum) that classifications of similarly situated persons be "rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."). For economic legislation, which receives the most deference, the Supreme Court has stated, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Comm., Inc.*, 508 U.S. 307, 313 (1993). There is a marked difference, however, between an arbitrary economic classification and a classification that denies relief from an admittedly unjust prison sentence to thousands of people while granting that same relief to comparatively worse offenders. Critics have argued for a sliding scale approach, including Justice Stevens, who concurred in *Beach* stating that "[j]udicial review under the 'conceivable set of facts' test is tantamount to no review at all." *Id.* at 323 n.3 (Stevens, J., concurring in judgment); see also Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979) ("Satisfaction of this 'rational relationship' requirement is a necessary condition of constitutionality under equal protection: no classification failing to satisfy the requirement is constitutional . . .").

Congress intended for prisoners sentenced under the Guidelines to benefit retroactively from the post-FSA amendments to the Guidelines while denying prisoners sentenced to the since-repealed ADAA mandatory minimums the benefits of the FSA's amendments to those mandatory minimums.

Furthermore, the rule of lenity and the principle of constitutional avoidance counsel in favor of allowing sentence reductions to ADAA mandatory minimum offenders on a discretionary basis.<sup>313</sup> Under the rule of lenity, an ambiguous criminal statute that cannot be clarified by “‘test, structure, history, [ ] purpose,’ . . . or reasonable inferences drawn from the overall statutory scheme” must be resolved in favor of the defendant.<sup>314</sup> The rule's application is limited, and “only applies if, after considering text, structure, history, and purpose, there remains a ‘grievous ambiguity or uncertainty in the statute,’ such that the Court must simply ‘guess as to what Congress intended.’”<sup>315</sup> The rule of lenity accompanies the long accepted remedial purpose canon—the principle of statutory construction that remedial statutes should be construed liberally to effectuate the intent of the enacting legislature.<sup>316</sup> Both canons of construction are at play when interpreting the retroactive effect of the FSA mandatory minimums. The constitutionality of nonretroactive application is called into doubt by the questionable interaction of mandatory minimums and the Guidelines. The relevant statutes can be reasonably read to have incorporated the new mandatory minimums into the currently retroactive Guidelines. As stated in *Blewett I*, “The new minimums ordered by the [FSA] to be incorporated by the guidelines are no longer ‘statutory’ only.”<sup>317</sup> It is reasonable to conclude that the *new* mandatory minimums provide the “bookends” for the amended retroactive Guidelines under which thousands of prisoners have already obtained relief.<sup>318</sup> This is an alternative view from the prevailing one, which interprets the relevant Guidelines ranges as existing separate and distinct from the mandatory minimums.

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313. *E.g.*, *United States v. Savani*, 733 F.3d 56, 65–66 (3d Cir. 2013) (invoking the rule of lenity in the cocaine sentencing context); *United States v. Flemming*, 617 F.3d 252, 260–61 (3d Cir. 2010) (same).

314. *Savani*, 733 F.3d at 65 (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)) (alteration in original).

315. *Barber*, 560 U.S. at 488 (quoting *Muscarello v. United States*, 524 U.S. 125, 139 (1998)) (citation omitted).

316. *See Peyton v. Rowe*, 391 U.S. 54, 65 (1968) (affirming the principle that “remedial statutes should be liberally construed”); *Stewart v. Kahn*, 78 U.S. 493, 504 (1870) (“The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment.”); *Chisholm v. Georgia*, 2 U.S. 419, 476 (1793) (“This extension of [legislative] power is *remedial*, because it is to settle controversies. It is therefore, to be construed liberally.”); Brian M. Saxe, Comment, *When a Rigid Textualism Fails: Damages for ADA Employment Retaliation*, 2006 MICH. ST. L. REV. 555, 586–92 (2006) (discussing critiques and application of the remedial purpose canon as applied to Americans with Disabilities Act claims).

317. *Blewett I*, 719 F.3d 482, 492 (6th Cir.), *rev'd en banc*, 746 F.3d 647 (6th Cir. 2013).

318. *Id.* at 491–92.

There is precedent for the use of these interpretive canons in the FSA context.<sup>319</sup> In a pre-*Dorsey* case, the Eleventh Circuit invoked the rule of lenity and interpreted the FSA in favor of a criminal defendant, holding that the FSA applied to crack defendants arrested before, but sentenced after the FSA went into effect.<sup>320</sup> The court noted that “while the rule of lenity does not apply where the statute is ‘clear,’ section 109 [the saving statute] is less than clear in many of its interactions with other statutes,” including the FSA.<sup>321</sup> After acknowledging that their primary interpretive decision was to determine “the ‘fair’ or ‘necessary’ implication [of Congress] derived from the mismatch between the old mandatory minimums and the new guidelines and to be drawn from the congressional purpose to ameliorate the cocaine base sentences,” the court concluded that “the rule of lenity . . . adds a measure of further support to [the Defendant].”<sup>322</sup> In fact, in light of the discretionary nature of sentence-modification proceedings, this logic applies equally, if not more so, when applied to defendants seeking relief under § 3582(c)(2).

As further explained in the *Blewett II* dissents, the predominant interpretation of the FSA raises serious constitutional concerns.<sup>323</sup> The constitutional avoidance principle, coupled with the principle that remedial statutes are interpreted broadly to effectuate their purpose, weighs in favor of interpreting the FSA and § 3582(c)(2) to have impliedly repealed the old mandatory minimums for purposes of sentence-modification proceedings.<sup>324</sup> The constitutional avoidance canon mandates that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”<sup>325</sup> Given the availability of an alternative and exponentially more rational interpretation of § 3582(c)(2), the saving statute, and the FSA—one that does not raise these constitutional concerns by treating similarly situated crack

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319. Compare *In re Sealed Case*, 722 F.3d 361, 363 (D.C. Cir. 2013) (holding a crack offender sentenced below an otherwise applicable statutory minimum because he provided substantial assistance to law enforcement is eligible for a sentence reduction under § 3582(c)(2) and Amendment 750), and *Savani*, 733 F.3d at 65–67 (applying the rule of lenity to hold that when a crack cocaine defendant was subjected to a pre-FSA mandatory minimum term but sentenced below the minimum pursuant to § 3553(e), and the applicable sentencing range was later lowered by the Sentencing Commission, the defendant is eligible to move for a § 3582(c)(2) sentence reduction), and *United States v. Wren*, 706 F.3d 861, 864 (7th Cir. 2013) (same), with *United States v. Joiner*, 727 F.3d 601, 602 (6th Cir. 2013) (holding that defendants that provided substantial assistance and accordingly received a sentence below the applicable mandatory minimum were ineligible to benefit from the amended sentencing Guidelines and have their sentences reduced pursuant to § 3582(c)(2)), and *United States v. Glover*, 686 F.3d 1203, 1208 (11th Cir. 2012) (same).

320. *United States v. Douglas*, 644 F.3d 39, 44 (1st Cir. 2011).

321. *Id.* (citation omitted).

322. *Id.*

323. See, e.g., *Blewett II*, 746 F.3d 647, 682 (6th Cir. 2013) (Clay, J., dissenting) (“The majority’s reading of the FSA would assign to Congress an improper discriminatory purpose, which must be avoided under the Constitutional avoidance doctrine.”), *cert. denied*, 134 S. Ct. 1779 (2014).

324. *Blewett I*, 719 F.3d 482, 490 n.8 (6th Cir.) (“The Fair Sentencing Act is clearly a remedial statute and should therefore be liberally construed.”), *rev’d en banc*, 746 F.3d 647 (6th Cir. 2013).

325. *U.S. ex rel Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909).

offenders in a markedly different manner—judges can and should evoke the constitutional avoidance doctrine and the rule of lenity to interpret those statutes in a manner that avoids this disparate treatment of similarly situated offenders. In light of the substantial evidence and acknowledgment by Congress that the ADAA’s 100-to-1 disparity between crack and powder is arbitrary,<sup>326</sup> and given that the FSA was intended to remedy that arbitrary legislation, the prevailing, purely prospective interpretation of the FSA mandatory minimums prevents the remedial provisions of the FSA from having their intended effect.<sup>327</sup>

As stated in *Blewett I*, “We should not allow the government’s legalisms to undermine the purpose of the Fair Sentencing Act and its more lenient punishment system for crack cocaine.”<sup>328</sup> To deny § 3582(c)(2) motions on the grounds that the now-infamous 100-to-1 mandatory minimums are controlling misguidedly breathes life into the admittedly unjust ratio for purposes of sentence-modification hearings. Due to the utter irrationality of disallowing mandatory minimum prisoners the opportunity to obtain § 3582(c)(2) relief, while at the same time allowing comparatively worse Guidelines offenders to obtain sentence reductions based on the retroactive Guidelines amendments, courts should afford offenders sentenced to 100-to-1 mandatory minimums the opportunity to petition the court for retroactive relief under § 3582(c)(2). This approach will further the pursuit of fairness and justice, restore credibility and integrity to the criminal justice system, assist the federal government’s pending transition toward a more flexible approach to drug sentencing, further the remedial policy objectives underlying the FSA, and uphold constitutional guarantees of equal protection.

#### IV. CONCLUSION

The FSA was a monumental step by Congress toward rectifying the plethora of social harms caused by Congress’s initial response to the crack epidemic. The ADAA, the 100-to-1 sentence disparity, and the corresponding mandatory minimum sentences have each had overwhelmingly harmful effects on society and the criminal justice system as a whole. Despite acknowledging and attempting to remedy these harms by passing the FSA, Congress failed to expressly allow for the FSA mandatory minimums to be retroactively applicable at sentence-modification proceedings. Currently, thousands of prisoners are serving admittedly unjust and unduly harsh prison sentences based on the infamous 100-to-1 sentencing ratio, ineligible to even petition the courts for a modest reduction of their sentences to reflect the newly enacted 18-to-1 ratio. The prevailing, purely prospective interpretation of the FSA, § 3852(c)(2), and

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326. See *supra* Part II.B for a discussion of Congress’s repudiation of the 100-to-1 sentencing ratio.

327. Lazarus, *supra* note 15, at 725 (“It is irrational to assume that Congress gave the Sentencing Commission discretion to make the new sentencing guidelines retroactive, but did not want the same for the FSA’s mandatory minimums, with which the new sentencing guidelines were to be consistent.”).

328. *Blewett I*, 719 F.3d at 490.

the saving statute undermines the express policy objectives that underlie the FSA and congressional efforts to reform federal cocaine sentencing policy. The purposes of the FSA and the spirit of the Constitution's promise of equal protection for all dictate that all prisoners currently serving pre-FSA mandatory minimum crack sentences be eligible to petition the courts for discretionary sentence reductions under § 3582(c)(2).