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Finally, Crack Sentencing Reform: Why It Should Be Retroactive

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FINALLY, CRACK SENTENCING REFORM: WHY IT SHOULD BE RETROACTIVE

I. INTRODUCTION

In a recent House Judiciary Subcommittee hearing, U.S. District Judge Spencer Letts recalled a sentencing held in his courtroom echoing a source of injustice reoccurring for nearly two decades.[1] Twenty-seven year old Johnny Patillo, a regularly employed college graduate, agreed to deliver a package to a Federal Express for his neighbor for payment of 500 dollars.[2] Patillo admitted he was aware the package contained drugs; however, he was uncertain of what kind of drugs and the amount.[3] The package contained nearly 680 grams of crack cocaine,[4] automatically triggering the imposition of a ten-year mandatory minimum sentence.[5] Judge Letts noted Patillo lacked any prior criminal activity and recognized Patillo was simply trying to earn a couple extra bucks during a tough financial time.[6] However, the harsh statute required application of the mandatory minimum sentence regardless of the unique circumstances of the case.[7] Patillo, an employed college graduate, participated in behavior that was "out of character" and surprising to family and friends who stated "this [was] the first time [the] defendant [had] been in any kind of trouble."[8] Nevertheless, without meeting Patillo, Congress thoughtlessly stripped him of ten years of his life.[9] This policy does not ensure fairness.[10]

Concern about crack cocaine gained national attention in the summer of 1986 when the media and public reacted to the University of Maryland basketball legend Len Bias's alleged overdose on crack cocaine.[11] However, his death was later attributed to

1. *See Unfairness In Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity? Hearing on H.R. 1466, H.R. 265, H.R. 2178, and H.R. 18 Before the Subcomm. on Crime, Terrorism, and Homeland Sec., H. Comm. On the Judiciary*, 111th Cong. 121-23 (2009) [hereinafter *Unfairness In Federal Cocaine Sentencing*] (statement of J. Spencer Letts, United States District J. for the Central District of Cal.).

2. United States v. Patillo, 817 F. Supp. 839, 840 (C.D. Cal. 1993).

3. *Id.*

4. In this comment, "crack cocaine" refers to cocaine base, and "powder cocaine" refers to cocaine hydrochloride.

5. *Patillo*, 817 F. Supp. at 840.

6. *Id.* at 840, 845.

7. *See Unfairness In Federal Cocaine Sentencing*, *supra* note 1, at 123 (statement of J. Spencer Letts, United States District J. for the Central District of Cal.).

8. *Patillo*, 817 F. Supp. at 845.

9. *Id.* at 843-44.

10. *See Unfairness In Federal Cocaine Sentencing*, *supra* note 1, at 121-22 (statement of J. Spencer Letts, United States District J. for the Central District of Cal.) (explaining the "unreasonable" and "unconstitutional" effects that the unfair crack-to-powder sentencing disparity causes in federal courts).

11. Julie Stewart, *Well Done Congress, Now Make Fair Sentencing Act Retroactive*, THE HUFFINGTON POST (Aug. 4, 2010, 5:11 PM), http://www.huffingtonpost.com/julie-stewart/well-done-congress-now-ma_b_671008.html; DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIVIL LIBERTIES UNION, CRACKS IN

powder cocaine.[12] Congress became panic-stricken and quickly reacted to a supposed crack cocaine epidemic that was sure to sweep the nation.[13] Without thoroughly examining the supposed trend,[14] Congress instead based its legislative determinations on now proven faulty statistics of the drug's effects, addictiveness, and its correlation with violence.[15] Congress established a sentencing scheme providing for punishment much more extreme, unfair, and unsuccessful than most politicians anticipated.[16] The resulting legislation, the Anti-Drug Abuse Act of 1986 ("Anti-Drug Act"),[17] created statutory provisions punishing crack cocaine trafficking[18] 100 times harsher than powder cocaine trafficking.[19] This sentencing scheme came "under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups."[20] After more than two decades of sentencing in this manner, Congress finally came to its senses and reduced the disparity in federal sentencing between crack cocaine and powder cocaine.[21] Ideally, defendants now face sentencing according to their requisite culpability, not strictly according to the form of cocaine and the quantity in their possession.[22]

President Obama signed the Fair Sentencing Act ("Fair Act") on August 3, 2010, greatly lessening the punishment defendants faced for so long.[23] This modification of the previous law represents Congress's realization that it made a mistake in drafting the

THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW, at i (2006), *available at* http://www.aclu.org/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf.

12. *See, e.g.*, Carol A. Brook, *Mukasey Puts Latest Crack in Truth on* Drugs, CHI. TRIB. (Mar. 7, 2008), http://articles.chicagotribune.com/2008-03-07/news/0803060576_1_crack-cases-bias-death-sentences; Michael Weinreb, *The Day Innocence Died*, ESPN.COM (Sept. 15, 2009, 8:29 PM), http://sports.espn.go.com/espn/eticket/story?page=bias.

13. Stewart, *supra* note 11.

14. *Id.*

15. *See* U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8, 31-36, 62-69 (2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/20070705_RtC_Cocaine_Sentencing_Policy.pdf [hereinafter USSC 2007 REPORT TO CONGRESS] (analyzing in depth federal sentencing data discussing violence, weapon involvement, and offender characteristics as well as cocaine's structure, effects, and addictiveness). *See generally* VAGINS & MCCURDY, *supra* note 11 (discussing the crack and cocaine sentencing disparity and addressing the many discriminatory effects of the drug law).

16. *See Unfairness In Federal Cocaine Sentencing*, *supra* note 1, at 99 (testimony of Marc Mauer, Executive Director, The Sentencing Project).

17. Anti Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

18. For the purposes of the article, the term "trafficking" means "with intent to distribute." The term "simple possession" means "without intent to distribute."

19. THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING 1-2 (2009) (on file with author) [hereinafter FEDERAL CRACK COCAINE SENTENCING] ("[D]efendants convicted with just five grams of crack cocaine . . . are subject to a five-year mandatory minimum sentence. The same five-year penalty is triggered for the sale of powder cocaine only when an offense involves 500 grams, 100 times the minimum quantity for crack . . . . Similarly, while the sale of 5,000 grams of powder . . . subjects defendants to a 10-year sentence, the same mandatory sentence is triggered by selling only 50 grams of crack.").

20. USSC 2007 REPORT TO CONGRESS, *supra* note 15, at 2 (citing apps. B & C).

21. The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (reducing the cocaine sentencing disparity by amending provisions of 21 U.S.C. § 841 (b)(1), and eliminating the mandatory minimum for simple possession required by 21 U.S.C. § 844).

22. *See* discussion *infra* Part III(A).

23. Fair Sentencing Act §§ 2-3 (reducing the disparity between crack and powder cocaine from the previous 100-1 ratio to an 18-1 ratio, increasing the quantities that trigger the mandatory minimums from 5 to 28 grams for the 5-year mandatory minimum, and from 50 to 280 grams for the 10-year mandatory minimum. The law also eliminated the 5-year mandatory minimum for simple possession of crack cocaine).

previous legislation.[24] On its face, the Fair Act does not include a specific provision expressing Congress's intent that the legislation apply retroactively.[25] Thus, the updated law might not apply to defendants with pending prosecutions under the previous law or defendants serving time under the previous unforgiving penalties.[26]

The Fair Act, which represents an intelligent and just change in federal cocaine sentencing, clearly indicates the impropriety of the former sentencing policy.[27] The Fair Act drastically reduces the disparity in federal sentencing between powder cocaine and crack cocaine, alters the possession amount that triggers the mandatory minimums and abolishes the mandatory minimum for first time simple possession of crack. This Act should retroactively apply to defendants pending sentencing and defendants previously sentenced under the more stringent sentencing laws, as they both deserve to benefit from this fairer legislation that better assigns punishment according to the appropriate level of culpability. This comment will discuss the history and misconceptions behind federal cocaine sentencing and its effects on the U.S. criminal justice system.[28] In addition, this comment will address the new law and the rationale concerning its retroactive application.[29]

II. BACKGROUND

A. Early Days of Federal Crack Cocaine Sentencing Laws

In June of 1982, the Reagan Administration launched a war on drugs using the threat of crack cocaine as a platform.[30] By 1986, the spotlight shone brightly on the new trend of crack cocaine usage.[31] Thousands of media reports, not based on scientific evidence, claimed that crack cocaine was a deadly and addictive drug that caused health problems, led to an increase in crime and violence, and destroyed families.[32] This "deluge" of news reports about the drug, combined with the political pressures of an upcoming election, demanded Congress's attention.[33] Congress addressed the issue by racing through the legislative process and failing to fully research before legislating.[34]

24. *See* People v. Oliver, 134 N.E.2d 197, 202 (N.Y. 1956) ("A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.").

25. *See generally* Pub. L. No. 111-220, 124 Stat. 2372 (2010).

26. *Id.*

27. *See* Press Release, Patrick Leahy, U. S. Sen. for Vt, Comment of Senator Leahy On Final Passage of The Fair Sentencing Act of 2010 (July 28, 2010), *available at* http://leahy.senate.gov/press/press_releases/release/?id=33bc0905-1642-4238-b1a0-a61c313e2fdc.

28. *See* discussion *infra* part II.

29. *See* discussion *infra* part III.

30. Alyssa L. Beaver, Comment, *Getting A Fix On Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2544 (2010).

31. *Id.* at 2538-39.

32. John P. Morgan & Lynn Zimmer, *The Social Pharmacology of Smokeable Cocaine: Not All It's Cracked Up To Be*, *in* CRACK IN AMERICA: DEMON DRUG, AND SOCIAL JUSTICE 134-35 (Craig Reinarman & Harry G. Levine eds., 1997).

33. *See* David H. Angeli, *A "Second Look" at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211, 1212 (1997).

34. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 116 (1995), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/19

The result was the Anti-Drug Act,[35] forming the origin of the disparity in crack cocaine sentencing that existed until 2010.[36] Through this disparity, Congress allegedly attempted pursuance and punishment of "major drug traffickers more severely than low-level [retail] dealers."[37] The law introduced the 100-1 crack cocaine and powder cocaine disparity, requiring the possession and trafficking of 100 times the amount of powder cocaine to receive the equivalent punishment for possession and trafficking of crack cocaine.[38] The difference in punishment was due in part to the unsupported beliefs and claims that crack was more dangerous, had a stronger link with violence and guns, and was more addicting than powder cocaine.[39] Thus, five and ten-year mandatory minimum sentences governed crack cocaine offenses depending on the quantity a defendant possessed.[40]

Unfortunately, Congress's attempt to resolve the alleged threat of crack cocaine led to its passing a bill without thorough investigation.[41] Varied drafts of the bill circulated so quickly that Congress members had trouble ascertaining what provisions were actually in the bill.[42] Congress amended the bill[43] that eventually became law more than 100 times.[44] The legislative process, deemed "rush[ed],"[45] did not impart a clear indication of the rationale behind the 100-1 sentencing disparity.[46] Enactment of a law based on sound policy requires an extensive understanding of the topic; including debates, hearings, and committee meetings.[47] Furthermore, the legislative record should

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9502_RtC_Cocaine_Sentencing_Policy/chap5-8.pdf [hereinafter USSC 1995 REPORT TO CONGRESS].

35. Anti Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

36. *See* Kimbrough v. United States, 552 U.S. 85, 95-96 (2007). "Congress apparently adopted the 100-to-1 ratio because it believed that crack, a relatively new drug in 1986, was significantly more dangerous than powder [cocaine]." *Id.* at 86 (citing to the case syllabus).

37. *Id.* at 98.

38. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 4-5 (2002), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/20 0205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf [hereinafter USSC 2002 REPORT TO CONGRESS] ("[A]s a result of the 1986 Act, 21 U.S.C. § 841(b)(1) requires a five-year mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the "100-to-1 drug quantity ratio.").

39. *Unfairness In Federal Cocaine Sentencing*, *supra* note 1, at 114-15 (statement of Senior J. Arthur L. Burnett Sr., National Executive Director, National African American Drug Policy Coalition, Inc.).

40. Anti-Drug Abuse Act § 1002.

41. *See* United States v. Peterson, 143 F. Supp. 2d 569, 572 (E.D. Va. 2001) (explaining "during the Senate floor debate on the 1986 Act, several senators commented that the bill was hastily prepared, rather than the product of a deliberative process, and was not enacted through the traditional committee procedure").

42. 132 CONG. REC. 26, 462 (daily ed. Sept. 26, 1986) (Statement Sen. Charles Mathias) ("You cannot quite get a hold of what is going to be in the bill at any given moment.").

43. H.R. 5484, 99th Cong. (1986), as amended by S. 2878, 99th Cong. (1986), was signed into law on October 27, 1986.

44. USSC 2002 REPORT TO CONGRESS, *supra* note 38, at 6 n.20 (discussing H.R. 5484, 99th Cong. (1986) "while under consideration from September 10, 1986 to October 27, 1986.").

45. 132 CONG. REC. 26, 434 (daily ed. Sept. 26, 1986) (statement of Sen. Bob 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.").

46. USSC 2002 REPORT TO CONGRESS, *supra* note 38, at 7; VAGINS & MCCURDY, *supra* note 11, at 2 (describing the lack of Congressional record involved in the passage of the harsh crack cocaine laws).

47. *See GOVERNMENT 101: How a Bill Becomes Law*, PROJECT VOTE SMART, http://

clearly indicate the congressional intent and purposes behind the legislation as courts typically use the record to ascertain the meanings and reasoning behind particular statutory provisions.[48]

In addition, the United States Sentencing Commission[49] ("USSC") promulgated mandatory sentencing guidelines[50] for federal judges at the time the Anti-Drug Act went into effect.[51] Subsequently, the USSC integrated the 100-1 crack-to-powder ratio into the mandatory sentencing guidelines.[52] The USSC used the 100-1 crack-to-powder ratio to determine sentences for every possession amount above and below the mandatory minimums put in place by Congress.[53] By integrating the 100-1 ratio into the sentencing guidelines, the USSC adopted Congress's harsh sentencing scheme and applied it to every crack sentence, regardless of possession amount.[54] With the USSC's adoption of the policy, the new framework resulted in numerical offense levels that corresponded with sentencing ranges much higher for crack cocaine offenders than powder cocaine offenders.[55]

Congress put the icing on the cake when it passed additional legislation directed at crack cocaine possession in 1988.[56] This new law required a five-year mandatory minimum sentence for first offense simple possession[57] of five grams or more of crack cocaine.[58] This legislation represented the only federal law of its kind creating a mandatory minimum punishment for a first time offender for simply possessing a drug.[59] Conversely, a first time possession offense of powder cocaine, or any other controlled

http://www.votesmart.org/education/how-a-bill-becomes-law (last visited Oct. 8, 2010).

48. *See* United States v. Union Pac. R. Co., 91 U.S. 72, 79 (1875) ("But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particlar [sic] provisions in it.") (citation omitted).

49. *See* U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION, *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf ("The United States Sentencing Commission is an independent agency in the judicial branch of government. Its principal purposes are: (1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.").

50. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 991(b)(1)(B), 98 Stat. 2017, 2018. This provision of the federal sentencing statute essentially made the federal guidelines mandatory or binding on federal courts during a criminal sentencing.

51. USSC 2007 REPORT TO CONGRESS, *supra* note 15, at 3.

52. *Id.* (discussing the integration of the 100-1 ratio into the federal sentencing guidelines).

53. *Id.*

54. *Id.*

55. *Id.* (discussing how the 100-1 drug quantity ratio can cause three to over six times greater punishment for crack versus powder cocaine).

56. Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, 102 Stat. 4181, 4370.

57. Again, for the purposes of this article, "simple possession" refers to an offense in which the defendant had *no* intent to distribute the controlled substance.

58. Pub. L. No. 100–690, 102 Stat. 4181, 4370 (1988).

59. USSC 2002 REPORT TO CONGRESS, *supra* note 38, at 11 (stating that possession of any other controlled substance (other than crack cocaine) by a first time offender is a misdemeanor that carries a *maximum* punishment of one year in prison. "In other words, pursuant to the 1988 Act, an offender who simply possesses five grams of crack cocaine receives the same five-year mandatory minimum penalty as a serious trafficker of other drugs.").

substance, carried a maximum punishment of one year in prison.[60]

From 1995 to 2007, the USSC issued extensive and detailed reports dispelling many of the assumptions and beliefs concerning crack cocaine and urged Congress to reduce the 100-1 sentencing disparity.[61] The USSC reports expressed that the 100-1 drug quantity ratio was "disproportionate" considering the "relative harms" between crack and powder cocaine, and advocated appropriate adjustment.[62] In addition, the reports stated that the harsh 100-1 crack-to-powder ratio unfairly punished low-level offenders, especially African Americans.[63] Although the federal statutory scheme remained in place, "[d]evelopments in state criminal justice systems provided further evidence for the Commission's finding that the 100-to-1 ratio that controlled federal sentencing was unjustifiable."[64] In the 1995 report, the USSC proposed amending the federal sentencing guidelines to create comparable penalties for crack and powder cocaine.[65] However, Congress rejected the amendments, demonstrating an intent not to punish crack any less severely than the current guidelines.[66] The 1997, 2002, and 2007 USSC reports continued to examine the crack and powder cocaine disparity and introduced alternatives to the sentencing scheme in place at the time.[67] For example, the USSC recommended equalizing the mandatory minimum penalties for first time simple possession of crack cocaine and powder cocaine[68] and adopting a "three-pronged" approach to federal sentencing.[69] In response, Congress ignored the recommendations in the reports.[70]

B. The Amendment to the Federal Sentencing Guidelines for Crack Cocaine

Finally, in 2007, the USSC took matters into its own hands and drafted an amendment[71] to its sentencing guidelines that "reduce[d] the base offense level [in the

60. *Id.*

61. *See generally* USSC 1995 REPORT TO CONGRESS, *supra* note 34; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/19970429_RtC_Cocaine_Sentencing_Policy.PDF [hereinafter USSC 1997 REPORT TO CONGRESS]; USSC 2002 REPORT TO CONGRESS, *supra* note 38; USSC 2007 REPORT TO CONGRESS, *supra* note 15.

62. Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing in Transition*, 19 FED. SENT'G REP. 291, 292 (2007).

63. *Id.*

64. United States v. Peterson, 143 F. Supp. 2d 569, 577 (E.D. Va. 2001).

65. *See* United States v. Fonts, 95 F.3d 372, 374 (5th Cir. 1996).

66. *Id.* (describing Pub. L. No 104-38, § 1, 109 Stat. 334 (1995) which "rejected the Sentencing Commission's proposed 1:1 ratio on October 30, 1995, and refused to change the disparity between crack cocaine and powder cocaine offenses.").

67. USSC 1997 REPORT TO CONGRESS, *supra* note 61, at 9; USSC 2002 REPORT TO CONGRESS, *supra* note 38, at 90-112; USSC 2007 REPORT TO CONGRESS, *supra* note 15, at 6-9.

68. *Id.*

69. USSC 2002 REPORT TO CONGRESS, *supra* note 38, at 104 (explaining the three pronged approach: "(1) increase the five-year mandatory minimum threshold quantity for crack cocaine offenses to *at least* 25 grams (and the ten-year threshold quantity to *at least* 250 grams); (2) provide direction for more appropriate sentencing enhancements within the guidelines' structure that target the most serious drug offenders (without regard to the drug involved) for more severe penalties; and (3) maintain the current mandatory minimum threshold quantities for powder cocaine offenses.").

70. Kimbrough v. United States, 552 U.S. 85, 99 (2007). "Congress took no action after the Commission's 1997 and 2002 reports recommended changing the ratio." *Id.* at 86 (citing to the case syllabus).

71. U.S. SENTENCING GUIDELINES MANUAL supp. to app. C – Amendments to the Guidelines Manual 221-27 (2008) [hereinafter U.S. SENTENCING GUIDELINES MANUAL].

sentencing guidelines] associated with each quantity of crack by two levels."[72] The USSC predicted the amendment would subtract nearly fifteen months from a crack cocaine sentence.[73] While the amendment would not reduce crack cocaine sentences governed by mandatory minimums, the USSC described the amendment as a "partial remedy" for the problems generated by the crack/powder disparity.[74] Following a six-month congressional review period in which Congress did not object to the proposed amendment, it came into effect.[75] While the USSC amendment to the sentencing guidelines only lessened sentences for crack possession amounts that did not trigger mandatory minimums, it demonstrated the USSC's continuous attempt to persuade Congress to alter the mandatory minimums.[76] In 2008, the USSC further proved its commitment to reducing the sentencing disparity when it unanimously[77] voted for retroactive application of the crack amendment[78] thereby reducing sentences for qualified defendants incarcerated under the previous guidelines.[79] The USSC estimated the retroactive reduction in the base offense level could effectively reduce sentence lengths for eligible incarcerated defendants by up to twenty-seven months.[80] From 2008 to 2010, federal courts granted over 16,000 prisoners' motions for a reduced sentence under the retroactive crack cocaine amendment.[81] The Chair of the USSC, Ricardo H. Hinojosa, "received more than 33,000 pieces of public comment regarding the issue of retroactivity" during the Commission's deliberation period.[82]

While the 2007 crack amendment attempted further reduction of the disparity in punishment compared to powder cocaine, thus providing relief to those behind bars, the amendment comes with complications.[83] The Department of Justice ("DOJ") took the position that the retroactive amendment would burden the judicial system by "diverting significant prosecutorial resources" in the predicted re-sentencing of nearly 20,000

72. *Kimbrough*, 552 U.S. at 100.

73. FEDERAL CRACK COCAINE SENTENCING, *supra* note 19, at 7.

74. USSC 2007 REPORT TO CONGRESS, *supra* note 15, at 10.

75. News Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20071211_Press_Release.htm [hereinafter News Release, U.S. Sentencing Comm'n].

76. *See* USSC 2007 REPORT TO CONGRESS, *supra* note 15, at 2 (stating "[i]t is the Commission's firm desire that this report will facilitate prompt and appropriate legislative action by Congress.").

77. News Release, U.S Sentencing Comm'n, *supra* note 75.

78. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 71, at 247.

79. U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT 2 (2010), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Crack_Cocaine_Amendment/20101013_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf [hereinafter PRELIMINARY DATA REPORT] ("Commission voted to promulgate Amendment 713, which added Amendment 706 as amended by 711, to the amendments listed in subsection (c) [sic] in §1B1.10 that apply retroactively. The Commission voted to make Amendment 713 effective on March 3, 2008. As a result, some incarcerated offenders are eligible to receive a reduction in their sentence under 18 U.S.C. § 3582(c)(2) pursuant to Amendment 706.").

80. Memorandum from Glenn Schmitt et al. to the Honorable Ricardo Hinojosa, Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive 23 (Oct. 3, 2007) (on file with author).

81. PRELIMINARY DATA REPORT, *supra* note 79, tbl. 1.

82. U.S. Sentencing Commission, Public Meeting Minutes 6 (Dec. 11, 2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20071211/20071211_Minutes.pdf.

83. *See* sources cited *infra* notes 84-87.

defendants.[84] In light of this burden, the DOJ believed strongly that attorneys would not have enough time and resources to prosecute current cases.[85] Further, it believed the retroactive application would overwhelm judicial districts with a large amount of re-sentencings for incarcerated crack defendants.[86] In addition, when the USSC amended the guidelines in 2007, it included many limitations on a particular defendant's eligibility to apply for a reduced sentence.[87] Although there are numerous obstacles to ending the sentencing disparity, the retroactive crack amendment represented a historical disassociation with the past injustices of federal cocaine sentencing.[88]

C. The Truth About Crack Cocaine Versus Powder Cocaine

As the USSC indicated in four extensive reports to Congress, the media based much of the crack cocaine hype on scientifically inaccurate research.[89] Additional studies proved the disparity in punishment between crack and powder cocaine resulted in "low-level retail" crack cocaine dealers and users receiving much harsher punishments than high-end large quantity powder cocaine dealers.[90] This disparity resulted in the imprisonment of addicted crack users and "[twenty-two] times more convictions among African Americans than whites."[91] Although the majority of the population that uses crack is white or Hispanic, over eighty percent crack cocaine offenses in 2006 involved African Americans.[92] The effects of crack cocaine's pervasiveness resulted in a devastating impact on the African American community.[93] African American defendants sentenced for crack cocaine offenses flooded the prison system, as the drug plagued the community more than "any other single cause since Jim Crow."[94] Three of the persistent issues concerning the controversy between crack and powder cocaine include the presumed greater addictiveness and harmfulness of crack, the presumed violence correlated with crack, and the belief that prenatal exposure will lead to "crack babies."[95]

Regarding the addictiveness of crack, regardless of whether the drug enters the body in the form of crack base or powder cocaine, studies suggest the behavioral effects

84. Letter from Alice Fisher, Assistant Att'y Gen., to the Honorable Ricardo Hinojosa, Chair, U.S. Sentencing Commission 1-2 (Nov. 1, 2007) (on file with author).

85. *See id.* at 2.

86. *Id.*

87. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(2)(B) (2008) (stating "[i]f the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range [during resentencing] . . . may be appropriate.").

88. *See* discussion *supra* Part II (A) and (B).

89. *See* discussion *infra* Part II (C).

90. Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine And Cocaine Hydrochloride: Are The Differences Myth Or Reality?*, 276 JAMA 1580, 1580 (1996).

91. *Id.* at 1581.

92. Press Release, John Conyers, Chairman U.S. House Judiciary Comm., Conyers Applauds Reforming the Unjust Crack-Cocaine Sentencing Disparity (July 28, 2010) (on file with author).

93. *See* STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 113 (1st ed. 2005).

94. *Id.*

95. *Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs*, 107th Cong. 142, 149-51 (2002) [hereinafter Murphy Statement] (statement of The Honorable Diana E. Murphy, Chair, United States Sentencing Commission); USSC 2002 REPORT TO CONGRESS, *supra* note 38, at v-viii; VAGINS & MCCURDY, *supra* note 11, at 5.

on the body are the same.[96] Statistical evidence reveals that most young people do not continue using crack cocaine after initially trying it.[97] Those that do continue using crack do not use it on a daily basis.[98] Many crack cocaine users developed the habit because of previous powder cocaine abuse.[99] The sentencing disparity troubles doctors, finding crack and powder cocaine pharmacologically[100] the same, and further concluding the differences lie in the accessibility, price range, and "cultural environment and social context" in which the different drug types are associated.[101] Findings prove that both forms of the drug are "powerful stimulants" that cause indistinguishable effects.[102] Evidence shows that cocaine is cocaine, regardless of how it is broken down.[103] The important consideration is that the type or form of the cocaine is immaterial.[104] The crucial factor is how the substance is administered into the body.[105] For instance, chewing tobacco and smoking tobacco, two different products comprised of the same base ingredient, produce similar effects on the body.[106] However, there are minor differences that uniquely result from the particular way a person introduces the substance into the body, similar to crack versus powder cocaine.[107] Both crack and powder cocaine may cause similar addictions.[108] However, the defining difference is the method in which the two drugs are administered into the bloodstream, as that affects the rapidity of the onset of the drug and the duration of the high.[109] The inhalation method, or smoking, is the favored method as it rapidly affects the user and results in the "highest peak blood levels."[110] Crack cocaine is considered more addictive because usage typically involves

96. Hatsukami & Fischman, *supra* note 90, at 1582-86 (explaining "regardless of whether cocaine is administered as hydrochloride or base, both its rate of elimination and its metabolic profile are similar." Further concluding "behavioral effects are a result of the parent compound regardless of the form in which the cocaine was ingested or the route of administration.").

97. Morgan & Zimmer, *supra* note 32, at 144 (citing a 1991 National Institute on Drug Abuse (NIDA) survey given to high school seniors).

98. *Id.*

99. Hatsukami & Fischman, *supra* note 90, at 1586.

100. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1694 (3d ed. 2002) (defining pharmacology as: "1. the science of drugs including their origin, composition, pharmacokinetics, therapeutic use, and toxicology; 2. the properties and reactions of drugs especially with relation to their therapeutic value.").

101. Hatsukami & Fischman, *supra* note 90, at 1586.

102. USSC 2002 REPORT TO CONGRESS, *supra* note 38, at 16.

103. Hatsukami & Fischman, *supra* note 90, at 1580; VAGINS & MCCURDY, *supra* note 11, at 5.

104. *See Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs*, 107th Cong. 168-69 (2002) [hereinafter Schuster Testimony] (testimony of Mr. Charles Schuster, Professor Psychiatry and Behavioral Neurosciences, Wayne State University, and former Director, National Institute on Drug Abuse).

105. *Id.*

106. See *Making the Decision to Quit Tobacco*, N.Y. TIMES, http://health.nytimes.com/health/guides/specialtopic/smoking-and-smokeless-tobacco/overview.html (last visited Oct. 5, 2010).

107. Hatsukami & Fischman, *supra* note 90, at 1580.

108. USSC 2002 REPORT TO CONGRESS, *supra* note 38, at 19 ("It is this difference in *typical* methods of administration [e.g. smoking, injecting, snorting, etc.], not differences in the inherent properties of the two forms of the drugs, that makes crack cocaine more potentially addictive to *typical* users. Smoking crack cocaine produces quicker onset of, shorter-lasting, and more intense effects than snorting powder cocaine. These factors in turn result in a greater likelihood that the user will administer the drug more frequently to sustain these shorter "highs" and develop an addiction.").

109. *Id.*

110. Testimony, Glen R. Hanson , Acting Director of the National Institute on Drug Abuse (NIDA), to the U.S. Sentencing Commission, Commission Public Hearing (Feb. 25, 2002).

smoking, a more addictive administration method.[111]

The former Director of the National Institute on Drug Abuse ("Director") further expanded on the varying leads of addictiveness, noting the physiological and psychoactive effects of smoked crack or injected powder cocaine are similar and the effect on the brain is identical.[112] In addition, the Director noted prolonged use of cocaine potentially produces "paranoid toxic psychosis" which might lead to behavior that is considered "aggressive"; however, the same symptoms apply regardless of the form of cocaine.[113] In recommending a departure from the 100-1 sentencing ratio to a 3-1 ratio, the Director reasoned that although the two forms of cocaine share similar risks and effects, the ease of procurement of crack cocaine and the dangers associated with its repeated smoking is a great enough concern to warrant a slightly stronger punishment.[114] However, punishing crack cocaine 100 times harsher than powder cocaine is certainly not a slight variation in punishment.[115]

Secondly, the statistically incorrect belief that crack cocaine usage contributed to an increase in violence also presumably justified the 100-1 sentencing ratio.[116] Criminologists predicted that crack cocaine would contribute to a "bloodbath."[117] However, the crime rate and occurrence of violence began to decrease and the predictions of crack cocaine's dangerousness failed to transpire.[118] Researchers defined three distinct groups of drug-related violence to explain the relationship of drugs and violence: violence induced from drug usage, violence induced by the need or want for more drugs, and violence induced by involvement in the drug culture.[119] Although a general relationship between drugs and crime may exist, it is extremely difficult to say that one drug in particular, such as crack, leads to more violence.[120]

Studies continue to suggest that crack cocaine does not cause a person to behave more violently as a result of the drug's pharmacological effect.[121] In 2000, a report on weapon use demonstrated 82.4% of powder cocaine offenses involved no weapon use, slightly higher than the 74.5% in crack cocaine cases.[122] In a 2005 report on violence involved in crack and powder cocaine offenses, 93.8% of powder cocaine offenses involved no violence compared to 89.6% of crack cocaine.[123] Proving the violence myth an exaggeration, the 2005 report also found that for both crack cocaine and powder

111. *See* Schuster Testimony, *supra* note 104.

112. *Id.*

113. *Id.*

114. *Id.*

115. *See supra* note 38 and accompanying text.

116. *See* Murphy Statement, *supra* note 95, at 149; VAGINS & MCCURDY, *supra* note 11, at 5.

117. LEVITT & DUBNER, *supra* note 93, at 114.

118. *Id.*; *see* USSC 2007 REPORT TO CONGRESS, *supra* note 15, at 36-37 (describing the decrease of violence).

119. Paul J. Goldstein et al., *Crack and Homicides in New York City: A Case Study in the Epidemiology of Violence*, *in* CRACK IN AMERICA: DEMON DRUG, AND SOCIAL JUSTICE, *supra* note 32, at 115-16.

120. *See* Testimony, *supra* note 110 (further explaining "[t]here appears to be no one single drugs-crime relationship.").

121. Morgan & Zimmer, *supra* note 32, at 137-38 (explaining that people that use cocaine, who are not already predisposed to violent behavior, do not suddenly have an urge to act violent).

122. USSC 2002 REPORT TO CONGRESS, *supra* note 38, at 54; VAGINS & MCCURDY, *supra* note 11, at 5.

123. USSC 2007 REPORT TO CONGRESS, *supra* note 15, at 38.

cocaine, "threats" were the most documented form of violence.[124] Many people incorrectly assume violence associated with crack cocaine involves "some bug-eyed crackhead shooting a shopkeeper over a few dollars."[125] Conversely, violence attributed to crack cocaine generally involves disputes between drug dealers and rival gang members.[126] One inner city study found that a vast amount of drug and crack cocaine related homicides resulted from the dangerous and "illicit" drug trade in general.[127] The market for all illegal drugs is "inherently violent."[128] Singling out one specific type of drug and claiming it leads to more violence is unsound.[129] Furthermore, the "aggressive" marketing of crack cocaine took place in predominantly poor neighborhoods already predisposed to violence.[130] Harsher crack cocaine sentencing based on the chemical composition of the drug and its presumed link with violence troubles Dr. Alfred Blumstein.[131] Blumstein, an experienced criminology and operations researcher at Carnegie Mellon University, recommends the particular violent behavior itself dictate the punishment, not the composition of the drug.[132] According to the USSC, there is no authoritative justification to implicate crack cocaine with systemic crime.[133]

Lastly, the idea that a mother's prenatal exposure to crack leads to the development of "crack baby syndrome" further motivated the crack cocaine sentencing scheme.[134] The effects of prenatal crack cocaine exposure on fetal development are identical to powder cocaine.[135] In assessing the negative effects of prenatal exposure to cocaine, researchers concluded the effects are much less harmful than originally thought.[136] Other factors such as exposure to "tobacco, marijuana, or alcohol, and the quality of the child's environment" help to explain the prenatal effects once originally attributed solely to cocaine.[137] Doctors analyzing prenatal cocaine exposure found no compelling evidence to support the conclusion that prenatal exposure leads to "toxic effects that are different in severity, scope, or kind from sequelae of multiple other risk factors."[138] Dr. Deborah Frank, who researched prenatal cocaine exposure for over a decade, concluded that the negative effects of prenatal powder or crack cocaine exposure are similar to tobacco, not associated with increased birth defects and drug withdrawal syndrome, and are not

124. *Id.*

125. LEVITT & DUBNER, *supra* note 93, at 134.

126. *Id.*

127. Goldstein et al., *supra* note 119, at 116-18; VAGINS & MCCURDY, *supra* note 11, at 5.

128. VAGINS & MCCURDY, *supra* note 11, at 5.

129. *See id.*

130. Testimony, Dr. Alfred Blumstein, H. John Heinz III School of Public Policy and Management, National Consortium on Violence Research ("NCOVR"), Carnegie Mellon University, to the U.S. Sentencing Commission, Sentencing Guidelines for Crack and Powder Cocaine 5 (Feb. 21, 2002).

131. *Id.* at 2.

132. *Id.* at 5-6

133. USSC 2002 REPORT TO CONGRESS, *supra* note 38, at 102.

134. Murphy Statement, *supra* note 95, at 150-51; VAGINS & MCCURDY, *supra* note 11, at 5.

135. Murphy Statement, *supra* note 95, at 150-51

136. USSC 2002 REPORT TO CONGRESS, *supra* note 38, at 21.

137. Deborah A. Frank, Marilyn Augustyn & Wanda Grant Knight et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613, 1624 (2001).

138. *Id.* at 1613.

connected with Sudden Infant Death Syndrome.[139] Interestingly, Dr. Frank used the term "crack/cocaine" since researchers have no physiologic indicators that can verify which form of the drug, crack cocaine or powder cocaine, the mother prenatally exposed to the newborn.[140] She concluded the "crack baby" was a "grotesque media stereotype, not a scientific diagnosis."[141] Furthermore, doctors lack the ability to differentiate between babies prenatally exposed to powder cocaine or crack, and babies that are not.[142] Therefore, because virtually no difference exists between prenatal exposure to crack versus powder cocaine, the sentencing disparity is unjustified based on this rationale.[143]

D. How Federal Courts Have Reacted to the Sentencing Disparity

Between the federal sentencing guidelines the USSC enacted in 1984, made binding on federal courts, and the harsh mandatory minimums Congress statutorily enacted in 1986 and 1988, courts had minimal discretion concerning the cocaine sentencing process.[144] Federal sentencing developed into a "web of rules" due to the culmination of the sentencing guidelines "level of factual detail" and the USSC's "quantification of the value of sentencing facts."[145] Hundreds of judges challenged the validity of mandatory federal sentencing guidelines[146] but the Supreme Court held them constitutional.[147] Justice Ruth Bader Ginsburg, troubled by the disparity between crack and powder cocaine sentencing, found it odd that crack dealers received harsher sentences than the powder cocaine distributors who supplied them.[148] Federal appellate courts strictly enforced the requirement that district judges sentence according to the guideline range and rarely affirmed deviation from the range.[149] The best opportunity a defendant had to receive a reduced sentence or a departure from a mandatory minimum was through assistance to the government in the investigation and prosecution of other crimes.[150] In other words, due to the harsh realities of strict mandatory minimums and

139. Testimony of Deborah A. Frank, M.D., before the U. S. Sentencing Commission 1-2 (Feb. 25, 2002) (on file with author).

140. *Id.* at 1.

141. *Id.* ("You may recall the initial predictions of catastrophic effects of prenatal cocaine or crack exposure on newborns including inevitable prematurity, multiple birth defects, 'agonizing withdrawal with catlike cry,' early death and profound long term disabilities for the survivors. The actual data are quite different."); VAGINS & MCCURDY, *supra* note 11, at 5.

142. Morgan & Zimmer, *supra* note 32, at 152.

143. *See* Murphy Statement, *supra* note 95, at 151 ("In any event, sentencing proportionality would be better achieved by imposing enhanced sentences directly on the small minority of offenders who knowingly distribute drugs to pregnant women.").

144. *See* Christine M. Zeivel, Comment, *Ex-Post*-Booker*: Retroactive Application of Federal Sentencing Guidelines*, 83 CHI.-KENT L. REV. 395, 400-01 (2008).

145. Frank O. Bowman III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 424 (2010).

146. Zeivel, *supra* note 144, at 401.

147. *Id.*; *see* Mistretta v. United States, 488 U.S. 361 (1989) (holding the Sentencing Reform Act of 1984 to be constitutional and not in violation of the non-delegation principle or the separation of powers principle).

148. *See* Ellis Cose, *Closing the Gap: Obama Could Fix Cocaine Sentencing,* NEWSWEEK, July 20, 2009, at 25.

149. Zeivel, *supra* note 144, at 400-01.

150. *See* 18 U.S.C.A. § 3553(e) (West 2010) (giving the court the ability to reduce a sentence, based on a motion by the government, when a defendant provides "substantial assistance in the investigation or

the lack of judicial discretion, a defendant's only avenue for a reduced sentence was through offering the government testimony against another person committing a criminal offense.[151] U.S. District Judge Robert Sweet expressed his concern over the inequality in federal sentencing claiming the unjust disparity "has resulted in Jim Crow justice."[152]

Defendants attacked the federal crack cocaine sentencing laws, claiming the harsh treatment of crack cocaine versus powder cocaine unfairly violated their constitutional rights.[153] Courts did not react favorably to defendants challenging the crack-to-powder ratio, continuing to uphold the crack cocaine laws as constitutional.[154] African American defendants challenged the 100-1 ratio arguing the 1986 Anti-Drug Act legislation and the USSC's adoption of its ratio violated equal protection rights through discriminating against them based on race.[155] Because of the difficulties[156] in proving the Anti-Drug Act facially discriminated based on a particular race, a classification of strict scrutiny was inapplicable.[157] Thus, the Supreme Court required application of "rational basis" scrutiny in reviewing equal protection challenges to the sentencing disparity.[158] Therefore, the government only needed to prove the purpose of the Anti-Drug Act was to achieve a legitimate government interest.[159] The government's stated legitimate interest, fighting drugs and reducing drug abuse, effortlessly satisfied this prong, requiring judges to "mechanically" reject equal protection challenges.[160] In rejecting a claim that the sentencing disparity violated due process, one court concluded, "Congress . . . has chosen to combat . . . [the] effects of crack cocaine on our society, and we believe the disproportionate sentencing scheme that treats one gram of cocaine base the same as 100 grams of cocaine is rationally related to this purpose."[161] Thus, although the mandatory guidelines and the harsh sentencing disparity came under criticism, they continued to govern federal sentencing.[162]

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prosecution of another person who has committed an offense.").

151. Adriano Hrvatin, Comment, *Unconstitutional Exploitation of Delegated Authority: How to Deter Prosecutors from Using "Substantial Assistance" to Defeat the Intent of Federal Sentencing Laws*, 32 GOLDEN GATE U. L. REV. 117, 142 (2002) ("By providing law enforcement with substantial assistance in the investigation or prosecution of another person, a defendant can receive significant leniency from otherwise applicable guideline ranges and mandatory-minimum penalties. Accordingly, this benefit provides defendants with a self-serving incentive to testify falsely against others.").

152. VAGINS & MCCURDY, *supra* note 11, at 4 (quoting *National War on Drugs Symposium, Panel II: Social Justice & the War on Drugs* (2000) (statement of Hon. Robert Sweet), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html); *see also* LEVITT & DUBNER, *supra* note 93, at 113 (also making a Jim Crow reference).

153. Chanenson & Berman, *supra* note 62, at 292.

154. *Id.*

155. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1303 (1995).

156. *See generally* Jason A. Gillmer, United States v. Clary*: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497 (1995) (discussing equal protection and the crack cocaine legislation in the courts).

157. Sklansky, *supra* note 155, at 1303-04; *see also* David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547 (1995) (discussing the inequality associated with denying heightened scrutiny for equal protection reviews by analyzing the intentional government discrimination requirement necessary for heightened scrutiny).

158. Sklansky, *supra* note 155, at 1303.

159. *Id.* at 1304.

160. *Id.*

161. Chanenson & Berman, *supra* note 62, at 292 (quoting United States v. Lawrence, 951 F.2d 751, 755 (7th Cir. 1991)).

162. Zeivel, *supra* note 144, at 401.

Since the enactment of the 1986 Anti-Drug Act's harsh mandatory minimum sentencing scheme, federal courts have dissected its statutory language in an effort to make sense of the sentencing disparity, better explain the rationale behind the policy, and judicially apply appropriate remedies to the harsh penalty structure.[163] A predominant circuit split evolved regarding the exact meaning of the definition of "cocaine base" as read in the Anti-Drug Act.[164] Each circuit's interpretation of the meaning of "cocaine base," although beyond the scope of this article,[165] is crucial, as possession of a smaller amount of "cocaine base" compared to a larger amount of powder cocaine triggers the much harsher penalties.[166] Powder cocaine, as described in this article, is penalized under 21 U.S.C. § 841(b)(1)(A) and (B) as it falls into the statutory category of "cocaine, its salts, optical and geometric isomers, and salts of isomers."[167] The circuit split involved courts' alternate definitions of the statute's reference to "cocaine base."[168] The Second, Third, and Tenth Circuit Courts of Appeal interpret "cocaine base" using a definition based on the chemical composition of the drug.[169] The Fourth and Seventh Circuit Courts of Appeal took a "crack-only" approach defining "cocaine base" to mean only crack cocaine.[170] The Ninth Circuit analyzed and included any form of cocaine base that was "smokeable" to define "cocaine base."[171] Crack cocaine fits into each of the above categories because "[a]ll crack is cocaine base but not all cocaine base is crack."[172] Consequently, a defendant's sentence can vary dramatically depending on how a particular sentencing court defines the type of "cocaine base" a defendant possesses.[173]

In 2005, a U.S. Supreme Court decision rendered the guidelines merely advisory, dramatically changing the role of the mandatory federal sentencing guidelines.[174] In essence, the holding in *United States v. Booker* shifted sentencing power from the USSC to the courts, allowing judges to implement their own crack and powder cocaine sentencing schemes, if they desired.[175] This landmark case involved a defendant sentenced to 360 months for possession of crack cocaine with intent to distribute, ten years longer than the recommended guideline range authorized by the jury verdict.[176] In

163. *See* Beaver, *supra* note 30, at 2535.

164. *Id.* at 2535.

165. *Id.* at 2557-65 (explaining, in detail, each circuit's approach to interpreting the meaning of "cocaine base" in 21 U.S.C. § 841 (West 2010)).

166. *See* 21 U.S.C.A. § 841(b)(1)(A) & (B) (West 2010).

167. *Id.*

168. *Id.*

169. Andrew C. Mac Nally, *A Functionalist Approach to the Definition of "Cocaine Base" in § 841*, 74 U. CHI. L. REV. 711, 721 (2007) (citing United States v. Jackson, 968 F.2d 158, 162 (2nd Cir. 1992); United States v. Barbosa, 271 F.3d 438, 461–67 (3d Cir. 2001); United States v. Easter, 981 F. 2d 1549, 1557–58 (10th Cir. 1992)).

170. *Id.* at 726 (citing United States v. Fisher, 58 F.3d 96 (4th Cir. 1995) and United States v. Edwards, 397 F.3d 570 (7th Cir. 2005)).

171. *Id.* at 731 (citing United States v. Shaw, 936 F.2d 412 (9th Cir. 1991)).

172. *See* United States v. Edwards, 397 F.3d 570, 571 (7th Cir. 2005).

173. *See* 21 U.S.C.A. § 841(b)(1)(A) & (B) (West 2010). *See generally* Mac Nally *supra* note 169.

174. *See generally* United States v. Booker, 543 U.S. 220 (2005).

175. *See* Chanenson & Berman, *supra* note 62, at 293. Of course, this proposition excludes a situation in which a defendant's conviction has triggered a mandatory minimum. In that case, judges are still obligated by statute to sentence according to the statutory minimum. *See* 21 U.S.C.A. § 841(b)(1)(A) & (B) (West 2010).

176. *Booker*, 543 U.S. at 226, 235.

reaching this sentence, the judge found that Booker possessed an additional 566 grams of crack (from the initial 92.5 found by the jury), based on facts and evidence not presented to the jury.[177] The Supreme Court held the Sixth Amendment right to a jury trial applies to the federal sentencing guidelines and "requires juries, not judges, to find facts relevant to sentencing."[178] The Court reemphasized that a defendant must admit any fact, or a jury must find beyond a reasonable doubt any fact necessary to support a sentence imposed beyond the maximum penalty.[179] Furthermore, because determining a sentence within a range required judges to consider specific circumstances of an offense and characteristics of a defendant typically without a jury, such as during a plea bargain, the Sixth Amendment right to a jury trial was incompatible with mandatory sentencing guidelines.[180] Thus, the Court rendered the guidelines "effectively advisory," requiring courts to consider the guidelines during sentencing, but "permits the court to tailor the sentence in light of other statutory concerns."[181]

The Supreme Court's reference in *Booker* to "other statutory concerns" directed courts to consider 18 U.S.C. § 3553(a) when sentencing.[182] This statute provides numerous factors, including the consideration of federal sentencing guidelines, for courts to reflect on in achieving a "sufficient, but not greater than necessary" sentence.[183] After *Booker*, a concern developed over the amount of weight courts should attribute to each of the factors, including the guidelines, and the appropriate remedy in the event factors conflicted.[184] Therefore, courts began to diverge in their treatment of the guidelines, some remaining hesitant to categorically sentence within certain guideline ranges and others essentially viewing the guidelines as mandatory.[185]

In 2007, the Supreme Court clearly indicated that when evaluating the § 3553(a) factors, judges could account for the disparity in sentencing between crack cocaine and powder cocaine, and sentence outside of the advisory guideline ranges if they believed a within-guideline range sentence was "'greater than necessary.'"[186] *Kimbrough v. United States* clarified prior confusion regarding the federal courts' ability to reduce a defendant's sentence based on a disagreement with the 100-1 ratio.[187] In *Kimbrough*, the

177. *Id.* ("The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just as in *Blakely*, 'the jury's verdict alone does not authorize the sentence.'").

178. *Id.* at 245.

179. *Id.* at 244-45 (citing Blakely v. Washington, 542 U.S. 296 (2004)) (explaining that a sentence imposed beyond the maximum penalty authorized by facts found by a jury verdict or a guilty plea "must be admitted by the defendant or proven to a jury beyond a reasonable doubt").

180. *Id.* at 249-52.

181. *Id.* at 245.

182. *Id.* at 245-46 (citing 18 U.S.C. § 3553(a) (2004)).

183. 18 U.S.C.A. § 3553(a) (West 2010).

184. Steven L. Chanenson, *Booker on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL'Y 551, 569-70 (2006).

185. *See id.*

186. Kimbrough v. United States, 552 U.S. 85, 91 (2007).

187. The decision in *Kimbrough* abrogated prior circuit decisions that held a district court had no authority to depart from the 100-1 ratio based on policy disagreements. *See* United States v. Leatch, 482 F.3d 790 (5th Cir. 2007) (holding a district court did not have the discretion to depart from 100:1 ratio based on a policy disagreement with the fairness of the ratio); United States v. Johnson, 474 F.3d 515 (8th Cir. 2007) (holding that a district court does not have the authority to reject the crack-to-powder ratio put in place by Congress); United States v. Castillo, 460 F.3d 337 (2nd Cir. 2006) (holding a district court cannot reject the 100-1 ratio

defendant plead guilty to four offenses, including possession with intent to distribute powder cocaine and possession of more than fifty grams of crack cocaine with intent to distribute.[188] The district court's calculation of Kimbrough's advisory guideline range, including all four of the charges, resulted in a sentence of 228 to 270 months, or over nineteen years in prison.[189] Notably, if Kimbrough possessed powder cocaine as opposed to the fifty-six grams of crack cocaine he actually possessed, a guideline range of 97 to 106 months would have been the appropriate sentence.[190] The district court disagreed with the range the guidelines recommended under the 100-1 ratio, concluding the statutory mandatory minimum of 180 months was "clearly long enough" to accomplish the goals of sentencing.[191] The Fourth Circuit vacated the sentence concluding it was unreasonable for a district court to sentence outside the recommended guideline range based on policy disagreements with the 100-1 sentencing disparity.[192]

On review, the Supreme Court considered the extensive USSC reports illustrating the disproportionate effects the crack-to-powder sentencing disparity created and agreed with the district court's view that Kimbrough's sentence, 4.5 years below the guideline range, was reasonable.[193] The Court clarified that the 1986 Anti-Drug Act did not require post-*Booker* sentencing courts to adhere to the 100-1 ratio in the absence of a statutory mandatory minimum.[194] The Court opposed the government's claim that allowing courts to sentence outside the guidelines based on disagreement with the 100-1 ratio created sentencing "cliffs"[195] and different outcomes depending on the particular judge's views on the disparity.[196] Although courts would experience difficulty in achieving complete uniformity, this necessary cost resulted from *Booker*, which made the guidelines advisory.[197] Ultimately, *Kimbrough* bestowed courts with more discretion in crack cocaine sentencing, as the Supreme Court held district judges have the authority to sentence outside the guideline range. This discretion allows judges to consider "the nature and circumstances" of each crime and "history and characteristics" of the

based on differing policy grounds); *see* United States v. Williams, 456 F.3d 1353 (11th Cir. 2006) (holding a district court's disagreement with the policy set forth by Congress was not a permissible sentencing factor); United States v. Miller, 450 F.3d 270 (7th Cir. 2006) (holding district court's must carry out the legislative choice of Congress in enacting a 100-1 ratio); *see* United States v. Eura, 440 F.3d 625 (4th Cir. 2006) (holding that a sentencing court does not have the ability to depart from the statutory crack-to-powder ration as that would result in an unwarranted sentencing disparity); United States v. Pho, 433 F.3d 53 (1st Cir. 2006) (holding a district court does not have the authority to impose a sentence not using the 100-1 crack-to-powder ratio based on the disparate treatment between crack and powder cocaine).

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

189. *Id.* at 93.

190. *Id.*

191. *Id.* (quoting district court opinion).

192. *Id.* ("Under Circuit precedent, the Court of Appeals observed, a sentence "outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.").

193. *Id.* at 109-11.

194. *Id.* at 102-05.

195. *Id.* at 88 ("For example, a district court could grant a sizable downward variance to a defendant convicted of distributing 49 grams of crack, but would be required by the statutory minimum to impose a much higher sentence for only 1 additional gram.").

196. *Id.* at 106-07.

197. *Id.* at 107-08.

defendant while simultaneously reflecting their disagreement with the 100-1 disparity.[198]

The authority of a district court to deviate from the 100-1 crack-to-powder ratio in the absence of a statutory mandatory minimum became more evident in *Spears v. United States*.[199] In *Spears*, the district court not only considered its disagreement with the 100-1 ratio, but also specifically applied its own 20-1 crack-to-powder ratio when sentencing the defendant.[200] Using *Kimbrough* as a platform, the Supreme Court approved the district court's adoption of a 20-1 ratio explaining, "[a] sentencing judge who is given the power to reject the [crack-to-powder] disparity . . . must also possess the power to apply a different ratio which, in his judgment, corrects the disparity."[201] The Court called it "absurd" to reject a sentence outside the advisory guideline range that is not restricted by a mandatory minimum simply because a judge explicitly stated the alternate crack-to-powder ratio he applied.[202]

With the transition of the USSC sentencing guidelines from mandatory to advisory, federal courts have more authority to deviate from the harsh penalties associated with the crack-to-powder sentencing disparity by applying a more appropriate sentence to each unique set of facts.[203] While courts are still required to follow statutory mandatory minimum sentences, the Fair Sentencing Act of 2010 represents Congress's significant attempt to fix the unjust disparity through reduction of the statutory crack-to-powder ratio from 100-1 to 18-1.[204]

E. Application of Retroactive Laws In General

The concept of retroactivity generally refers to the extension of a law's scope and effect to matters that have already occurred.[205] A retroactive law is a legislative act which "looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect."[206] The general rule is that newly enacted statutes are to apply prospectively starting from the statutorily designated date of enactment.[207] This principle of directing newly enacted laws prospectively proscribes procedural fairness, as it provides an opportunity to learn the law in advance and thus adjust behavior in accordance with the requirements of the law.[208] However, at common law, newly enacted penal statutes that mitigated previous penalties applied retroactively.[209]

198. *Id.* at 110-11.

199. *See* Spears v. United States, 129 S. Ct. 840 (2009) (holding that a district court has the authority to categorically disapprove of the 100-1 sentencing ratio, and substitute its own ratio (in this case 20:1) that is deemed more appropriate).

200. *Id.* at 842, 844.

201. *Id.* at 843.

202. *Id.* at 844-45.

203. *See* discussion *supra* Part II (D) (discussing various cases and the evolution of federal cocaine sentencing including the courts ability to reflect disagreement with the 100-1 crack-to-powder ratio).

204. *See* discussion *infra* Part III (A).

205. *See* BLACK'S LAW DICTIONARY 1432 (9th ed. 2009).

206. *Id.* at 1432 ("A retroactive law is not unconstitutional unless it (1) is in the nature of an ex post facto law or a bill of attainder, (2) impairs the obligation of contracts, (3) divests vested rights, or (4) is constitutionally forbidden.").

207. 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 41:4 (Norman J. Singer ed., 7th ed.).

208. *Id.*

209. Holiday v. United States, 683 A.2d 61, 66 (D.C. 1996) (citing Bradley v. United States, 410 U.S. 605, 607-08 (1973); *see also* People v. Oliver, 134 N.E.2d 197, 200 (N.Y. 1956) ("On the other hand, when a

In the early 1800's, the U.S. Supreme Court stated "[retroactive] laws which do not impair the obligation of contracts, or partake of the character of ex post facto laws, are not condemned or forbidden by any part of [the constitution]."[210] Furthermore, when a newly amended or enacted law results in a change that is favorable for a defendant, such as a reduction in the punishment of a particular crime, the defendant should be able to benefit from the change.[211] In particular, "[t]he retroactive application of a sentencing statute is permissible as long as the changes are 'procedural' or 'ameliorative.'"[212] An ameliorative change benefits a defendant as it "fails to make a statute 'more [burdensome] than the prior law.'"[213] For instance, a statute that lessens the previous punishment for a crime by subjecting children defendants to corrective treatment as juvenile delinquents instead of charging them as adult criminals is ameliorative.[214] Although it seems more logical for Congress to enact laws pertaining to a criminal act prior to its commission, as one scholar put it, applying ameliorative changes to a law retroactively may be "better late than never" in order to ensure fairness.[215]

Congress's bipartisanship in passing ameliorative legislation, such as the Fair Act, may be a result of the "strong public interest in the smooth functioning of government" such as making sure the government remains aligned with the current views of society.[216] The legislature, as representatives of society, needs to evaluate a statute's shortcomings and make appropriate amendments in order to better achieve the original goals of a particular statute.[217] Although federal courts consider most legislation to address only future acts, if the legislature clearly manifests an intention to affect past laws, retroactive application of laws is appropriate.[218] The mitigation of punishment associated with a criminal act represents society's abandonment of previous perceptions regarding the proper penalty for committing that crime.[219] The passage of ameliorative legislation, such as the reduction in the penalties for crack cocaine possession, signal the

criminal statute is repealed or a penalty reduced, different considerations are involved.").

210. Satterlee v. Matthewson, 27 U.S. 380, 413 (1829).

211. *See Oliver*, 134 N.E.2d at 203 ("Whenever the Legislature alters existing law, a certain measure of inequality is bound to ensue. Where the change is ameliorative and reflects a judgment that the earlier law was unduly harsh or unjust, a court should not withhold the benefits of the new statute to one tried after its passage, merely because it is powerless to extend them to those already convicted.").

212. *E.g.*, Knapp v. Cardwell, 513 F. Supp. 4, 18 (D. Ariz. 1980), *aff'd*, 667 F.2d 1253 (9th Cir. 1982) (citing Dobbert v. Florida, 432 U.S. 282, 293-94 (1977)).

213. *Id.*

214. *Oliver*, 134 N.E.2d at 202.

215. Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 237 (1927) ("It is not surprising, therefore, that many such laws have been uniformly sustained while on others there has developed a conflict of authority.").

216. *See* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 705 (1960).

217. *See id.* For instance, one of the original goals of the 100-1 crack-to-powder ratio was to prosecute high-end drug dealers and major traffickers (also known as kingpins). Unfortunately, the legislation ended up harshly punishing a large amount of low-level users and traffickers and first time offenders. The Fair Sentencing Act of 2010 represents an amendment to the statute that better aligns the legislation with the original goals of drug trafficking prevention. *See generally* Murphy Statement, *supra* note 95.

218. Orrego v. 833 W. Buena Joint Venture, 943 F.2d 730, 735 (7th Cir. 1991) (citing Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)).

219. *See* S. David Mitchell, *In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 15 (2009).

realization by society that the criminal conduct warrants a less harsh punishment.[220] Generally, retroactive application of a statute is justified when Congress directly or impliedly indicates intent for retroactive application, when the new legislation is ameliorative, or where a defendant reasonably expects the new legislation to apply retroactively.[221] The provisions of the Fair Sentencing Act of 2010, which modify the Anti-Drug Act of 1986, is predominantly ameliorative in nature and arguably falls into each of the three categories above.[222]

III. WHY THE FAIR SENTENCING ACT OF 2010 REQUIRES RETROACTIVE APPLICATION

A. The Fair Sentencing Act of 2010

The Fair Act, a bill Senator Dick Durbin introduced on October 15, 2009, represented an effort to "restore fairness to federal cocaine sentencing."[223] On March 17, 2010, the Senate unanimously passed this bill.[224] On July 28, 2010, the House passed the bill by voice vote, and less than a week later, President Obama signed the bill into law.[225] Attorney General Eric Holder recognized the strong bipartisan leadership of the Senate Judiciary Committee and expressed his confidence in the Fair Act's ability to provide "more just[ified] sentencing policies while enhancing the ability of law enforcement officials to protect our communities from violent and dangerous drug traffickers."[226] Senator Durbin articulated the need to address the crack-to-powder sentencing ratio was long overdue, as it represented one of the "greatest injustices in our war on drugs."[227]

Although the initial bill recommended complete elimination of the 100-1 crack-to-powder sentencing disparity, the Senate Judiciary Committee agreed unanimously that a reduction to an 18-1 ratio was smart and fair.[228] In analyzing the effects of the Fair Act, the USSC predicts the federal prison population will decrease by more than 1,550 people between 2011 and 2015.[229] At a cost of $27,000 a year per prisoner, the Bureau of Prisons will save an estimated forty-two million during that time span.[230] The Fair Act will affect nearly 3,000 crack cocaine offenders each year and reduce crack sentences by

220. *See id.*; People v. Oliver, 134 N.E.2d 197, 202 (N.Y. 1956).

221. 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 41:4 (Norman J. Singer ed., 7th ed.).

222. *See* discussion *infra* Part III (A), (C), and (D).

223. *S. 1789: Fair Sentencing Act of 2010*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s111-1789 (last visited Nov. 7, 2010).

224. *Id.*

225. *Id.* The President signed the bill into law on August 3, 2010.

226. Statement of the Attorney General on Passage of the Fair Sentencing Act (July 28, 2010) [hereinafter Statement of Attorney General] (on file with the Department of Justice Office of Public Affairs).

227. Press Release, United States Senator Dick Durbin, Durbin's Fair Sentencing Act Passed By House, Sent to President for Signature (July 28, 2010) (on file with Senator Durbin's office).

228. *See id.*

229. Congressional Budget Office, S. 1789 Cost Estimate 2 (2010) ("Based on this analysis, CBO estimates that the modified sentences required under the bill would decrease the prison population by 1,550 person-years over the 2011-2015 period. (A person-year measures the incarceration of one person for a full year.) According to the Bureau of Prisons, a decrease in the federal prison population of this magnitude would save about $27,000 per person per year for avoided incarceration time. CBO estimates that the savings from implementing S. 1789 would total $42 million over the 2011-2015 period.").

230. *Id.* at 2.

an average of twenty-seven months.[231]

The majority of the provisions in the Fair Act have an ameliorative effect resulting in the lessening of statutory penalties.[232] The second section, entitled "Cocaine Sentencing Disparity Reduction," represents the long awaited departure from the previous Anti-Drug Act's harsh penalties.[233] Under the Anti-Drug Act, possession with intent to distribute five grams or more of crack cocaine triggered the same five-year mandatory minimum as possession of 500 grams of powder cocaine, which resulted in the 100-1 crack-to-powder sentencing disparity.[234] The Fair Act increases the crack cocaine possession amount necessary to trigger the five-year mandatory minimum from five grams to twenty-eight grams.[235] In addition, Section Two of the Fair Act increases the possession amount necessary to trigger the ten-year mandatory minimum from fifty grams to 280 grams.[236] Because of the increased possession amounts necessary to trigger the mandatory minimums, the sentencing disparity now reflects an 18-1 crack-to-powder ratio.[237] The Fair Act also abolishes the harsh five-year mandatory minimum for simple possession of crack cocaine.[238] The Fair Act increases fines for major drug traffickers and for offenses involving the import and export of drugs.[239] In addition, the Fair Act allows for sentencing enhancements for a defendant's role in the crime, acts of violence, and aggravating factors.[240]

The Fair Act provides the USSC with "emergency authority" to promulgate amendments that conform the federal sentencing guidelines to reflect the statutory changes to "achieve consistency with other guideline provisions and applicable law."[241] This allows the USSC to integrate the new 18-1 crack-to-powder ratio into the sentencing guidelines for use in all crack cocaine offenses.[242] On October 15, 2010, the USSC promulgated a temporary amendment, incorporating the Fair Act's mitigating punishments into the sentencing guidelines.[243] The amended guidelines apply to all

231. Press Release, Families Against Mandatory Minimums, Impact of S. 1789 The Fair Sentencing Act of 2010 (Aug. 2, 2010), *available at* http://www.famm.org/Repository/Files/S1789%20impact%20factsheet%203.pdf.

232. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372; *see also* United States v. Douglas, 746 F. Supp. 2d 220, 223 (D. Me. 2010) (providing a brief summary of the new law).

233. Fair Sentencing Act § 2; *see also supra* notes 38-46 and accompanying text.

234. *See* Anti Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

235. Fair Sentencing Act § 2. The Fair Act does not alter the possession amount of powder cocaine necessary to trigger the five-year mandatory minimum. It remains at 500 grams.

236. *Id.* The Fair Act does not alter the possession amount of powder cocaine necessary to trigger the ten-year mandatory minimum. It remains at 5,000 grams.

237. 28 grams of crack cocaine triggers the equivalent penalty as 500 grams of powder cocaine (18-1 ratio), and 280 grams of crack cocaine triggers the equivalent penalty as 5,000 grams of powder cocaine (18-1 ratio).

238. Fair Sentencing Act § 3; *Douglas*, 746 F. Supp. 2d at 223.

239. Fair Sentencing Act § 4; *Douglas*, 746 F. Supp. 2d at 223.

240. Fair Sentencing Act §§ 5-7; *Douglas*, 746 F. Supp. 2d at 223.

241. *Id.* § 8 (authorizing the USSC to promulgate amendments to the guidelines "as soon as practicable" and "not later than 90 days" after August 3, 2010).

242. News Release, U.S. Sentencing Comm'n, United States Sentencing Commission Promulgates Amendment to Implement Fair Sentencing Act of 2010 (Oct. 15, 2010), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20101015_Press_Release.pdf.

243. *Id.* ("The Commission will consider a permanent amendment implementing the Fair Sentencing Act as part of its work during the coming year and will submit such amendment to Congress no later than May 1, 2011.").

defendants sentenced after November 1, 2010.[244] Furthermore, because the Fair Act only amends the mandatory minimums Congress previously enacted, the USSC does not have the ability to make the mandatory minimum changes retroactive.[245] However, similar to the 2008 retroactive application of the crack amendment, the USSC has the power to make the sentencing guidelines retroactive in the cases not restricted by mandatory minimums.[246] Conversely, for the Fair Act's mandatory minimum amendments to operate retroactively, courts must interpret Congress's intent in enacting the law to judicially apply the amendments retroactively, or Congress must pass new legislation specifically rendering the Fair Act's provisions retroactive.[247]

Although the Fair Act is straightforward, Congress failed to include any reference as to what type of defendant can seek relief under the new ameliorative provisions.[248] Numerous concerns remain, including whether defendants already in prison under the previous mandatory minimums should benefit from the Fair Act, or whether the Fair Act only applies to conduct occurring after the law's enactment.[249] In addition, Congress did not address a defendant convicted under the old harsh statutory framework but not scheduled for sentencing until after the effective date of the Fair Act.[250] In the past, Congress expressly stated which type of defendant new ameliorative legislation would effect.[251] For example, Congress inserted a provision in the new legislation restricting application of the repealing statute to a particular type of defendant to prevent judicial confusion.[252] Conversely, in regards to the Fair Act, Congress's ambiguity concerning retroactive application allows judicial discretion to determine which defendants reap the benefits of the new Act.[253]

B. Retroactive Application of Fair Act Does Not Violate Ex Post Facto Clause

Article I of the U.S. Constitution clearly prohibits the passage of ex post facto laws.[254] Applying laws retroactively only violates the Ex Post Facto Clause if the law disadvantages the defendant, such as an *increased* punishment.[255] As early as 1798, Justice Chase recognized that ex post facto violations occurred only when a new law criminalized a previous innocent act and subsequently punished a defendant for violating it, or when a subsequent law increased the punishment of a crime previously

244. *Id.*

245. Press Release, Families Against Mandatory Minimums, Frequently Asked Questions About Making Federal Crack Reforms Retroactive (Nov. 5, 2010), *available at* http://www.famm.org/Repository/Files/110510%20FINAL%20RETROACTIVITY%20FAQ.pdf [hereinafter Making Reforms Retroactive].

246. *See* discussion *supra* Part II (B).

247. Making Reforms Retroactive, *supra* note 245.

248. *See* Pub. L. No. 111-220, 124 Stat. 2372 (2010).

249. United States v. Douglas, 746 F. Supp. 2d 220, 221 (D. Me. 2010).

250. *Id.*

251. *See* Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 656 n. 4 (1974) (the repealing statute states "'[p]rosecutions for any violation of law occurring prior to the effective date of (the Act) shall not be affected by the repeals or amendments made by (it) . . . or abated by reason thereof'").

252. *See id.* at 656.

253. *See* Pub. L. No. 111-220, 124 Stat. 2372 (2010) (failing to address whether the amendments to the statute apply prospectively only, or whether retroactive application is allowed).

254. U.S. CONST. art I, § 9, cl. 3; United States v. Douglas, 746 F. Supp. 2d 220, 224 (D. Me. 2010).

255. Lynce v. Mathis, 519 U.S. 433, 441 (1997); *Douglas*, 746 F. Supp. 2d at 224.

committed.[256] The Supreme Court also noted that laws which "mollif[y] the rigor of the criminal law" present no ex post facto violation.[257]

The majority of the provisions in the Fair Act represent ameliorative changes as they *decrease* the penalties associated with crack cocaine possession, and therefore do not present an ex post facto violation.[258] Furthermore, in regards to the relationship between federal sentencing guideline amendments and the Ex Post Facto Clause, "Congress did not believe that the [] clause would apply to amended sentencing guidelines."[259] Courts agreed with Congress, as long as the defendant was not subject to an increased punishment.[260] The federal sentencing guidelines require a court to use the sentencing guidelines in effect at the time of sentencing, unless the court determines the sentence will violate the Ex Post Facto Clause, in which case the court should apply the guidelines in effect at the time the offense was committed.[261]

C. Judicial Retroactive Application of the Fair Act To Cases Not Yet Final

Under the common law doctrine of abatement, the repeal of a criminal statute or the mitigation of penalties associated with a crime applied retroactively and terminated all prosecutions in which a defendant had not reached a finalized conviction.[262] In order to avoid the termination of pending prosecutions, a legislature needed to specifically include an express savings clause in the new statute manifesting an intent that the previous criminal statute apply to all pending prosecutions.[263] In the absence of an express savings clause in the new statute, when a legislature repealed or amended a statute, the doctrine of abatement essentially characterized the prior statute as "having never existed."[264] Thus, to prevent the abatement of pending prosecutions in situations where the legislature inadvertently failed to insert an express savings clause, legislatures began adopting general savings clauses.[265]

256. Calder v. Bull, 3 U.S. 386, 390 (1798) (Justice Chase listed four scenarios in which the Ex Post Facto Clause can be violated: "1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.").

257. *Id.* at 391.

258. *See* discussion *supra* Part III (A) (examining the Fair Act's ameliorative provisions).

259. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 cmt. Background (2010); *Douglas*, 746 F. Supp. 2d at 224 n.23. A court should apply the sentencing guidelines in effect at the date of sentencing, unless such guidelines would result in a harsher penalty then previous guidelines in effect at the time the offense was committed.

260. *See* sources cited *supra* note 259.

261. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b) (2010); *Douglas*, 746 F. Supp. 2d at 229.

262. Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120, 121, 123 (1972). The author would also like to thank the Office of the Federal Defender for providing an abundance of resources and case law regarding crack cocaine sentencing and retroactivity and its relationship with the savings statute, located on their website, http://www.fd.org/odstb_crackcocaine.htm and the OFFICE OF THE FEDERAL DEFENDER, MODEL LETTER OR PLEADING ON THE APPLICATION OF THE FAIR SENTENCING ACT TO PENDING CASES WITH OFFENSES COMMITTED BEFORE AUGUST 3, 2010, at 2 (on file with the author).

263. Mitchell, *supra* note 219, at 25.

264. *Id.*

265. *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation,*

In drafting the Fair Act, Congress included no express clause saving the previous harsh mandatory minimums for pending prosecutions and no express provision applying the Fair Act retroactively.[266] Presented with this dilemma, courts must determine Congress's intent and consider the general federal savings statute, which reads:

> The 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 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.[267]

Many courts interpret the language of the general savings statute literally, indicating intent to apply the general savings statute to prevent retroactivity in cases in which Congress did not specifically insert a provision providing for retroactivity.[268] However, the Fair Act's purpose, restoration of fairness in federal cocaine sentencing, fails if incarcerated defendants or those awaiting sentencing cannot benefit from the ameliorative legislation simply because they committed the act prior to the effective date of the amended statute.[269] In 1908, Justice White indicated the general savings statute should not apply to new legislation when it conflicts with the legislative goals of Congress.[270] Courts reemphasized this concept explaining the general savings statute was not an "inflexible rule of law" but one of statutory construction "in order to effect the will and intent of Congress" when determining application to new legislation.[271]

Various state supreme courts make persuasive and sensible arguments for correctly applying ameliorative legislation retroactively.[272] Similarly, in applying the Fair Act, federal courts need to conclude the legislative intent behind the new ameliorative legislation trumps application of the general savings statute.[273] For instance, in *People v.*

supra note 262, at 127 (The adoption of general savings legislation resulted in the "shifting of the legislative presumption from one of abatement unless otherwise specified to one of non-abatement in the absence of contrary legislative direction.").

266. The Fair Act includes no express savings clause requiring the pre-amendment statute to continue to apply to cases in which defendants have not been sentenced. Furthermore, there is no provision expressly making the Fair Act retroactive. Congress's inaction, purposely or inadvertently, leaves the decision to courts. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

267. 1 U.S.C. § 109 (2006).

268. *See* United States v. Carradine, 621 F.3d 575, 580 (6th Cir. 2010) (holding that in the absence of an express retroactive provision in the Fair Act, the general federal savings statute requires the court to apply the penalties associated with the crime at the time it was committed); Holiday v. United States, 683 A.2d 61, 70-71 (D.C. 1996); *see also* Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 661 (1974) ("[T]he saving clause has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense.") (internal citations omitted)).

269. *See* Great N. Ry. Co. v. United States, 208 U.S. 452, 465 (1908) ("[The general savings statute] cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment."); OFFICE OF THE FEDERAL DEFENDER, *supra* note 262, at 5.

270. Great N. Ry. Co., 208 U.S. at 465 (explaining an exception to the application of the general savings statute when "it results that the legislative mind will be set at naught by giving effect to the [general saving statute.]"); OFFICE OF THE FEDERAL DEFENDER, *supra* note 262, at 5.

271. *Holiday*, 683 A.2d at 103 (Schwelb, J. dissenting) (quoting in part Hertz v. Woodman, 218 U.S. 205, 217 (1910)) (emphasis omitted).

272. *Id.* at 67-70 (describing the approaches of various state supreme courts in refusing to apply general savings statutes when doing so would undermine legislative intent).

273. *Id.* Federal courts should adopt the various state court approaches regarding how to apply the Fair Act in the absence of an express retroactive clause in the new legislation.

Oliver, a fourteen-year-old defendant murdered his brother subjecting him to a statutory penalty for murder in the first degree.[274] Prior to trial, the New York legislature amended the statute to prohibit the criminal prosecution of children under the age of fifteen, directing courts to treat children under fifteen only as "delinquents" and not criminals.[275] Although the new ameliorative legislation did not include instructions as to its effect on prior acts, thus triggering the state's general savings statute, the court rejected its application.[276] The court explained the "very nature of the legislation" and its "general object" provided a "forceful stamp" that the new ameliorative legislation apply to all defendants with pending cases, including in *Oliver*, where the crime was committed under the pre-amended statute.[277]

In *Oliver*, New York's highest court based its reasoning on the concept that continuing punishment under the old harsh law would contribute "no [legitimate] purpose other than to satisfy a desire for vengeance."[278] Although the legislature did not include an express retroactive clause in the ameliorative legislation, similar to Congress in drafting the Fair Act, the court recognized the legislature's intent in correcting a harsh and unjustified statute was to render the law more "humane" and fair.[279] The *Oliver* court viewed ameliorative legislation, which mitigates punishment, as a reflection of the legislature's renewed efforts to punish criminal acts in accordance with the three main theories of punishment: "(1)to discourage and act as a deterrent upon future criminal activity, (2)to confine the offender so that he may not harm society and (3) to correct and rehabilitate the offender."[280] The court suggested that the continued application of harsh pre-amendment penalties to defendants with pending cases, once the legislature indicated an abandonment of those penalties, did not fit into any justifiable theory of punishment.[281] Congress, in passing the Fair Act, corrected a legislative mistake through mitigation of the harsh penalties associated with crack cocaine trafficking.[282] Similar to the court in *Oliver*, which recognized the intent of the legislature and the principles of punishment, federal courts need to look beyond the general savings statute and apply the Fair Act's provisions to all federal defendants to ensure fairness.[283]

In *Holiday v. United States*, the dissenting opinion gives further reasoning for

274. People v. Oliver, 134 N.E.2d 197, 198-99 (N.Y. 1956).

275. *Id.* at 199.

276. *Id.* at 202 ("To preserve the criminal penalties previously in force and to inflict them after the law-making body has so determined and declared would serve no justifiable purpose.").

277. *Id.*

278. *Id.* ("Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance.").

279. *Id.* at 202.

280. *Id.* at 201-02.

281. *Id.* at 202 ("A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.").

282. *See* Letter from Dick Durbin & Patrick Leahy, United States Sens., to the Honorable Eric Holder, United States Att'y Gen. (Nov. 17, 2010), *available at* http://www.famm.org/Repository/Files/Fair%20Sentencing%20Act%20AG%20Holder%20letter%20111710%5B1%5D.pdf (describing the mitigating provisions of the Fair Act and the intended effects on the criminal justice system).

283. *Id.* (explaining the sense of urgency behind the legislation and the absurdity that would result if the Fair Act is not applied to all defendants in which the court has yet to sentence).

properly overlooking the general savings statute to reflect the intent of the legislature.[284] Multiple defendants convicted of drug offenses were subject to mandatory minimum penalties that the legislature subsequently repealed prior to sentencing.[285] Arguing the court should apply the new ameliorative penalties to defendants regardless of the general savings statute, the dissenting judge relied on Supreme Court precedent stressing the duty of courts to make certain that defendants "are not sent to prison, or kept there, unless such incarceration clearly and unambiguously reflects the legislative will."[286] Senator Dick Durbin, who introduced the Fair Act legislation, clearly indicated legislative will when he stated Congress intended the Fair Act's ameliorative provisions become effective "as soon as possible" to restore fairness to federal cocaine sentencing.[287]

In *Holiday*, the dissenting judge found it difficult to believe that a legislature, which passed ameliorative legislation to cure an unfair sentencing statute, intended for judges to use the general saving statute to continue sentencing under the pre-amended statute simply because the defendants committed the act prior to the effective date of the amended statute.[288] Regardless of whether the legislature included an express retroactive clause in the new ameliorative legislation, it was "an inevitable inference" that a legislature's mitigation of the penalties associated with a crime demonstrated its determination that the lighter punishment was suitable to apply to all cases not yet final.[289] Giving complete deference to the legislature, the dissent explained the reason to apply ameliorative changes retroactively in light of a general savings statute was to give effect to the "rational[]" decision of the legislature in not wanting courts to continue to impose sentences that the legislature deemed "excessive or unfair."[290]

One of the few federal court's to rule on the retroactive application of the Fair Act relied on much of the same reasoning as the majority in *Oliver* and the dissent in *Holiday*.[291] In *United States v. Douglas*, the defendant pled guilty to crack cocaine trafficking and was subject to the pre-amended harsh ten-year mandatory minimum.[292] Before the defendant's sentencing, Congress passed the Fair Act, which greatly lessened the mandatory minimum for the defendant's possession amount from ten to five years.[293] The court correctly determined that application of the general savings statute to preserve the 100-1 crack-to-powder ratio for mandatory minimums would produce inconsistent

284. Holiday v. United States, 683 A.2d 61, 91-104 (D.C. 1996) (Schwelb, J. dissenting) (using state supreme court precedent to give an in-depth explanation of valid reasons why the court should fail to apply the general saving statute to new legislation, especially ameliorative, when it conflicts with legislative intent).

285. *Id.* at 64.

286. *Id.* at 91-92 (Schwelb, J. dissenting) (citing United States v. Bass, 404 U.S. 336, 348 (1971).

287. Letter from Dick Durbin & Patrick Leahy, *supra* note 282.

288. *Holiday*, 683 A.2d at 95 (Schwelb, J. dissenting).

289. *See id.* at 96 (quoting In re Estrada, 408 P.2d 948, 951 (Cal. 1965).

290. *See id.* (explaining the reason for adopting the principles of state supreme courts is obvious). The dissent opinion also cites United States Supreme Court precedent that suggest the rule of lenity applies to cases involving statutory ambiguity and potential mandatory minimum sentence. *See id.* at 99.

291. *See* United States v. Douglas, 746 F. Supp. 2d 220 (D. Me. 2010). While not directly citing *Oliver* and *Holiday* in the decision, this court's logic was in line with those cases.

292. *Id.* at 221.

293. *Id.*

results with the federal sentencing guidelines.[294] The court explained that preserving the harsh mandatory minimums through the general savings statute would conflict with the Fair Act's specific requirement that the USSC promulgate emergency amendments adopting the ameliorative changes of the Fair Act.[295] Furthermore, because the USSC requires courts to use the sentencing guidelines in effect at the time of sentencing, this would result in the amended guidelines reflecting the new 18-1 crack-to-powder ratio, while the general savings statute preserved the previous 100-1 crack-to-powder ratio for defendants subject to mandatory minimums.[296] Remaining consistent with the federal sentencing guidelines, the court held the Fair Act's reduced mandatory minimums applied to all defendants not yet sentenced, even if the criminal conduct occurred prior to enactment of the Fair Act.[297] Not relying on the general savings statute, the court emphasized "an earlier Congress cannot bind a later Congress," again stressing that Congress certainly did not want courts to continue imposing excessive and unfair penalties.[298]

In rejecting the application of the general savings statute, federal courts need to adopt the logical and fair approach as the previously discussed courts and give retroactive effect to every sentencing that comes before them.[299] Although the passage of the Fair Act is a large step forward towards ensuring a fair and consistent cocaine sentencing policy, failing to apply the lessened mandatory minimums to defendants not yet sentenced takes a step backward.[300] In order to avoid unnecessary litigation and judicial confusion as to whether courts should apply the Fair Act's changes retroactively to pending cases, Congress should pass a new bill clearly directing courts to apply the Fair Act retroactively.[301] As the Fair Act passed with unanimous support, surely a bill introducing a retroactive clause would receive similar support.[302]

D. Post-Sentence Application of the Fair Act

Although it is the duty of the courts to interpret the laws the legislature enacts, they generally do not apply retroactive laws to defendants already incarcerated.[303] This

294. *Id.* at 228-30 (explaining the problem that the application of the general savings statute will present when interacting the federal sentencing guidelines).

295. *Id.* at 228 ("[T]he new Guidelines cannot be "conforming" and "achieve consistency" (Congress's express mandate) if they are based upon statutory minimums that cannot be effective to a host of sentences over the next five years until the statute of limitations runs on pre-August 3, 2010 conduct.").

296. *See id.*

297. *Id.* at 231.

298. *Id.* at 230-31 (In ruling on the application of the general saving statute, the court explained, "I do not rely upon [the general savings clause] to escape the ramification of what Congress set out to do in 2010.").

299. *See* discussion *supra* Part III (C) (examining the reasoning of courts in not applying the general savings statue).

300. *See* Statement of Attorney General, *supra* note 226.

301. *See* 1 U.S.C. § 109 (2006) (indicating that Congress can override the general savings statute by simply inserting a clause stating their intent to make the new legislation retroactive).

302. *See S. 1789: Fair Sentencing Act of 2010*, *supra* note 223 (listing the quick legislative history of the Fair Act).

303. *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, *supra* note 262, at 145; *see* People v. Oliver, 134 N.E.2d 197, 203 (N.Y. 1956) ("It may be well to note that the construction that we are here according to the amendment cannot be applied in favor of an offender tried and sentenced to imprisonment before its enactment.") (citing People ex. rel. Downie v. Jackson, 146 N.Y.S.2d 457 (1955).

presumption against applying ameliorative retroactive changes to defendants with finalized judgments derives from the policy belief that altering final judgments results in the court exercising pardoning or clemency powers reserved for the executive branch.[304] However, federal courts allow modification of imprisonment terms in numerous instances such as a Bureau of Prisons motion for a reduced sentence, a USSC amendment to the guideline range, or "another statute . . . *expressly* permit[ting] the court to do so."[305] Retroactive laws are important and powerful tools for Congress.[306] They equip the legislature with the means necessary to achieve "social and political goals" in an effort to correct and improve old laws.[307]

Although courts may apply the ameliorative provisions of the Fair Act retroactively to defendants not yet sentenced, they generally do not have the ability to modify final judgments of incarceration unless a statute expressly permits modification.[308] In addition, because the Fair Act represents Congress's amendments to the mandatory minimum laws, the USSC cannot make the Fair Act's changes to mandatory minimums retroactive.[309] Congress is the only entity that can make the Fair Act retroactive through the passage of new legislation that specifically makes the Fair Act's provisions applicable to incarcerated defendants.[310] Congress, with the help of the USSC, the Bureau of Prisons, and the courts, can successfully pass a new bill setting up an efficient procedure for incarcerated defendants to take advantage of the new lighter penalties. Congress can work closely with the USSC, who successfully made a crack guideline amendment retroactive in 2008, in determining the best method for using retroactivity to reduce mandatory minimum penalties for incarcerated defendants.[311] As many have already noted, courts, experienced in dealing with retroactive crack amendments since 2008, are ready to manage a large amount of sentence reductions primarily submitted through simple motions that would not overburden the court.[312]

Most importantly, it is absurd to deny incarcerated defendants the benefits of the lesser penalties when they are the ones who have paid the ultimate price for Congress's harsh policy.[313] The President of Families Against Mandatory Minimums was correct in stating that a court's determination on whether an incarcerated defendant can benefit from the Fair Act should not depend on an "arbitrary" factor such as when the criminal

304. *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, *supra* note 262, at 145.

305. United States v. Goodwyn, 596 F.3d 233, 235 (4th Cir. 2010) (citing 18 U.S.C. § 3582(c)).

306. *See* Jan G. Laitos, *Legislative Retroactivty*, 52 WASH. U. J. URB. & CONTEMP. L. 81, 99 (1997).

307. *See id.*

308. 18 U.S.C.A. § 3582 (c)(B) (West 2010) ("[T]he court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.") This section must not conflict with any section governing punishments listed in the penalties section of 21 U.S.C. 841(b). In other words, if the mandatory minimum penalty cannot override any other rule of law, then the § 841(b) will have to be modified to allow for sentence reductions. *See* 21 U.S.C.A. 841(b) (West 2010).

309. Making Reforms Retroactive, *supra* note 245.

310. *Id.*

311. *See supra* discussion Part II (b).

312. Harlan Protass & Mark D. Harris, *Make New Crack Law Retroactive*, NAT'L L.J., Sept. 27, 2010, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202472477377&Make_new_crack_law_retroactive&slreturn=1&hbxlogin=1.

313. *See* Stewart, *supra* note 11.

act took place.[314] In the past, courts found it troubling that an incarcerated defendant was not able to benefit from ameliorative legislation, arguing, "drawing the line at finalized convictions is no less arbitrary or more fundamentally fair than drawing the line at any other stage in the criminal process."[315] Congress, in passing the Fair Act, lowered the requisite culpability necessary to trigger mandatory minimums.[316] Continuing to punish a defendant for a degree of culpability that Congress no longer believes is fair does not find justification under any theory of punishment.[317] In addition, Congress can give life back to thousands of defendants previously sentenced under the harsh disproportionate sentences.[318] Congress has the opportunity to minimize the social costs associated with incarceration as well as utilize tax dollars for various rehabilitation programs.[319] It is meaningless to continue expending tax dollars to keep defendants incarcerated under mandatory minimums that Congress views as excessive and unfair.[320] Two authors from The National Law Journal said it best, stating, "[n]ow Congress needs to finish the job by making the new scheme retroactive" as it seems only fair that incarcerated defendants "should be among the first to receive relief" from Congress's "enlightened perspectives about punishment."[321] Furthermore, application of the Fair Act retroactively to incarcerated defendants truly accomplishes Congress's goal of restoring fairness in federal sentencing.[322]

IV. CONCLUSION

After over two decades of disproportionately punishing crack cocaine trafficking much worse than powder cocaine trafficking, Congress reduced the sentencing disparity to reflect a much fairer penalty.[323] The United States Sentencing Commission, criminologists, and doctors criticized the reasons associated with supporting the harsh disparity and continuously proved the reasons lacked a scientific and factual basis.[324] The topic resulted in heavy litigation, and the federal courts disagreement with the harsh sentencing disparity took center stage in a major Supreme Court case.[325] The negative effects of the sentencing disparity had a discriminatory impact, which greatly increased

314. *Id.*

315. *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, supra* note 262, at 146 (referencing dissenting opinions in cases in which judges found not allowing ameliorative legislation to apply retroactively to incarcerated defendants violates the principles of justice).

316. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

317. *See* Mitchell, *supra* note 219, at 43 ("The restriction of ameliorative changes in [denying retroactive amelioration] is based not upon the degree of culpability but temporality. To deny the application of change based upon such an arbitrary distinction offends the theories of punishment whether one is a consequentialist or retributivist.").

318. *See* Letter from Julie Stewart, Families Against Mandatory Minimums, to the Honorable William K. Sessions III, Chair, United States Sentencing Comm'n 8-9 (Aug. 16, 2010) (on file with author).

319. *See id.* at 9.

320. *See id.* (explaining it costs nearly $26, 000 to incarcerate a defendant in federal prison every year, while alternatives to incarceration reduce costs but increase opportunities).

321. Protass & Harris, *supra* note 312.

322. Fair Sentencing Act § preamble.

323. *See* The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

324. *See* discussion *supra* Part II (C). *See generally* sources cited *supra* note 60.

325. *See* discussion *supra* Part II (D). *See generally* Kimbrough v. United States, 552 U.S. 85 (2007).

African American incarceration rates.[326] The Department of Justice is one of many organizations that supported the revision of cocaine sentencing, recognizing "[p]ublic trust and confidence [as] essential elements of an effective criminal justice system."[327] The Department of Justice is confident that the passage of the Fair Act promotes trust in the government's ability to punish in a manner society deems fair and appropriate.[328] Although the Fair Act does not specifically allow for application to cases not finally adjudicated or defendants already incarcerated, the courts and Congress have the ability to render the Fair Act's mandatory minimum changes retroactive.[329] With the court's correct interpretation of Congress's clear intent behind passing the Fair Act, the general savings statue does not restrict retroactive application to cases not finally adjudicated.[330] Furthermore, Congress needs to pass new legislation to extend the Fair Act's benefits to those who have suffered most, those behind bars under the previous unjust sentencing policy. The success of the USSC's retroactive crack amendment in 2008 proves that courts have the ability and experience to handle reduced mandatory minimums made retroactive for defendants in prison.[331] Otherwise, defendants remain incarcerated under laws that Congress views as unfair.[332] For continued faith and respect in the criminal justice system, basic fairness requires the government to apply ameliorative changes retroactively, regardless of when the criminal conduct occurred.[333]

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326. *Unfairness In Federal Cocaine Sentencing*, *supra* note 1, at 97-98 (statement of Marc Mauer) (discussing crack cocaine and its devastating impact on the African American community).

327. *Id.* at 31 (statement of Assistant Att'y Gen. Lanny A. Breuer).

328. *See id.*

329. *See* discussion *supra* Part III (C) & (D).

330. *See supra* Part III (C).

331. *See* source cited *supra* note 80; Protass & Harris, *supra* note 312; PRELIMINARY DATA REPORT, *supra* note 79.

332. The Fair Act preamble reads, "An Act To restore fairness to Federal cocaine sentencing." Thus, Congress is attempting to fix a law they believe is unfair. Continuing to punish defendants based on an old unfair law does not ensure basic equity or fairness. *See* The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

333. *See Unfairness In Federal Cocaine Sentencing*, *supra* note 1, at 31 (statement of Assistant Attorney General Lanny A. Breuer).

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