Criminal Law Sunset Provisions As Racial Justice

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* Professor of Law, Howard University School of Law. The Author thanks Howard Law School for the financial support provided for this Article. This Article is dedicated to Dr. Freida H. Outlaw, who recognizes and values the humanity of all people, and to the Author's former public defender office clients, who were partners in the fight to rid the criminal legal system of racially discriminatory practices and outcomes. Thank you to the Penn State Law Review editors and staff for their partnership in publishing this Article.

I. INTRODUCTION

United States District Court Judge Clyde Cahill Jr. did not hold back or mince his words:

> The reason why we cannot wait for the congressional modification and changes that the Court believes will occur in time is that the horror of continuing is so very destructive. There are many prisoners serving 10–year sentences for possessing with intent to distribute 50 grams of crack. They are usually between 18–30 years of age and about 90 percent are black. Their absence in such numbers, if continued, threatens the possibility of the ultimate extinction of the black race in America.[1]

The target of Judge Cahill's ire was the Anti-Drug Abuse Act of 1986 ("1986 Act"), specifically its mandatory minimum sentencing scheme under which (at the time) one gram of crack was equivalent to 100 grams of powder cocaine, despite being the same drug.[2] While the 100:1 sentencing ratio seemed racially neutral on its face, Judge Cahill knew that because crack offenders were overwhelmingly black and powder cocaine offenders were overwhelmingly white, the ratio was resulting in clear, obvious, and disturbing racial disparities.[3] In the Eastern District of Missouri, where Judge Cahill sat, 98.2% of the crack defendants at the time were black, which exceeded the already alarming national rate of 92.6%.[4] In comparison, the national breakdown at the time for the race of powder cocaine defendants was 45.2% white compared to 20.7% black.[5]

After applying and seeing the impact of the 100:1 powder cocaine-crack ratio for nearly eight years, Judge Cahill had seen enough. He had enough of the 100:1 ratio leading to racial sentencing disparities, where black offenders convicted of crack offenses received longer prison sentences than white offenders convicted of powder cocaine offenses.[6] The disparity he witnessed was "so significantly disproportional that it shock[ed] the conscience of the Court."[7] While he understood and appreciated Congress's effort to address the public's panic and fear about

1. United States v. Clary, 846 F. Supp. 768, 794 (E.D. Mo. 1994), *reversed by*, 34 F.3d 709 (8th Cir. 1994).

2. *See id.* at 770. *See generally id.*

3. *See id.* at 786 (discussing statistics on race of crack and powder cocaine offenders).

4. *See id.*

5. *See id.*

6. *See id.* at 770.

7. *Id.* at 770.

crack, he was disturbed by the racially coded language and images Congress used to enact and justify the 1986 Act.[8] He was dismayed and troubled by Congress abandoning its usual legislative process to enact the 1986 Act at an unprecedented accelerated pace that did not allow for deliberation or input from experts.[9] The long parade of black crack offenders prosecuted in his district made him suspicious of the purpose of the 1986 Act, the 100:1 ratio, and how the local U.S. Attorney's Office was using the law and its ratio.[10] For these reasons and more (including the country's history of using the criminal justice system to enforce a racial hierarchy), Judge Cahill held that the 100:1 powder cocaine-crack ratio violated the "Equal Protection Clause of the U.S. Constitution generally and as applied in this case."[11]

Judge Cahill's analysis was deep, thorough, and abundantly sourced.[12] His opinion is a remarkable and strong indictment of the 100:1 ratio and the racial disparities and racial injustice it caused. And yet, without hesitation or concern, the Eighth Circuit reversed Judge Cahill's decision.[13] According to the circuit court, Judge Cahill's evidence and findings "[fell] short of establishing" that Congress acted—consciously or unconsciously—with discriminatory intent, and that the defendant in the case had failed to sufficiently demonstrate that he was unconstitutionally targeted for prosecution because of his race.[14]

Sixteen years would pass after Judge Cahill's opinion before Congress fully acknowledged the problems with the 100:1 powder cocaine-crack ratio by passing a law (i.e., the Fair Sentencing Act) to narrow (but not eliminate) the ratio.[15] In those 16 years, and the eight that preceded them, thousands of black offenders convicted of crack-related crimes were sentenced to unjustly longer sentences compared to white offenders convicted of powder cocaine offenses. Much of this harm could have been avoided. Available to Congress was a mechanism to avoid many of the racial disparities and injustices caused by the 1986

8. *See id.* at 783–84.

9. *See id.* at 784–85.

10. *See id.* at 788–91.

11. *Clary*, 846 F. Supp. at 797.

12. *See* United States v. Clary, 34 F.3d 709, 713 (8th Cir. 1994) ("The district court's painstakingly-crafted opinion demonstrates the careful consideration it gave not only to the testimony before it, but also to the voluminous documents introduced by Clary, including both law review and text materials. This case undoubtedly presents the most complete record on this issue to come before this court.").

13. *See id.* at 714.

14. *Id.* at 713; *see id.* at 713–14.

15. *See* Dorsey v. United States, 567 U.S. 260, 264 (2012) ("In 2010, Congress enacted [the Fair Sentencing Act] reducing the crack-to-powder cocaine disparity from 100-to-1 to 18-to-1." (citing Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010))).

Act: a sunset provision expiring the 1986 Act after a certain period of years, absent reauthorization by Congress. A sunset provision would have forced Congress, well before it did, to acknowledge and confront the law's racial injustice consequences, and either justify or amend the law under threat of expiration.

Using the 1986 Act as a backdrop, this Article proposes that incorporating a sunset provision into a federal criminal drug statute is an act of racial justice. As shown here, sunset provisions in federal criminal drug laws serve racial justice by being time-triggered guardrails against the "horror of continuing" with criminal drug laws.[16] Often enacted in times of public panic, these laws are readily used to arrest, prosecute, and imprison people of color at disproportionate rates, even when the racial injustice consequences are widely known.[17] To make the case, this Article proceeds in five sections. Part II sets the key definitions for the remainder of the Article. Part III summarizes the history and evolution of sunset provisions in American law. Part IV discusses the common race-neutral arguments in support of sunset provisions. Part V explores the connection between sunset provisions and racial justice. In Part VI, the 1986 Act, particularly its powder cocaine-crack sentencing ratio, is used as a case study for why incorporating sunset provisions into federal criminal drug laws yields significant and impactful racial justice benefits.

II. DEFINITIONS

A. Legislative Sunset Provisions

Legislative sunset provisions limit the lifespan of a law or government agency.[18] There are three primary types: (1) sunset provisions that terminate a law, government program, or government agency on a specific date or after a defined period of time; (2) sunset provisions that require the legislature to renew or reauthorize a law, government program, or government agency at a specific date or after a defined period of time; and (3) sunset provisions that terminate a law, government program, or government agency once a defined goal,

16. *Clary*, 846 F. Supp. at 794.

17. *See infra* Part V.

18. *See* Mirit Eyal-Cohen, *Unintended Legislative Inertia,* 55 GA. L. REV. 1193, 1208–09 (2021); David Schraub, *Doctrinal Sunsets,* 93 SO. CAL. L. REV. 431, 439–40 (2020); John E. Finn, *Sunset Clauses and Democratic Deliberations: Assessing the Significance of Sunset Provision in Antiterrorism Legislation,* 48 COLUM. J. TRANSNAT'L L. 442, 445 (2010) (discussing different types and forms of sunset provisions); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1960 (2020); Rebecca Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code,* 40 GA. L. REV. 335, 351 (2006). Judicial sunsets—judicially imposed time limits on a law or agency—are not discussed in this Article. For more on judicial sunsets, see generally Schraub, *supra*.

criteria, or effect has been achieved.[19] Sunset provisions can apply to an entire statute or parts of a statute, to agency regulations or programs, or to an entire administrative agency.[20]

B. Racial Justice

A widely accepted definition of "racial justice" remains elusive and hotly debated.[21] One lasting and dominating definition is "the systemic fair treatment of all races, resulting in opportunities and outcomes for all."[22] With the rise and development of Critical Race Theory, this long-held definition has been challenged as resting on a false premise that America's institutions and culture are color-blind, racially and culturally neutral, objective, and meritocratic.[23] A side in this debate is not chosen or argued for here. For this Article, racial justice is defined using a narrow lens by linking, filtering, and confining the elusive concept to criminal law, procedure, practice, and policy. Here, racial justice means the movement toward the systemic fair and equal treatment of people of all races by the criminal justice system through: (1) the elimination of discriminatory practices and intention in the formation of criminal laws and policy, the enforcement of criminal laws, and the imprisonment of violators of the law; and (2) the prompt mitigation, and elimination, if necessary, of criminal laws, enforcement practices, and policies that

19. *See* Eyal-Cohen, *supra* note 18, at 1212–13 ("Temporary legislation . . . automatically repeal[s] . . . [when] it has fulfilled its purpose or achieved its desired effect."); *id.* at 1211 (describing the history of sunset laws that "were passed in hopes of abolishing redundant programs and agencies"); *id.* at 1212 ("[P]eriodic determinations pressure future legislatures to decide by a specific date whether a particular rule, program, or agency should persist.").

20. *See The Federalist Society 2011 National Lawyers Convention*, 16 TEX. REV. L. & POL. 339, 341 (2012) (comments of Professor Thomas W. Merrill).

21. *See* Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. REV. 1009, 1010 (2002) (noting the "current conflicts over how to define and achieve racial justice"); Gary Peller, *History, Identity, and Alienation*, 43 CONN. L. REV. 1479, 1483–88 (2011) (discussing how the definition of racial justice varies according to political alignment). *See generally* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990) [hereinafter Peller, *Race Consciousness*] (discussing how critical race theory is transforming the definition, components, and understanding of racial justice).

22. *See Racial Justice in Education: Key Terms and Definitions*, NAT'L EDUC. ASS'N (Jan. 2021), https://perma.cc/B7NJ-EKFH.

23. *See* Etienne C. Toussaint, *Dismantling the Master's House: Toward a Justice-Based Theory of Economic Development*, 53 U. MICH. J.L. REFORM 337, 392–93 (2019); *Foreword to the Symposium on Race Consciousness and Legal Scholarship*, 1992 U. ILL. L. REV. 945, 945–46 (1992). *See generally* Peller, *Race Consciousness*, *supra* note 21 (discussing how critical race theory is transforming the definition, components, and understanding of racial justice); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) (arguing that American institutions continually alter and shift definitions of merit to safeguard white privilege and elevated status).

yield unjustified racially disproportionate consequences (direct, indirect, intended, and unintended).

III. SUNSET PROVISIONS & AMERICAN LAW

Sunset provisions are no stranger to American law.[24] Founding father Thomas Jefferson was one of the earliest proponents of sunset provisions. In a letter to James Madison, Jefferson argued that "every law [should] naturally expire[] at the end of 19 years."[25] Fixed expiration was needed, according to Jefferson, because each generation had the natural right to "govern . . . as they please," which includes the right to make its own laws and not be bound and limited by the laws of a prior generation.[26] Jefferson's suggestion did not make its way into the Constitution largely due to Madison's influence and belief that a constitutional sunset requirement would cause debilitating instability for property rights and businesses.[27] Nonetheless, a narrow and limited sunset provision did make its way into the Constitution: Article I, Section 8, Clause 12 restricts the use of military appropriations to two years.[28]

Despite the resistance to including a comprehensible sunset provision in the Constitution, colonial legislatures and early congresses did embrace sunsets for individual laws.[29] The Sedition Act of 1798, for instance, which criminalized the printing, publishing, or speaking of any false, scandalous, or malicious statement about the government, expired

24. *See* Eyal-Cohen, *supra* note 18, at 1209; Schraub, *supra* note 18, at 437 ("Sunset clauses have a long pedigree in American . . . law."); Michael Gentithes, *Sunsets on Constitutionality & Supreme Court Efficiency*, 21 VA. J. SOC. POL'Y & L. 373, 384 (2014); Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1356 (2008); Jacob E. Gerson, *Temporary Legislation,* 74 U. CHI. L. REV. 247, 249–61 (2007); *see also* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1960 (2020) ("The idea of temporary legislation is not new.").

25. Gentithes, *supra* note 24, at 384; Myers, *supra* note 24, at 1328. The full letter is available at The Papers of Thomas Jefferson maintained by Princeton University. *See II. Thomas Jefferson to James Madison, 6 September 1789*, NAT'L ARCHIVES, https://perma.cc/TYG6-ZBVY (last visited Oct. 15, 2025) (transcribing Letter from Thomas Jefferson to James Madison (Sep. 6, 1789)).

26. *II. Thomas Jefferson to James Madison, 6 September 1789*, *supra* note 25; *see id.* ("The earth belongs always to the living generation. They many manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please."); *see also* Myers, *supra* note 24, at 1357–59; Kysar, *supra* note 18, 351.

27. *See* Myers, *supra* note 24, at 1358–59.

28. *See* U.S. CONST. art I, § 8, cl. 12 ("To raise and support Armies, but no Appropriation of Money to that Use shall be a longer Term than two Years.").

29. *See* Adler & Walker, *supra* note 24, at 1961; Jacob Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 250–55 (2007).

by design in 1801.[30] Many colonial legislatures had standing committees to address the renewal of temporary laws scheduled to expire.[31]

Sunset provisions gained intensive attention during the late 1960s and early 1970s.[32] The rise in attention is widely accredited to political theorist Thomas Lowi.[33] In 1969, Lowi proposed a "tenure-of-statutes act" that would limit the life of any law creating a federal agency to five to ten years.[34] Lowi argued that sunset provisions were needed to disrupt stagnant government bureaucracies that become bloated, inefficient, and beholden to the interests the agencies are supposed to monitor and regulate.[35] Lowi's idea gained traction as public distrust of government institutions grew during the 1970s.[36] President Jimmy Carter championed Lowi's idea during his presidency.[37] During his 1979 State of the Union Address, Carter declared that the country needed a "[sunset] law that when government programs have outlived their value, they will automatically be terminated."[38]

The growing popularity did not translate into the passage of a comprehensive or broad federal sunset law. This includes two promising legislative efforts during the 1970s to mandate periodic reviews of government programs with the possibility of termination.[39] The first effort, the Sunset Act of 1977, "would have subjected virtually all federal programs to strict review and evaluation every four years."[40] Even though it had the support of President Carter, the bill died in committee.[41] A few years later, in 1979, the federal "Sunset Act," which

30. *See* Adler & Walker, *supra* note 24, at 1961.

31. *See* Gersen, *supra* note 29, at 253; *see also* David M. Gold, *Rites of Passage: The Evolution of the Legislative Process in Ohio, 1799–1937*, 30 CAP. U. L. REV. 631, 631–32 (2002) (noting that by the 1770s, colonial legislatures had a standing committee responsible for "report[ing] on the renewal of temporary laws").

32. *See* Gentithes, *supra* note 24, at 385; Chris Mooney, *A Short History of Sunsets,* LEGAL AFFAIRS (Feb. 2004); Adler & Walker, *supra* note 24, at 1961; Kysar, *supra* note 18, at 351–52.

33. *See* Gentithes, *supra* note 24, at 385.

34. *See* Mooney, *supra* note 32; Adler & Walker, *supra* note 24, at 1961; Gentithes, *supra* note 24, at 385; Kysar, *supra* note 18, at 351–52.

35. *See id.*

36. *See* Adler & Walker, *supra* note 24, at 1961; Gentithes, *supra* note 24, at 385; Kysar, *supra* note 18, at 352–53.

37. *See* Kysar, *supra* note 18, at 353.

38. *The Jimmy Carter Presidential Library and Museum*, JIMMY CARTER PRES. LIB. & MUS. (alteration in original), https://perma.cc/XP6Z-BGFP (last visited Oct. 15, 2025) (transcribing Jimmy Carter, State of the Union Address (Jan. 23, 1979)); *see also* Kysar, *supra* note 18, at 353.

39. *See* Kysar, *supra* note 18, at 355–56.

40. Gentithes, *supra* note 24, at 386 (quoting Chris Mooney, *A Short History of Sunsets,* LEGAL AFFAIRS (Feb. 2004)); Kysar, *supra* note 18, at 355–56.

41. *See* Kysar, *supra* note 18, at 355–56.

would have set a ten-year sunset provision for every federal agency program, passed the Senate, but died in the House.[42]

Despite these failed efforts, narrower sunset provisions have steadily found their way into a variety of federal legislation.[43] The federal tax code, in particular, has continuously embraced sunset provisions.[44] Tethered to Sections 4 and 5 of the Voting Rights Act of 1965, important bulwarks against state-sponsored disenfranchisement of nonwhite voters, was a sunset provision requiring congressional reauthorization every five years, which was repeatedly achieved until the Supreme Court declared the sections unconstitutional in 2013.[45] Federal immigration law has seen its share of sunset provisions, most notably during the 1920s when Congress enacted various laws to limit and curtail immigration (particularly from Asian countries) into the country.[46] Passed as part of the post-Watergate reform effort, the independent counsel provisions of the Ethics in Government Act of 1978 were subject to a five-year sunset absent reauthorization.[47]

Sunset provisions have also made their way into federal criminal statutes—the focus of this Article. An early example is the Aliens Act of 1789, which made it a crime to return to the United States after having been removed from the country by the president, had a two-year sunset term.[48] A ten-year sunset was added to the assault weapons ban provision of the Violent Crime Control and Law Enforcement Act of 1994 to

42. *See* Gentithes, *supra* note 24, at 386.

43. *See id.*; Kysar, *supra* note 18, at 356–57.

44. *See generally* Kysar, *supra* note 18.

45. *See* Shelby County v. Holder, 570 U.S. 529, 538 (2013). The Voting Rights of 1965 addressed "entrenched racial discrimination in voting" that had historically denied nonwhite citizens from voting and having their votes count in equal measure as white votes. *Id.* at 535; *see id.* at 536–37. Section 4 of the Act established a "coverage formula" for determining the "covered jurisdictions," meaning which states the Act applied to, and Section 5 provided that no "covered jurisdiction" could change their voting procedures unless cleared by federal authorities as established by the Act. *Id.* at 537–38.

46. *See, e.g.*, Immigration Act of 1924, Pub. L. 68-139, 43 Stat. 153; *see also* Gersen, *supra* note 29, at 255; Howard F. Chang, *Liberalized Immigration as Free Trade; Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1151–52 n.18 (1997) (noting that the 1921 Act was temporary). *See generally* Marisa S. Cianciarulo, *Seventeen Years Since the Sunset: The Expiration of 245(i) and Its Effect on U.S. Citizens Married to Undocumented Immigrants*, 18 CHAP. L. REV. 451 (2015) (discussing how the effect of the sunsetting of Section 245(i) of the Immigration and Nationality Act, which allowed undocumented individuals who married U.S. citizens to adjust their legal status while remaining in the United States instead of departing the country to apply for an immigrant visa abroad).

47. *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601, 92 Stat. 1824, 1873 (codified as amended at 28 U.S.C. § 598 (2006)). The independent counsel provisions were regularly reauthorized by Congress until 1999 when the provisions were allowed to lapse.

48. *See* Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 115 n.48 (2012).

garner congressional and public support.[49] That same year, President William Clinton signed into law the Violence Against Women Act of 1994, which provided funding to address and prosecute crimes against women and was legislatively set to expire after six years absent reauthorization.[50]

Less than a decade later, Congress included a sunset provision in its legislative response to the September 11, 2001 attack on the World Trade Center and the Pentagon: the USA PATRIOT Act.[51] The anti-terror legislation expanded law enforcement's surveillance capabilities and the executive branch's authority to detain and deport noncitizens linked to terrorist organizations.[52] A four-year sunset provision was added to many of the Act's provisions in response to bipartisan concerns that the hastily drafted legislation encroached too far on individual rights and that law enforcement and intelligence agencies would abuse their newly granted powers.[53]

State legislatures have also embraced sunset provisions. Colorado was the first state to pass a sunset law in 1976.[54] Following Colorado, the movement for sunset provisions moved quickly at the state level.[55] Over the next five years, 36 states enacted various forms of sunset laws.[56]

IV. HISTORICAL & COMMON JUSTIFICATIONS FOR SUNSET PROVISIONS

There is plenty of scholarship and commentary promoting sunset provisions as a needed and beneficial legislative tool.[57] Proponents

49. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110105, 108 Stat 1796, 2000; *see also* Kysar, *supra* note 18, 356–57.

50. *See* Eyal-Cohen, *supra* note 18, at 1198 n.17. The VMA was routinely and regularly reauthorized until it expired in 2019, and then was subsequently revived and reauthorized in 2022. *See id.*; *Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)*, WHITE HOUSE (President Biden Administration) (Mar. 16, 2022), https://perma.cc/MN55-3EAG. *See generally* Kaitlin O'Neil, *The 2012 Battle for the Reauthorization of the Violence Against Act: Lessons Learned and Questions Left Unanswered*, 35 WOMEN'S RTS. L. REP. 243 (2014).

51. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

52. *See id.*; *see also* Kysar, *supra* note 18, at 357.

53. *See* Kysar, *supra* note 18, at 357.

54. *See* Mooney, *supra* note 32; *see also* Mark B. Blickle, *The National Sunset Movement,* 9 SETON HALL J. LEGIS. 209, 213, 217 (1985), https://perma.cc/W5HH-64B3. The Colorado law imposed formal reviews of the state's government agencies, regulatory boards, and licensing commissions every six years. *See* Kysar, *supra* note 18, at 353–54. The law required targeted agencies, boards, and commissions to justify their continued existence during public hearings held by the Colorado State Assembly. *See id.*

55. *See* Adler & Walker, *supra* note 24, at 1961; Gentithes, *supra* note 24, at 385.

56. *See* Adler & Walker, *supra* note 24, at 1961.

57. For a comprehensive justification of sunset provisions, see generally Myers, *supra* note 24. *See also* Eyal-Cohen, *supra* note 18, at 1209–21 (discussing the

regularly argue that sunset provisions are an efficient method of eliminating obsolete laws.[58] To these sunset advocates, statute books are bloated with outmoded and outdated laws that have outlived their usefulness and purpose, but whose continued existence has a chilling effect on the public and can lead to governmental abuse.[59] Without sunset provisions, according to these proponents, "dead people" will continuously rule us because we will are forever subjected to laws that dictate our living that were envisioned and enacted by people who are no longer living and do not have to live with the laws' consequences.[60]

Emerging during the 1970s, and often cited today, is the experimentalism and compromise justification for sunset provisions.[61] Adherents of this view see sunset provisions as a valuable legislative lubricant that convinces skeptics to support a proposed law because the law's preset expiration allows lawmakers, the public, and interested parties to measure the law's effects and merits before it is extended or made permanent.[62] The ten-year sunset provision expiring the assault weapons ban within the Violent Crime Control and Law Enforcement Act of 1994,[63] and the four-year sunset added to multiple parts of the USA PATRIOT Act, are examples of this rationale at play.[64]

During the 1980s, sunset provisions grew in popularity as a means to reduce government bloat by streamlining and even eliminating government agencies and programs that waste taxpayer money.[65] Lastly, there is the populism school made popular in the 1960s by Lowi.[66] This rationale's foundation is that government agencies are frequently captured by special and corporate interests and fail to serve the people.[67] Sunset provisions sever this capture, as this school argues, by forcing an

scholarship supporting and criticizing sunset provisions). *But see* Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1008–15 (2011) (arguing that sunset provisions fail to yield the benefits claimed by sunset advocates).

58. *See The Federalist Society 2011 National Lawyers Convention*, *supra* note 20, at 343–44 (comments of Professor Thomas W. Merrill).

59. *See id.* (comments of Professor Thomas W. Merrill).

60. *Id.* at 350 (comments of Philip Howard).

61. *See id.* at 342–43 (comments of Professor Thomas W. Merrill); *see also* Eyal-Cohen, *supra* note 18, at 1216–17.

62. *See The Federalist Society 2011 National Lawyers Convention*, *supra* note 20, at 342–43 (comments of Professor Thomas W. Merrill); *see also* Eyal-Cohen, *supra* note 18, at 1217.

63. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110105, 108 Stat 1796, 2000; *see also* Kysar, *supra* note 18, at 356–57.

64. *See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272; *see also* Kysar, *supra* note 18, at 357.

65. *See The Federalist Society 2011 National Lawyers Convention*, *supra* note 20, at 342–43 (comments of Professor Thomas W. Merrill).

66. *See id.* at 342 (comments of Professor Thomas W. Merrill).

67. *See id.* at 342–43 (comments of Professor Thomas W. Merrill).

agency to justify its continued existence, which it will fail to do if it only serves special interests.[68]

Often, the rationales for a sunset provision overlap and reinforce one another. The four-year sunset provision added to the legislation that created the Commodity Futures Trading Commission (CFTC) in 1974 illustrates the point.[69] The commission's first sunset review was an excoriating affair that almost led to the agency's elimination .[70] During the review, damaging allegations were levied against the new agency, including that the CFTC was disorganized, cumbersome, overlooking or slow to address major trading scandals, and had unhealthy relationships with those it was supposed to monitor and regulate[71] The agency rallied to fend off the attacks, as well as attempts by the Treasury Department and Securities and Exchange Commission to assume parts of the CFTC portfolio.[72] The sunset provision in the legislation creating the CFTC reflects multiple pro-sunset rationales: the experimentalism and compromise school in winning over skeptics to allow the creation of the CFTC; and the populism and bloated approaches that emerged during the agency's bruising first sunset review.

V. THE RACIAL JUSTICE NEED FOR SUNSET PROVISIONS IN FEDERAL DRUG OFFENSES

Missing from the pro-sunset scholarship reviewed for this Article is a substantive exploration of the racial justice benefits of sunset provisions in criminal laws.[73] This Article seeks to begin filling this void by starting a conversation specifically about the racial justice benefits of incorporating sunset provisions into federal criminal drug laws.

What is the link between sunset provisions in federal criminal drug laws and racial justice? Asked another way, why would incorporating

68. *See id.* at 342 (comments of Professor Thomas W. Merrill).

69. *See* Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, § 101(b), 88 Stat. 1389, 1391 (codified as amended at 7 U.S.C. § 16(d)).

70. *See The Federalist Society 2011 National Lawyers Convention*, *supra* note 20, at 344–345 (comments of Professor Thomas W. Merrill); *see also* Mark D. Young, *A Test of Federal Sunset: Congressional Reauthorization of the Commodity Futures Trading Commission*, 27 EMORY L.J. 853, 862–66 (1978) (describing how the reauthorization process allowed the CFTC to continue intact despite its many problems).

71. *See The Federalist Society 2011 National Lawyers Convention*, *supra* note 20, at 344–45.

72. *See id.*

73. In their article *Race and Retribution: An Empirical Study of Implicit Bias and Punishment*, Professors Levinson, Smith, and Hioki acknowledge that including sunset provisions in sentencing laws would limit the harmful impacts when such laws are enacted in response to public panic, and that mitigation would yield benefits for people of color. *See* Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment*, 53 U.C. DAVIS L. REV. 839, 888 (2019).

sunset provisions into federal criminal drug statutes reduce the over-policing of communities of color, curtail the disproportionate mass incarceration of people of color, mollify the collateral consequences of the criminal justice system that are experienced by people of color at disproportionate levels, and dull discriminatory intent in the formation and enforcement of criminal laws?[74] The most effective way to answer this question is to explore how the *absence* of sunset provisions in federal criminal drug laws has contributed to people of color being over-policed, overly imprisoned, and overly burdened with the collateral consequences of the criminal legal system.

Three factors, as explored in this section, are the foundation for the racial injustices stemming from the absence of sunset provisions in federal criminal drug laws: (1) Congress enacting federal criminal drug legislation in response to public panic triggered by a drug-related incident(s) that invoke fears about people of color, particularly young black men; (2) federal prosecutors using criminal drug statutes to prosecute individuals outside Congress's intended targets; and (3) the unreliability and fickleness of prosecutorial discretion.

A. Panic Legislating

In the wake of a highly publicized criminal incident that shocks the nation, Congress often feels pressure to enact new laws or expand existing ones to address the perceived cause or culprits of the incident, and to prevent future similar occurrences.[75] This is particularly true when

74. While this Article argues that sunset provisions are an effective tool against criminal lawmaking done with racist or discriminatory intent or purpose, for this Article, it is assumed that legislatures do not pass criminal statutes with racist intent to bring about outcomes that disproportionately harm nonwhite people. This assumption is made here not because is demonstrably true, nor because the Author believes it. Rather, this assumption allows the Article to avoid the debate about legislative intent and race, the burdens of proving racist intent and purpose, and the difficulties of discerning between the motivations of individual legislators versus a legislature as a whole. *See* United States v. O'Brien, 391 U.S. 367, 383–84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."). Moreover, whether there is racist intent is of no consequence here. The proposed prescription—more sunset provisions—applies equally (if not more so) if there is racist intent by lawmakers. The assumption that criminal statutes are enacted without racist intent or purpose, in short, allows this Article to avoid a side-debate and the burden of proving racist intent that would quickly overtake the Article.

75. *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn From the States*, 109 MICH. L. REV. 519, 524 (2011) ("Often, new federal laws are passed or existing laws are expanded in the wake of a highly publicized crime."); Sun S. Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 755 (2005) ("Federal criminal law . . . [contains] legislation drafted in response to whatever crime is the focal point in the media—even if that offense is already defined and punished harshly and effectively under

the perpetrators of the shocking event are people of color and/or embody something "foreign" to main street white America. Take, for notable instance, the PATRIOT Act, which greatly expanded the federal government's surveillance power and authority in the name of national defense and antiterrorism.[76] The PATRIOT Act was enacted in response to the September 11th terrorist attack by a group of men from Saudi Arabia, Lebanon, Egypt, and the United Arab Emirates.[77] As a bill, the PATRIOT Act consisted of hundreds of pages and involved complicated legal issues concerning Fourth Amendment rights, executive power, and privacy. Despite its length and complexity, the PATRIOT Act was drafted, passed, and enacted within weeks of the September 11th attack.[78] Congress's fleetness was fueled by the public's widespread fear of the stereotypical (brown or black) Muslim terrorist that "became ubiquitous after 9/11, saturating the rhetoric of politicians, prominently featured on movie and television screens, and echoed on local and national news."[79] As noted by scholar and journalist Geneive Abdo, the PATRIOT Act "in theory applies to all citizens, but it was written with Muslims in mind and in practice denies them their civil liberties by empowering law

state law."); Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 654 (2006) ("[R]edundancies [in the federal code] again can be traced largely to the political desire to react to a given scandal . . . by enacting a 'new' section that simply repeats existing prohibitions (and by jacking up statutory maximum penalties to underscore congressional resolve).").

76. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; *see also* Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 119, 141–143 (2012).

77. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; *see also* Kam C. Wong, *The USA PATRIOT Act: A Policy of Alienation*, 12 MICH. J. RACE & L. 161, 162–63 (2006).

78. On October 26, 2001, President George W. Bush signed into law the PATRIOT Act, a 300-page piece of legislation aimed at increasing and improving the abilities of law enforcement to detect and deter terroristic attacks against the United States and our interests and allies. The Act greatly expanded federal law enforcement's authority to conduct surveillance of suspected terrorists and obtain information and data held by third parties, such as big tech companies and mobile phone services providers. Congress passed the legislation by wide bipartisan margins: 98-1 in the Senate and 357-66 in the House. *See* Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1, 29–31 (2018).

79. *Id.* at 26; *see also* Shafiqa Ahmadi, *The Erosion of Civil Rights: Exploring the Effects of the Patriot Act on Muslims in American Higher Education,* 12 RUTGERS RACE & L. REV. 1 (2011); Saher Kahn & Vignesh Ramachandran, *Post-9/11 Surveillance Has Left a Generation of Muslim Americans in the Shadow of Distrust and Fear*, PBS NEWS (Sep. 16, 2021, at 17:30 ET), https://perma.cc/GVM6-LMA7; Mariam Fam, Deepti Hajela & Luis Andres Henao, *Two Decades After 9/1,1 Muslim Americans Still Fighting Bias*, ASSOCIATED PRESS (Sep. 7, 2021, at 01:40 ET), https://perma.cc/D5G9-RH3H; Elver, *supra* note 76; Wong, *supra* note 77.

enforcement authorities to raid their homes, offices, and mosques in the name of the war on terrorism."[80]

Panic legislation is often hastily written and enacted without much deliberation, which often leads to unintended and unwanted collateral consequences.[81] This is particularly true about panic-induced criminal drug laws. "The common thread through this country's drug policy," as noted by Professor Michael Vitiello, "is that anti-drug policymakers act in moral panic [and] [s]eldom has anti-drug policy been based on good science."[82] Instead of sound science, panicked drug criminalization is consistently based on the public's fear of crime by people of color, particularly young black men.[83] It is then no wonder that people of color often suffer an oversized and disparate portion of the carceral consequences of panicked criminal drug legislating.[84]

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80. Geneive Abdo, *Islam in America: Separate but Unequal*, 28 WASH. Q. 5, 12 (2005), https://perma.cc/M7SL-JTXQ.

81. *See supra* note 75 and accompanying text.

82. Michael Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences*, 69 CLEV. ST. L. REV. 441, 455 (2021).

83. *See generally* KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH (2021) (exploring the criminalization of black adolescent life, play, and youthful experimentation with drugs and sex); Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447 (2003) (exploring how race has impacted the evolution of juvenile criminal justice policies and juvenile criminal courts); Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates,* 5 MICH. J. RACE & L. 611 (2000) (proposing a "decoding" that reveals the racist intent behind the federal crack-powder cocaine sentencing disparity). *See also* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform,* 98 CORN. L. REV. 383, 408–26 (2013); Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment,* 56 STAN. L. REV. 983, 987–88 (2004).

84. *See* George Lipsitz, *"In an Avalanche Every Snowflake Pleads Not Guilty": The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights,* 59 UCLA L. REV. 1746, 1777 (2012) ("Raced and gendered moral panics about crime fueled by fears of out-of-control black women and Latinas have contributed to efforts by lawmakers at the state and federal level to compel judges to mete out harsh penalties for even minor offenses committed by ex-offenders."); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1266–67 (1996) (discussing racial disparate impact of mandatory minimums and sentencing guidelines connected to 1986 Act); *see also* State v. Anderson*,* 516 P.3d 1213, 1227 (Wash. 2022) (discussing how panic about crime has historically led to the "superpredator" stereotyping of children of color and causing a disproportionate number of black and Latino children being charged as adults compared to white children). *See generally* Kenneth Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the 'War on Drugs' was a 'War on Blacks'*, 6 J. GENDER, RACE & JUST. 381 (2002) (arguing that the "war on drugs" by design and purpose targets black Americans); Jeffrey S. Adler, *'To Stay the Murderer's Hand and the Rapist's Passions, and for the Safety and Security of Civil Society': The Emergence of Racial Disparities in Capital Punishment in Jim Crow New Orleans*, 59 AM. J. LEGAL HIST. 297 (2019) (discussing how public panic transformed white New Orleanians thoughts on capital punishment to turn capital punishment into a "bulwark for race control"); Deborah

As the public panic dissipates over time, the consequences of a panic law—intended and unintended—continue to accrue because the panic law remains on the books.[85] Even though the crisis and the panic it induced fades, the unjustifiable and disproportionate incarceration of people of color goes on. Such is the case with the Anti-Drug Abuse Act of 1986.[86] As discussed more fully later, the 1986 Act was a panicked legislative response to widespread public fear of the "crack epidemic" that reached a fever pitch following the death of a well-known college basketball standout.[87] In the nearly four decades since the 1986 Act was enacted, the crack panic has subsided, the justifications for the law's disparate treatment of crack versus powder cocaine have been debunked, and the unjustified racial disparities in incarceration caused by the law are now widely known.[88] Yet the 1986 Act is not only still viable law (with some modifications since its original enactment), it also remains one of the most employed federal criminal statutes by federal prosecutors. As this Article discusses later, much of the racial injustice that has flowed from the 1986 Act would have been avoided had a sunset provision been incorporated into the panic law from the start.

B. Targeting Individuals for Prosecution Not Intended by the Legislature

Once a criminal statute is enacted, there is little outside of prosecutorial discretion to ensure that prosecutors use the statute to prosecute the type or category of individuals intended by the legislature. Legislatures can hold hearings to scrutinize and comment on prosecutorial use of law, and use other legislative methods to influence how a statute is used (such as the budget appropriation process, or modifying or repealing the statute), but those methods require time, are subject to political and partisan interference, and have little to no effect on prosecutors' use of a statute as it is occurring. Inherent in prosecutorial power is the prosecutor's ability to use a criminal law to target individuals for prosecution and incarceration not intended by the

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Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841 (2010) (discussing how the criminal legislating response to the public panic about drugs is shaped by the race of the drug user and traffickers).

85. *See generally* Michael M. O'Hear, *Perpetual Panic,* 21 FED. SENT'G REP. 69 (2008) (2008 WL 8509306) (advocating that sunset provisions as an antidote to the problems associated with panic legislation when the panic dissipates).

86. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; *infra* Part VI.

87. *See infra* Part VI.

88. *See infra* Part VI. *See generally* U.S. SENT'G COMM'N, 2002 REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY (2002) [hereinafter U.S.S.C., 2002 REPORT], https://perma.cc/3RCQ-83MH.

legislature.[89] In these circumstances, prosecutors use a criminal statute to prosecute the *type* of criminal conduct intended by the legislature, but target categories of *individuals* outside the legislature's intent. This deviation can result in problematic racial disparities that further fuel the mass incarceration of people of color.

A notable example of this phenomenon is 28 U.S.C. § 994(h) and its tethered career offender sentencing guideline, section 4B1.1 of the U.S. Sentencing Guidelines. Section 994(h) directs the United States Sentencing Commission to "assure" that the federal sentencing guidelines promulgated by the Commission specify a prison term "at or near the maximum term authorized" for adult defendants convicted of a crime of violence or certain drug trafficking offenses, and who have two prior felony convictions for a crime of violence and/or drug trafficking.[90] In accordance with this directive, the career offender guideline, § 4B1.1 of the United States Sentencing Guidelines, subjects a defendant meeting 994(h)'s criteria to an advisory sentencing guideline range at or near the maximum term of imprisonment allowed by the statute of conviction.[91] The career offender guideline can transform a defendant's sentencing exposure from a few years into decades of imprisonment, and even life imprisonment.[92]

The harsh and drastic sentencing impact of the career offender is by design. Congress wanted the career offender guideline to severely punish a specific category of repeat drug offenders:

> [R]epeat drug offenders: (a) for whom drug trafficking is "extremely lucrative"; (b) who distributed drugs to "an unusual degree" through

89. *See* Wayte v. United States, 470 U.S. 598, 607 (1985).

90. 28 U.S.C. § 994(h).

91. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 2024), https://perma.cc/XBC7-JPVX. For the unfamiliar, the federal sentencing guidelines specify a base offense level for every federal offense, and that pre-set offense level increases or decreases based on enumerated contextual factors of a particular case. The base offense level with the adjustments produces a final offense level that ranges from one to forty-three. Separately, to account for the varying criminal records of defendants, the Commission established a point-based system for measuring a defendant's criminal record and status at the time of the instant conviction. A defendant's total number of criminal history points determines into which of the six criminal history categories (I being the lowest, and VI being the highest) a defendant falls. Using the guidelines' sentencing table, the final offense level is cross-referenced with the defendant's criminal history category to yield a defendant's presumptive sentencing range. When a defendant qualifies as a career offender, the defendant is immediately placed in the highest criminal history category (category VI) and the her base offense level is set at the greater of: (a) the level applicable to the offense of conviction; or the more likely, (b) the level set by the table within the career offender guidelines that is configured to fulfill Congress's mandate that career offenders receive prison sentences "at or near" the maximum term authorized. *Id.*

92. *See id.* § 4B1.1(b) (setting offense levels for career offender defendants).

> "continuing patterns of criminal activity"; (c) who have "substantial ties outside of the United States from whence most dangerous drugs are imported into the country"; and (d) who have the resources and contacts to "to escape to other countries with relative ease in order to avoid prosecution."[93]

In short, Congress wanted the career offender guideline to reach and punish kingpins and major drug traffickers, and others at or near the top of the drug trafficking chain, and who benefit from the money, resources, and foreign contacts not available to lower-level and street-level drug offenders.[94] The goal of the guideline, in other words, is to punish high level drug offenders who pose the most danger to society and who are responsible for distributing large amounts of illegal drugs.[95]

Despite Congress's clear intent, a substantial bulk of the drug offenders targeted by federal prosecutors for career offender sentences are neither kingpins nor major traffickers.[96] The 969 individuals sentenced in fiscal year 2021 as career offenders, where the underlying and triggering offenses were drug trafficking offenses, proves the point.[97] For nearly half (45.5%), the career offender guideline resulted in an increase in *both* the defendants' final offense level *and* their criminal history category.[98] The increase in offense level means that these offenders' conduct did not involve large amounts of illegal drugs associated with major and kingpin traffickers, and the increase in criminal history indicates that these individuals were not the repeat offenders of concern to Congress.[99]

Fiscal year 2021 was no anomaly and reflects how federal prosecutors regularly use the career offender guideline to target mostly low-level drug offenders for long prison sentences, and not major and

93. S. REP. NO. 98-225, at 20, 212 (1983).

94. *See id.* at 20.

95. *See id.*

96. *See* Lucius T. Outlaw III, *Time for A Divorce: Uncoupling Drug Offenses from Violent Offenses in Federal Sentencing Law, Policy, and Practice,* 44 AM. J. CRIM. L. 49, 58–60 (2016).

97. *See* U.S. SENT'G COMM'N, QUICK FACTS: CAREER OFFENDERS [Fiscal Year 2021], https://perma.cc/XV3C-4UPF (last visited Nov. 28, 2025). At a distant 9% (115 individuals), firearm-related offenses were the next most common underlying and triggering conviction. *See id.*

98. *See id.*

99. To explain: the amount (weight) of drugs involved in the offense of conviction is the key factor for determining a defendant's offense level under the sentencing guidelines. The more drugs involved, the higher the offense level. If a defendant sentenced as a career offender was actually a major or kingpin trafficker, the gap between the defendant's non-career offender offense level and career offender offense level should be narrow and result in little or no increase to go from the former to the latter. If the career offender guideline was reaching the kingpins and major traffickers one would expect to see a much lower rate of increased offense levels and criminal history category.

kingpin traffickers.[100] The Sentencing Commission, for years, has documented, exposed, and discussed the gap between congressional intent for the career offender guideline and execution by federal prosecutors. As far back as 2004, the Commission, in noting how the guideline was employed overwhelmingly against low- and street-level dealers, questioned whether the career offender guideline had any reduction effect on drug trafficking-related crime because "retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high."[101] In 2016, the Commission told Congress that career offender data revealed that "[d]rug trafficking-only career offenders are not meaningfully different from other federal drug trafficking offenders and [therefore] should not categorically be subject to the significant increases in penalties required by the career offender directive."[102] In other words, the career offender guideline was resulting in unjustified and excessive sentences because federal prosecutors were targeting low-level drug offenders for career offender sentences whose conduct was otherwise aptly captured by non-career offender sentences.

Importantly for the purposes here, not only has the career offender guideline not effectively reached the major drug traffickers as intended by Congress, but the punishment impact of the guideline has disproportionately fallen on black defendants.[103] When the Sentencing Commission studied the impacts of the career offender guideline in 2016, it found that when the guideline was applied to offenders charged with only drug-trafficking offenses, black offenders accounted for 57.5% of the total offenders while white offenders accounted for a distant 21.7%.[104] The Commission attributed this disparity, in part, to "the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods . . . , which suggests that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers."[105]

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100. *See* Outlaw, *supra* note 96, at 58–60.

101. U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 134 (2004) [hereinafter U.S.S.C., FIFTEEN YEARS], https://perma.cc/8DJS-3TPX.

102. U.S. SENT'G COMM'N., REPORT TO CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 3 (2016) [hereinafter U.S.S.C., 2016 REPORT], https://perma.cc/36K3-7Q2M.

103. *See* Outlaw, *supra* note 96, at 61–62; *see also* Amy Baron-Evans and Kate Stith, *Booker Rules,* 160 U. PA. L. REV. 1631, 1688 (2012); Carol A. Brook, *Racial Disparity Under the Federal Sentencing Guidelines,* 35 NO. 1 LITIG. 15, 16 (2008).

104. U.S.S.C., 2016 REPORT, *supra* note 102, at 29.

105. U.S.S.C., FIFTEEN YEARS, *supra* note 101, 134.

Why has the Sentencing Commission not modified the career offender guideline to reduce its racially disparate impact and course-correct federal prosecutors' use of the guideline? The answer: Congress tied the Commission's hands. Section 994(h) severely limits the Sentencing Commission's ability to revise or modify the career offender guideline, even in the face of mounting evidence and data that the guideline is being used contrary to congressional intent and resulting in troubling racial disparities.[106] To make the needed changes to the guideline, congressional modification of § 994(h) is required.[107]

Congressional action to correct a guideline that for nearly 40 years has so widely missed its intended targets and harmed black people at such disparate rates would not be needed if § 994(h) had included a sunset provision when first enacted. A sunset provision of five, ten, or even fifteen years would have forced Congress to face the career offender data and other evidence showing the large gap between the legislative intent of § 994(h) and the execution of the career offender guideline by federal prosecutors. This confrontation of intent versus execution would have compelled Congress to either adjust § 994(h) in the manner pleaded for by the Sentencing Commission, justify reauthorizing § 994(h) without change, or let the statute lapse (and thereby remove the congressional directive for the career offender guideline). Except for reauthorization without change, the other options would have saved thousands of convicted individuals, particularly black drug offenders, from serving hundreds of years of unwarranted prison time.[108]

C. The Unreliability and Fickleness of Prosecutorial Discretion[109]

"In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute."[110] This immense power, commonly

106. *See* U.S.S.C., 2016 REPORT, *supra* note 102, at 27; *see also* 28 U.S.C. § 994(o) (directing the Commission to periodically send Congress reports "commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted."); 28 U.S.C. § 994(p) (establishing how the Commission's promulgated guideline amendments and modifications take effect unless "modified or disapproved by Act of Congress").

107. *See* U.S.S.C., 2016 REPORT, *supra* note 102, at 27.

108. *See* Outlaw, *supra* note 96, at 61–62.

109. In this Article "prosecutorial discretion" is used in the criminal context and defined as the prosecutor's power to "determine how, when, and whether to initiate and pursue enforcement proceedings." Peter Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty,* 97 B.U. L. REV. 489, 490 (2017).

110. Wayte v. United States, 470 U.S. 598, 607 (1985) (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982)). *See generally* William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform,* 54 OHIO ST. L.J. 1325 (1993) (offering a discussion on prosecutorial discretion).

referred to as "prosecutorial discretion", is often cited as an available cure for many of the racial disparities that flow from the making and enforcement of our criminal laws.[111] This prescription is built on the prosecutor's exclusive power to determine who to prosecute and what offenses to charge, and her central and weighty role at nearly every stage of a criminal prosecution.[112] The discretion-based prescription theory contends that prosecutors can and should use their broad discretion power to avoid, mitigate, and/or reduce the unjust disparities and disadvantages experienced by people of color that stem from the enforcement of criminal laws.[113]

While prosecutorial discretion can yield racial justice benefits, for multiple reasons, it is not a sufficient substitute for sunset provisions.[114] First, the prosecutorial discretion antidote theory fails to recognize how deeply entrenched racism (or systemic practices and policies that cause racial disparities) is throughout the prosecutorial arm of the criminal legal system.[115] It infects every nook-and-cranny of every role and part a prosecutor plays in prosecuting a case.[116] Often, the racism or disparate

111. *See* Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor,* 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 823 (2013):

> As the most powerful officials in the criminal justice system, [prosecutors'] discretionary decisions—especially their charging and plea bargaining decisions—play a very significant role in creating and maintaining the racial disparities in the criminal justice system. The good news is that prosecutors can, if they wish, use that same power and discretion to help reduce these disparities.

Id.; *see* Justin Murray, *Criminal Prosecution: Toward a Color-Conscious Professional Ethic For Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1569 (2012) (proposing that a "color conscious" vision and approach will help prosecutors to use their discretion in non-racially discriminatory ways); Anthony V. Alfieri, *Prosecuting Race,* 48 DUKE L.J. 1157, 1208 (1999) (proposing "a race-conscious, community-oriented model of prosecutorial discretion"); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion,* 67 FORDHAM L. REV. 13, 18–19 (1998) [hereinafter Davis, *Prosecution & Race*] (proposing using racial impact studies to guide prosecutorial discretion and reduce racial discrimination in the criminal justice system).

112. *See* Davis, *Prosecution & Race*, *supra* note 111, at 18–19.

113. *See id.*

114. *See* Myers, *supra* note 24, at 1354 ("Prosecutorial discretion comes with other costs: lack of transparency, perceived racial inequality, and all of the problems with the bureaucratic oversight of agents who provide a service that is difficult to measure.").

115. *See* Darryl K. Brown, Batson v. Armstrong*: Prosecutorial Bias and the Missing Evidence Problem,* 100 OR. L. REV. 357, 365–76 (2022) (discussing evidence linking racial bias and prosecutorial discretion at multiple stages of a criminal prosecution).

116. *See id.* (discussing evidence linking racial bias and prosecutorial discretion at multiple stages of a criminal prosecution); Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of The Prosecutor,* 39 COLUM. HUM. RTS. L. REV. 202, 205–10 (2007) (discussing how racial disparities can flow from race-neutral prosecutorial decisions); *IV. Race and the Prosecutor's Charging Decision*, 101 HARV. L. REV. 1520, 1525–32 (1988) (discussing the empirical evidence that racial bias affects charging decisions in multiple ways).

racial outcomes are not purposeful or deliberate, but the result of implicit biases that go undetected and are difficult to mitigate.[117] Without sufficient guardrails and mechanisms to protect against explicit and implicit racial bias, prosecutorial discretion is as susceptible to infectious racial bias as any other part of the criminal legal system.[118]

The fickleness of prosecutorial discretion is the second key reason why prosecutorial discretion is not a reliable source of racial justice. Prosecutorial discretion is an unmoored practice.[119] Beyond the constitutional guardrails provided by the equal protection and due process clauses, there are no enforceable standards or best practices to hold prosecutors accountable for how they exercise their discretion.[120] This is particularly true for federal prosecutors who are appointed, and do not have to win elections to obtain and retain power like state prosecutors.[121] Federal prosecutors have the freedom and flexibility to alter how they use their discretion power at any moment and without any means for the public, the court, defendants, or defense attorneys to challenge or resist such changes, even if a change interjects more undue racial disparities and injustice into the system.

As recent events show, a third and key obstacle is the political backlash to prosecutors using their discretion to make racial justice gains. Over the past few years, the backlash has been on full display in response to the "progressive prosecutor" movement, which puts defense attorneys, former public defenders, and progressive and reformist-

117. *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion,* 35 SEATTLE U. L. REV. 795, 795–97 (2012) (calling for an "implicit bias research agenda" due to compelling proof that prosecutorial discretion is affected by racial implicit biases); Brown, *supra* note 115, at 365–76 (discussing evidence linking racial bias and prosecutorial discretion at multiple stages of a criminal prosecution).

118. A currently existing guardrail, *United States v. Armstrong*, which prohibits prosecutors from charging defendants for racially motivated reasons, is notoriously ineffective, largely because of the weighty burden on the defendant to show a charging disparity between similarly situated defendants of different races. *See* 517 U.S. 456, 464–65 (1996) (holding that to establish entitlement to discovery on claim of selective prosecution based on race, defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not); Brown, *supra* note 115, at 402–03.

119. *See generally* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (discussing the limits of, and problems with, prosecutorial discretion).

120. *See Armstrong,* 517 U.S. at 464; Vasquez v. Hillery, 474 U.S. 254, 264 (1986) ("[A] conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of his race."); United States v. Batchelder, 442 U.S. 114, 125 n.9 (1979) ("The Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification."' (quoting Oyler v. Boles*,* 368 U.S. 448, 456 (1962))).

121. *See* Brown, *supra* note 119, at 256.

minded attorneys at the head of prosecutor offices around the country.[122] Progressive prosecutors promise to use their office and discretion to reform the criminal legal system by reducing incarceration rates (particularly of people of color), holding police officers accountable for misconduct and abuse, and reallocating funds to restorative justice initiatives, non-carceral punishment alternatives, and public services.[123]

True to Newton's third law, the progressive prosecutor movement has been met with an equally opposite reaction. The backlash from conservative and "law and order" lawmakers, police departments and unions, and the public frustrated with crime has led to efforts to limit or strip progressive prosecutors of their discretion power, and in a growing number of cases, to remove progressive prosecutors completely from office.[124] In Florida, for instance, Governor Ron DeSantis removed two progressive prosecutors heading state attorney's offices.[125] One of the removed state attorneys was Monique Worrell, the second black person ever to head the state attorney's office of Florida's Ninth Judicial Circuit.[126] Elected in 2020, Worrell captured 66% of the vote by running as a progressive prosecutor with a restorative justice platform.[127] According to Governor DeSantis, Worrell's progressive approach in office made her "clearly and fundamentally derelict in her job."[128]

Worrell is not an isolated case. Fellow progressive prosecutors around the country have faced or are currently facing similar attempts to strip or curtail their position and power. In Los Angeles, George Gascon

122. *See* Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019, at 20:02 ET), https://perma.cc/HL48-PBTX; *see also* Brooks Holland & Steven Zeidman, *Progressive Prosecutors or Zealous Defenders, From Coast-to-Coast*, 60 AM. CRIM. L. REV. 1467, 1470–77 (2023). The emergence of the movement is frequently credited to Professor Angela Davis's seminal article. *See generally* Davis, *Prosecution & Race*, *supra* note 111.

123. *See* Carissa B. Hessick, *Pitfalls of Progressive Prosecution*, 50 FORDHAM URB. L.J. 973, 975–82 (2023).

124. *See* Tim Arango & Ana Facio-Kracer, *In L.A. District Attorney Race, Rhetoric Shifts From Reform to Fear*, N.Y. TIMES (Dec. 25, 2023), https://perma.cc/486H-LZYC; J. David Goodman, *With an Array of Tactics, Conservatives Seek to Oust Progressive Prosecutors*, N.Y. TIMES (Apr. 12, 2023), https://perma.cc/LQ9F-Y4Y8; *see also* James Queally, *Frustration and Criticism as L.A. County DA Struggles to Reform Sentencing*, L.A. TIMES (Aug. 15, 2023), https://perma.cc/NX3M-L7WF; Jeremy B. White, *California Keeps Electing Progressive DAs—Then Pushing to Recall Them*, POLITICO (Aug. 15, 2023), https://perma.cc/HE2R-EZG2; Joshua Spivak, *Recall the Progressive Prosecutor Movement?*, HILL (Dec. 12, 2022), https://perma.cc/7ZDA-QJ2Y; Marco della Cava, *New, More Progressive Prosecutors Are Angering Police, Who Warn Approach Will Lead to Chaos*, USA TODAY (Feb. 10, 2020), https://perma.cc/E2RL-PMUK.

125. *See* Lori Rozsa & Tim Craig, *Florida Gov. Ron DeSantis Suspends Another Democratic State Attorney*, WASH. POST (Aug. 9, 2023), https://perma.cc/K4RY-3NWV.

126. *See id.*

127. *See id.*

128. *See id.*

faced a failed recall effort launched by crime victims and city law enforcement officials.[129] Rachel Rollins, the first black woman to serve as the U.S. Attorney of Massachusetts, resigned in the face of an investigation into her travel and use of a personal cellphone for official business. The investigation was pushed by Republican Senator Tom Cotton (R-Arkansas), who had vigorously opposed Rollins's nomination.[130] Philadelphia District Attorney Larry Krasner fended off an impeachment effort by Pennsylvania Republicans and Philadelphia's police unions.[131] A successful recall effort ousted San Francisco District Attorney Chesa Boudin, a former public defender, whose ending of cash bail and other progressive policies drew intense public and political backlash as property and violent crimes in that city increased during the pandemic.[132] Progressive prosecutors who are black women are facing a peculiar brand of backlash where the insubordination, dismissiveness, and resistance to their authority have racialized and misogynistic tones.[133] As the backlash experiences of these and many other progressive prosecutors show, attaining office is no guarantee that a progressive prosecutor will be able to successfully fulfill her reformist promises that were endorsed by the voting public or the appointing executive. In fact, attaining office is no guarantee that a progressive prosecutor will serve her full elected or appointed term.

Aside from the backlash, it remains an open question whether progressive prosecutors are effectively using their discretion and power to achieve racial equity gains.[134] Certainly, progressive prosecutors have successfully implemented changes and policies that yield some substantial racial justice benefits, particularly policies ending or reducing cash bail, reducing pretrial detention rates, and not prosecuting marijuana offenses.[135] Absent, however, is evidence that progressive prosecutors

129. *See* Soumya Karlamangla, *Efforts to Recall Los Angeles District Attorney George Gascon Fails*, N.Y. TIMES (Apr. 16, 2022), https://perma.cc/NQF4-C3QR.

130. *See* Sarah N. Lynch, *Massachusetts US Attorney To Resign Amid Justice Dept Ethics Probe*, REUTERS (May 16, 2023, at 22:15 ET), https://perma.cc/ZW7T-PU67.

131. *See* Scott Calvert, *Impeachment Trial of Philadelphia District Attorney Larry Krasner is Delayed*, WALL ST. J. (Jan. 11, 2023), https://perma.cc/J7ZZ-3YLW.

132. *See* Thomas Fuller, *Voters in San Francisco Topple the City's Progressive District Attorney, Chesa Boudin*, N.Y. TIMES (June 8, 2022), https://perma.cc/A9AW-VQPR.

133. *See* Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Would Not Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1994–98 (2022).

134. *See* Holland & Zeidman, *supra* note 122, at 1467 (arguing and exploring why the reform agendas promised by progressive prosecutors have "fared modestly to poorly").

135. *See id.* at 1470–77 (case studies of the gains made by progressive prosecutors across the country); Butler, *supra* note 133, at 1990–93 (discussing racial justice and

have made significant progress in reducing the prosecution and incarceration rates of people of color, transforming the policing of communities of color, or redirecting prosecutorial and incarceration resources toward holistic and restorative justice measures.[136] As one study of the progressive prosecutor movement concluded, not only has the movement "brought, at best, modest or episodic reform," but it may eventually harm future racial justice efforts by "substantially enhanc[ing] the capacity of prosecutors to add harm to an already unfair and imbalanced legal system."[137] To criminal justice reformists, the lack of evidence that progressive prosecutors are moving the needle of racial justice in a significant manner is further proof that racism and racial inequities are too entrenched in the system to be reformed from within a prosecutor's office.[138] As succinctly put by Professor Paul Butler, a former federal prosecutor, "[b]ecoming a prosecutor to help resolve the unfairness of the criminal justice system is like enlisting in an army because you are opposed to the current war."[139]

VI. CASE STUDY ON THE RACIAL JUSTICE NEED FOR SUNSET PROVISIONS: THE ANTI-DRUG ABUSE ACT OF 1986

The 1986 Act, particularly its codified sentencing disparity for crack and powder cocaine offenses, provides a sound case study on how including sunset provisions into federal criminal drug laws will yield impactful racial justice benefits, and how the absence of a sunset provision can exacerbate existing racial inequities and injustices in our criminal legal system.

A. Background

The virus-like spreading of crack during the 1980s heightened the national concern about illegal drugs.[140] Between 1985 and 1986, national television networks broadcasted over 400 reports related to crack, and

incarceration reduction gains made by progressive prosecutors in Philadelphia, Chicago, and Baltimore).

136. *See* Butler, *supra* note 133, at 1983. *See generally* Holland & Zeidman, *supra* note 122 (arguing that progressive prosecutor movement "has brought, at best, modest or episodic reform, while it has substantially enhanced the capacity of prosecutors to add harm to an already unfair and imbalanced legal system").

137. Holland & Zeidman, *supra* note 122, at 1469.

138. *See* Butler, *supra* note 133, at 1983; Brown, *supra* note 115, at 365–76. *See generally* Smith & Levinson, *supra* note 115 (calling for an implicit bias among prosecutors research agenda due to compelling proof that prosecutorial discretion is affected by racial implicit biases).

139. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 102 (2010).

140. *See* United States v. Clary, 846 F. Supp. 768, 783 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

crack-related horror stories appeared daily in most major newspapers.[141] In the months leading to the 1986 national elections, crack was the focus of more than 1,000 reports in the national media.[142] Two of the leading news magazines at the time, *Newsweek* and *Time*, published five cover stories each about crack, with *Time* declaring crack the "Issue of the Year," and *Newsweek* calling crack the biggest news story since Vietnam and Watergate.[143] Most of the reporting depicted young black men as the cause of the horror, and created the stereotype image of a crack dealer as an unemployed and gang-affiliated young black man who carries a gun and terrorizes society.[144] According to the United States Sentencing Commission, "[t]he media played a large role in creating the national sense of urgency surrounding drugs, generally and crack cocaine specifically."[145]

The heightened national concern turned into a frenzy when college-turned-professional basketball phenom Len Bias died of cocaine-induced cardiac arrest on June 19, 1986.[146] In the aftermath of Bias's death, Congress was under relentless public pressure to do something about the "crack epidemic" and illegal drugs generally.[147] The panic propelled

141. *Id.*; *see also* U.S. SENT'G COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 122 (Feb. 1995) [hereinafter U.S.S.C., 1995 SPECIAL REPORT], https://perma.cc/6VNL-U8J9 (discussing the impactful role of the media's coverage of crack during the 1980s).

142. *See* Jason A. Gillmer, United States v. Clary*: Equal Protection and the Crack Statute,* 45 AM. U. L. REV. 497, 545 (1995).

143. *See* U.S.S.C., 1995 SPECIAL REPORT, *supra* note 141, at 122. The Time issue was dated September 22, 1986. *See id.* The Newsweek issue was dated June 16, 1986. *See id.*

144. *See Clary*, 846 F. Supp. at 783; Gillmer, *supra* note 142, at 547–48.

145. U.S.S.C., 1995 SPECIAL REPORT, *supra* note 141, at 121.

146. Len Bias was college basketball phenom who died on June 19, 1986, of a cocaine and alcohol overdose while he celebrated being drafted by the Boston Celtics. At the time many reports mistakenly attributed Bias's cardiac arrest death to Bias using crack, when in fact he had consumed powder cocaine. *See* U.S.S.C., 1995 SPECIAL REPORT, *supra* note 141, at 121; U.S.S.C., 2002 REPORT, *supra* note 88, at 5; *see also* Jon Schuppe, *30 Years After Basketball Star Len Bias' Death, Its Drug War Impact Endures*, NBC News (June 19, 2016, 05:24 ET), https://perma.cc/K2MQ-DMQY; Roy S. Johnson, *All-American Basketball Star, Celtic Choice, Dies Suddenly*, N.Y. TIMES, June 20, 1986, https://perma.cc/65EV-BNQ7; *see also* Arthur H. Garrison, *Disproportionate Incarceration of African-Americans: What History and the First Decade of the Twenty-First Century Have Brought*, 2011 J. INST. JUST. INT'L STUD. 87, 94 (2011); Deborah J. Vagins & Jesselyn McCurdy, *"Cracks in the System" Twenty Years of the Unjust Federal Crack Cocaine Law*, AM. C.L. UNION, Oct. 2006, at 1, https://perma.cc/G76Q-F3N9.

147. Within days of Bias's death, then-Speaker of the House Thomas "Tip" O'Neill, a Democrat who represented the Boston area, announced that House Democrats would introduce a sweeping drug enforcement bill, and he set a five-week deadline for doing so. *See* Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 408 (1995); *see also* Radley Balko, *America's Drug War: 30 Years of Rampaging Wildebeest*, WASH. POST (Oct. 28, 2016), https://perma.cc/889L-

Congress to draft and pass the 1986 Act within just a few months of Bias's death.

B. Legislative History

The 1986 Act was the product of extraordinary panic legislating.[148] The inferno of fear sparked by Len Bias's death captured Capitol Hill.[149] As described by a congressional staffer at the time, the day after Bias's death "was like Pearl Harbor had just been bombed; nobody in [the congressional buildings] was talking about anything but Bias."[150] Then Speaker of the House Philip "Tip" O'Neill held an emergency meeting during which he told Democrat legislators:

> Write me some goddamn legislation. All anybody up in Boston [is] talking about [is] Len Bias. The papers [are] screaming for blood. We need to get out front on this now. This week. Today. The Republicans beat us to it in 1984 and I don't want that to happen again. I want dramatic new initiatives for dealing with crack and other drugs.[151]

To answer the Speaker's call and respond to the public pressure, Congress abandoned its regular and deliberative legislative process to enact the 1986 Act. Neither the House nor the Senate held committee hearings on the proposed bill to gather input and information from experts on illegal drugs and drug enforcement.[152] No mark-ups were held to allow legislators to add amendments or offer other changes to the bill's language.[153] The final bill that was passed into law was

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LJW9; Eric. E. Sterling & Julie Steward, *Undo this Legacy of Len Bias's Death*, WASH. POST (June 24, 2006), https://perma.cc/S6NV-QFF8.

148. *See* Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection,* 37 HARV. J. L. & PUB. POL'Y 241, 241 (2014) (noting that the 1986 Act was "[e]nacted in the midst of a panic over the emergence of a new form of cocaine colloquially known as 'crack'"); U.S.S.C., 2002 REPORT, *supra* note 88, at 5 ("Because of the heightened concern and national sense of urgency surrounding drugs generally and crack cocaine specifically, Congress bypassed much of its usual deliberative process."); *see also* Simon v. United States, 361 F. Supp. 2d 35, 44 (E.D.N.Y. 2005) ("[The 1986 Act] was moved through Congress with little discussion."); *see also* Balko, *supra* note 147; Sterling & Steward, *supra* note 147; Jonathan Gelber, *How Len Bias's Death Helped Launch The US's Unjust War on Drugs*, GUARDIAN (June 29, 2001), https://perma.cc/7DTB-9SN5.

149. *See* Larkin, *supra* note 148, at 246*; see also* 132 CONG. REC. 22,660 (1986) (statement of Rep. Robert Michel) ("[The] death of basketball star Len Bias shocked us into action.").

150. Balko, *supra* note 147.

151. *Id.* (quoting DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF THE FAILURE (1997)); *see also* Sterling & Steward, *supra* note 147.

152. *See* U.S.S.C., 2002 REPORT, *supra* note 88, at 5–6; Sterling*, supra* note 145, at 408; Balko, *supra* note 147.

153. *See* Balko, *supra* note 147.

unaccompanied by any committee reports.[154] As noted by the Sentencing Commission, the "1986 Act was notable for the speed of its development and enactment."[155]

The few pre-enactment discussions that Congress did have about the legislation were frequently framed in a racial (i.e., anti-black and brown) context and littered with racial dog-whistles, such as references to "crack babies" and "boarder babies."[156] To feed the panic legislating and justify Congress's unprecedented abandonment of the regular legislative process, legislators used and relied on (racist) crack-horror media reports.[157] Senator Paula Hawkins (R-Florida) introduced into the Congressional Record a number of such articles, including a *Newsweek* article stating that "Crack is not widely used in many areas of the country—but that may be only a matter of time. It is already creating social havoc in the ghettos of Los Angeles, New York, and other large cities, and it is rapidly spreading into the suburbs on both coasts."[158] Another crack-panic article that was made part of the Congressional Record was more direct with its racism:

> Most of the [crack] dealers, as with past drug trends, are black or Hispanic . . . . Whites rarely sell the cocaine rocks. Streets sales of cocaine rocks have occurred in the same neighborhoods where other drugs were sold in the past: run-down, black neighborhoods . . . . But the drug market also is creeping into other neighborhoods. An interracial neighborhood . . . has become one of West Palm Beach's most highly visible cocaine rock areas. Less than a block from where unsuspecting white retirees play tennis, bands of young black men) [sic] push their rocks on passing motorists, interested or not.[159]

C. Overview of the 1986 Act

The 1986 Act was a sweeping overhaul of federal sentencing for drug offenses.[160] Its drafting was guided by the "war on drugs" strategy of increasing the sentencing penalties for drug-related offenses by imposing mandatory minimum penalties that could not be circumvented by a sentencing judge.[161] Indeed, the 1986 Act embodies the federal

154. *See id.*

155. U.S.S.C., 1995 SPECIAL REPORT, *supra* note 141, at 121.

156. *Id.* at 189.

157. *See* United States v. Clay, 846 F. Supp. 768, 783–84 (E.D. Mo. 1994); *see also* 132 CONG. REC. 4412 (1986).

158. 132 CONG. REC. 4418 (1986).

159. 132 CONG. REC. 8292 (1986).

160. *See* U.S. SENT'G COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 9 (1991) [hereinafter U.S.S.C., 1991 SPECIAL REPORT], https://perma.cc/G436-3NL2.

161. *See* Candice N. Jones, Note, *A Broken Pattern: A Look at the Flawed Risk and Needs Assessment Tool of the First Step Act*, 5 HOW. HUM. & C.R. REV. 185, 188 (2021).

government's plan to use sentencing as its preferred weapon in the war on drugs.[162]

The 1986 Act "set up a new regime of non-paroleable, mandatory minimum sentences for drug trafficking offenses that tied the minimum penalty to the amount of drugs involved in the offense."[163] Congress's stated goals with the 1986 Act were to "subject larger drug dealers to a ten-year mandatory minimum for a first offense and a 20-year sentence for a subsequent conviction of the same offense . . . and mid-level players in the drug distribution chain [to] a mandatory minimum penalty of five years."[164] As explained on the Senate floor by Senator Robert Byrd (D-West Virginia) at the time of the law's passage, the ten-year mandatory minimum was designed to punish "the kingpins—the masterminds who are really running these [drug] operations" and the five-year mandatory minimum would punish "middle-level dealers" who supported the kingpins.[165]

The 1986 Act and its tiered mandatory minimum penalties are codified at 21 U.S.C. §§ 841 and 960.[166] Both provisions contain a tiered penalty scheme that ties mandatory minimum penalties to the type and quantity of the drug involved in the offense.[167] The first tier carries a five-year mandatory minimum penalty, with the second tier carrying a ten-year mandatory minimum.[168] The mandatory penalties increase "if death or serious bodily injury results from the use" of a drug, or if a convicted defendant has prior convictions for "serious" drug or violent offenses.[169]

A key consequence of the Act's tiered mandatory minimum scheme was the shifting of sentencing power from the judiciary to the executive

162. *See* Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs,* 58 AM. CRIM. L. REV. 1685, 1694 (2021).

163. U.S.S.C., 1991 SPECIAL REPORT, *supra* note 160, at 9.

164. *Id.*; *see also* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 10–11 (2017) [hereinafter U.S.S.C., OCT. 2017 MINIMUM PENALTIES], https://perma.cc/TMR6-ALGY (stating that the two-tiered penalty structure established by the 1986 Act "was designed to target discrete categories of traffickers by linking the five-year mandatory minimum penalties to 'serious' traffickers and the ten-year mandatory minimum penalties to 'major' traffickers").

165. 132 CONG. REC. 27193–94 (1986).

166. *See* U.S. SENT'G COMM'N, OVERVIEW ON MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL SYSTEM 11 (2017) [hereinafter U.S.S.C., JULY 2017 MINIMUM PENALTIES], https://perma.cc/2EMY-UC8U.

167. *See* 18 U.S.C. §§ 841, 960.

168. *See* 18 U.S.C. §§ 841, 960. Both provisions contain enhanced mandatory minimums based on a defendant's prior record and if the distribution conduct resulted in the serious injury or death of a person.

169. *See* 21 U.S.C §§ 841(b)(1)(A)–(B).

branch, i.e., federal prosecutors.[170] Prior to the law, judges dominated sentencings in drug cases.[171] It was the judge's discretion that dictated the outcome of a drug case.[172] The 1986 Act's mandatory minimum scheme upended the power balance by shifting the sentencing power largely to the charging stage of a drug case, where judges have no authority, and prosecutors retain all the power and discretion.[173]

This power shift had a profound and immediate effect on federal drug prosecutions and the federal prison population.[174] In the five years from 1985 (a year before the enactment of the 1986 Act) to 1990, the percentage of the federal prison population whose drug and/or weapon conduct invoked a mandatory minimum doubled from 10% to 20%.[175] For that same period, both the median and mean prison sentences for federal defendants whose drug conduct involved mandatory minimum drug weights (but no firearm-related conduct) substantially increased.[176] The median prison sentence for such defendants increased from 36 months to 66 months, and the mean sentence length increased from 53 to 94 months.[177]

Except for a few slight fluctuations, since 1990, prosecutorial use of the sentencing power granted by the 1986 Act (and related laws imposing mandatory minimums for drug offenses) has only increased. For example, in fiscal year 2018, of the 69,425 sentenced cases reported to the Sentencing Commission, 27.7% carried a mandatory minimum sentence, of which 70.5% were drug trafficking-related.[178] Among all drug-offenders sentenced that fiscal year, 60% were convicted of an offense carrying a mandatory minimum penalty; and the average

170. *See* Harris v. United States, 536 U.S. 545, 571 (2002) (Breyer, J., concurring in part) (criticizing mandatory minimums because "[t]hey transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring."); *see also* Alison Siegler, *Shift the Paradigm on Mandatory Minimums,* 36-WTR CRIM. JUST. 28, 30–31 (2022); Stephanie Holmes Didwania, *Mandatory Minimum Entrenchment and the Controlled Substances Act,* 18 OHIO ST. J. CRIM. L. 25, 40 (2020).

171. *See Harris*, 536 U.S. at 558–60.

172. *See id*. In fact, the complaint that judicial discretion was creating wide differences and disparities in sentences for drug defendants was a driving motivation in Congress for mandatory minimums and the perceived consistency they would bring. *See* Anna D. Vaynman & Mark R. Fondacaro, *Prosecutorial Discretion, Justice, and Compassion, Reestablishing Balance in Our Legal System,* 52 STETSON L. REV. 31, 39-40 (2002).

173. *See Harris*, 536 U.S. at 571 (Breyer, J., concurring in part) (criticizing mandatory minimums because "[t]hey transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring").

174. U.S.S.C., OCT. 2017 MINIMUM PENALTIES, *supra* note 164, at 66.

175. *See* U.S.S.C., 1991 SPECIAL REPORT, *supra* note 160, at 41.

176. *See id.* at 44.

177. *See id.*

178. *See* U.S. SENT'G COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES [Fiscal Year 2018] 1, https://perma.cc/EVN2-QVBG.

sentence was 131 months of imprisonment for those who remained subject to a mandatory minimum at sentencing.[179] Three years later, there was an uptick. Of the 57,287 sentenced cases reported to the Sentencing Commission for fiscal year 2021, 29.9% carried a mandatory minimum, of which 75.5% were drug-trafficking-related.[180] Among all drug-offenders sentenced that fiscal year, 70.4% were convicted of an offense carrying a mandatory minimum penalty.[181] The average sentence of a drug-trafficking defendant who remained subject to a mandatory minimum penalty at sentencing was 128 months.[182]

As the Sentencing Commission has concluded, "drug mandatory minimum penalties continue to have a significant impact on the sentencing of drug offenders and on the federal prison population."[183] The longer sentences received by drug offenders convicted of an offense carrying a mandatory minimum penalty, "coupled with the fact that drug offenses are the most common offenses carrying mandatory minimum penalties, considerably affect the prison population."[184] As discussed next, a key contributor to this impact, and its racial injustice consequences in particular, is the sentencing disparity between crack and powder cocaine that was purposely embedded within the 1986 Act.

D. The Crack-Powder Cocaine Sentencing Disparity

Crack and powder cocaine are two forms of the same drug: cocaine.[185] Both forms are the same psychoactive alkaloid derived from the leaves of the coca plant.[186] Both forms produce the same physiological and psychotropic effects.[187] A major difference between the forms is the method of production. Powder cocaine is produced by mixing coca paste with hydrochloric acid to produce cocaine hydrochloride, a salt that resembles a powder form.[188] Crack is made by dissolving powder cocaine in a mixture of water and baking soda (sodium bicarbonate), boiling the mixture to separate the solids that

179. *See id.* at 2.

180. *See* U.S. SENT'G COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES [Fiscal Year 2021] 1, https://perma.cc/UE8U-JH3S.

181. *See id.* at 2.

182. *See id.*

183. U.S.S.C., OCT. 2017 MINIMUM PENALTIES, *supra* note 164, at 66.

184. *Id.*

185. *See* Kimbrough v. United States, 552 U.S. 85, 94 (2007) ("Crack and powder cocaine are two forms of the same drug."); *see also* U.S.S.C., 1995 SPECIAL REPORT, *supra* note 141, at 14; David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1290 (1995).

186. *See* Sklansky, *supra* note 185, at 1290.

187. *See Kimbrough,* 552 U.S. at 94; U.S.S.C., 1995 SPECIAL REPORT, *supra* note 142, at 14.

188. *See* U.S.S.C., 1995 SPECIAL REPORT, *supra* note 141, at 12.

form, and then, once cooled, cutting the solids into smaller pieces commonly referred to as "rocks" or "crack rocks."[189]

Despite being the same drug, the 1986 Act punishes crack trafficking more harshly than powder cocaine trafficking.[190] When first enacted, the 1986 Act codified a mandatory minimum sentencing scheme under which 500 grams of powder cocaine triggered a five-year mandatory minimum sentence, and 5,000 grams of powder cocaine triggered a ten-year mandatory minimum sentence.[191] For crack, the 1986 Act originally set the five-year mandatory minimum penalty trigger at just five grams, and the trigger for the ten-year mandatory penalty at 50 grams.[192] Viewed together, the 1986 Act originally codified a powder cocaine-to-crack ratio of 100-to-1—meaning that it took 100 times more powder cocaine to trigger the same mandatory penalties assigned to crack.

The codification of the powder cocaine-crack sentencing disparity was purposeful and bipartisan. During the bill's formation, the Reagan administration proposed a 20-to-1 ratio.[193] House Democrats, who held the majority at the time, pushed for a 50:1 ratio.[194] One of the most extreme ratios—1,000:1—was proposed by a Democrat (Senator Lawton Chiles (D-Florida)).[195] Then-Senator Joseph Biden (D-Delaware) led a Senate Judiciary working group that pushed for a ratio disparity and helped negotiate the compromise 100:1 ratio that became law.[196] As president, Biden expressed regret about the 1986 law and its ratio disparity.[197] But as a senator in 1986, Biden was a forceful and full-throated supporter of the legislation, the disparity ratio, and the truncated

189. *See id.* at 14.

190. The scholarship on the crack-powder cocaine sentencing disparity is voluminous. This article refers to several articles that discuss the disparity. *See generally* Mona Lynch & Marisa Omori, *Crack as Proxy: Aggressive Federal Drug Prosecutions and the Production of Black-White Racial Inequality,* 52 L. & SOC'Y REV. 773 (2018), https://perma.cc/8AYW-LWUY; Larkin, *supra* note 148; Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the 'War on Drugs' Was a 'War on Blacks',* 6 J. GENDER, RACE, & JUST. 381 (2002); Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From the "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95 (2014); David A. Sklansky, *Cocaine, Race, and Equal Protection,* 47 STAN. L. REV. 1283 (1995); Spade, *supra* note 84.

191. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, tit. I, § 1002, 100 Stat. 3207 (1986).

192. *See id.*

193. *See* Elise Viebeck, *How an Early Biden Crime Bill Created the Sentencing Disparity for Crack and Cocaine Trafficking*, WASH. POST *(*July 28, 2019), https://perma.cc/ZS4W-A5JS.

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

legislative process that produced both.[198] The day the Senate passed the 1986 Act, the future president boasted that "All 100 senators can be proud of this legislation on its merits, and can be proud of the process that led to the bill."[199]

The 100:1 ratio was motivated by Congress's view that crack was far more dangerous than powder cocaine, and therefore crack traffickers deserved significantly longer prison sentences.[200] This view was driven primarily by five key beliefs widely held in Congress at the time:

> (1) crack is extremely more addictive than powder cocaine;
>
> (2) there is a higher correlation between crack use, distribution, and related violent crime than powder cocaine (or any other drug);
>
> (3) crack's physiological effects are more perilous (including death), especially to prenatal children (i.e. "crack babies");
>
> (4) young people are particularly prone to using and trafficking crack;
>
> (5) crack's purity, potency, low cost per dose, and ease with which it is made and distributed led to its widespread use (in comparison to powder cocaine).[201]

Missing, however, was sufficient evidence and data justifying these beliefs.[202] As Representative Daniel Lungren (R-California) later admitted, "[w]e didn't really have an evidentiary basis for [the 100:1 ratio], but that's what we did, thinking we were doing the right thing at the time."[203]

Since the passage of the 1986 Act, these beliefs have been debunked and exposed as baseless and unsupported by science, medicine, or any objective proof. For instance, the ratio justification that crack is more addictive has been debunked by medical science showing that the addictiveness of cocaine depends largely on how the drug is administered into the body (i.e., smoking, injecting, snorting) more than

198. *See id.*

199. *Id.*

200. *See* U.S.S.C., 2002 REPORT, *supra* note 88, at 90.

201. *See id.* at 9–10; *see also* Kimbrough v. United States, 552 U.S. 85, 94, 95–96 (2007).

202. *See* Kimani Paul-Emile, *Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy,* 19 CORNELL J.L. & PUB. POL'Y 691, 734 (2010) (explaining that "racially-tinged media reports" about crack and crack-related violence "captured the public's attention and inspired a moral panic, which allowed legislators to substantiate the incendiary media reports conflating issues of poverty, race, drugs, and crime by passing [the 1986 Act] based on little scientific or medical evidence").

203. 156 CONG. REC. H6202 (daily ed. July 28, 2010) (statement of Rep. Daniel Lungren); *see also* United States v. Blewett, 746 F. Supp. 647, 672 (6th Cir. 2013) (Cole, J., dissenting).

the form of the cocaine.[204] Similar research has shown that "the negative effects of prenatal crack cocaine exposure are identical to the prenatal effects of prenatal powder cocaine exposure," completely undermining the racist-toned crack baby justification for the ratio disparity.[205] Congress's justification that the country was on the brink of a crack epidemic among minors "never materialized," and in fact, the opposite turned out to be true – the rate of powder cocaine use by minors far exceeded the use of crack cocaine by minors.[206] Despite the debunking of Congress's justifications for the ratio disparity, the 100:1 ratio remained unchanged for more than two decades.

E. Racial Impact of the 1986 Act

The 1986 Act overhauled and transformed sentencing and imprisonment for federal drug offenses.[207] The impact of this transformation has fallen mostly on convicted black and Latino drug offenders by most measures, such as arrest and conviction rates, prison sentence length, and the collateral consequences that accompany federal convictions.[208]

The widening racial disparity among individuals convicted for an offense carrying a mandatory minimum prison sentence pursuant to the 1986 Act is just one of the racially-tied negative impacts. Twice, in 2011 and 2017, the Sentencing Commission published reports on the carceral effects of the 1986 Act's mandatory minimum sentencing scheme.[209] Both reports show that blacks and Latinos accounted for the majority of drug offenders convicted of an offense carrying a mandatory minimum established by the 1986 Act. As per the Commission's 2011 report, for fiscal year 2010, Latinos accounted for 44% of offenders convicted of a drug offense carrying a mandatory minimum penalty, followed by black offenders at 30.3%, and then white offenders at a distant 23.1%.[210] In the six years leading up to the Commission's 2017 report, the racial disparity widened with Latinos accounting for 59.1% of offenders convicted of a drug offense carrying a mandatory minimum penalty in fiscal year 2016,

204. *See* U.S.S.C., 2002 REPORT, *supra* note 88, at 93–94.
205. *See id.* at 94.
206. *See id.* at 96.
207. *See* Lynch & Omori, *supra* note 190, at 775–83.
208. *See id.*
209. *See* U.S. SENT'G COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM [Fiscal Year 2010], https://perma.cc/APB4-G3GZ [hereinafter U.S.S.C., 2011 REPORT]; *see* U.S.S.C., JULY 2017 MINIMUM PENALTIES, *supra* note 166. The 2011 report and the July 2017 report focused on a number of offenses carrying mandatory minimum penalties. The October 2017 report, *see* U.S.S.C., OCT. 2017 MINIMUM PENALTIES, *supra* note 164, focused solely on the mandatory minimum penalties established by the 1986 Act.
210. *See* U.S.S.C., 2011 REPORT, *supra* note 209, at 154.

followed by black offenders accounting for 23.6%, and white offenders trailing third at 21.9%.[211] In sum, during its first 31 years, the 1986 Act fueled a clear and obvious racial disparity in who was prosecuted and sentenced to mandatory prison sentences for drug offenses.[212]

A key driver of this racial disparity is the 1986 Act's powder-crack sentencing ratio.[213] By 2000, the overwhelming majority (85%) of drug offenders subjected to the 1986 Act's mandatory crack penalties were black.[214] Given the data, it is not hyperbole to say that "[p]erhaps no aspect of the drug war has contributed to the rapid increase of African American prisoners in federal prisons more than the federal cocaine sentencing scheme" established by the 1986 Act.[215] As Judge Cahill declared in the opinion that opens this Article, the "'100 to 1' ratio coupled with the mandatory minimum sentencing provided by [the 1986 Act] has created a situation that reeks with inhumanity and injustice."[216] Or, as more bluntly put by a criminologist and sociologist who studied the impact of the 1986 Act's sentencing scheme, "Black Americans have borne the brunt of federal crack policies."[217]

F. The 1986 Act's Absent Sunset Provision

As discussed earlier, three factors are the foundation for the racial injustice stemming from federal criminal drug laws that lack sunset provisions: (1) panicked legislation motivated by fears about people of color, particularly young black men; (2) federal prosecutors using criminal drug statutes to prosecute individuals outside Congress's intended targets; and (3) the unreliability and fickleness of prosecutorial discretion. All three factors are at play with the 1986 Act.

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211. *See* U.S.S.C., OCT. 2017 MINIMUM PENALTIES, *supra* note 164, at 25.

212. *See* Lynch & Omori, *supra* note 190, at 776; *see also* Larkin, *supra* note 148, at 241. The scholarship that discusses, examines, and exposes the racially disparate impact of the 1986 Act is too plentiful to cite in full here.

213. *See* U.S.S.C., 1995 SPECIAL REPORT, *supra* note 141, at 192 (starting as early as 1995, the Sentencing Commission put Congress on notice that the powder-crack ratio was "unduly high," and the "vast majority of those persons most affected by such an exaggerated ratio are racial minorities," who were receiving "harsher and more severe" sentences than white drug offenders).

214. *See* U.S.S.C., 2002 REPORT, *supra* note 88, at 102.

215. Kenneth Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the 'War on Drugs' Was a 'War on Blacks',* 6 J. GENDER, RACE, & JUST. 381, 396 (Fall 2002); *see also* Larkin, *supra* note 148, at 279 ("The Anti-Drug Abuse Act of 1986 has led to the imprisonment of large numbers of African-Americans convicted of trafficking crack cocaine. The numbers are undeniable.") (cleaned up).

216. United States v. Clary, 846 F. Supp. 768, 772 (E.D. Mo. 1994), *reversed by*, 34 F.3d 709 (8th Cir. 1994).

217. Lynch & Omori, *supra* note 190, at 776.

1. The 1986 Act is Panic Legislation

The 1986 Act is a panicked legislative response to the public's simmering fear about drug-related addiction, crime, and violence spreading from the inner cities (where it mostly affected people of color) to the (white) suburbs, which quickly shot to a boil upon Len Bias's drug-related death.[218] The legislative process that produced the 1986 Act was unprecedented in its speed.[219] Before being subject to a vote on the floor of the House and Senate, normally a bill, particularly one with great impact on society, is first referred to a committee for consideration; hearings are held to explore the proposed legislation and its impact; comment is obtained from the executive branch, the judiciary, experts, and the public; and a markup is held where members of Congress can offer amendments to the bill.[220] None of this occurred during the 1986 Act's pendency in Congress. Congress abandoned the regular legislative process to meet the public's heightened fear and demand for action following Len Bias's high-profile death.[221]

2. Unintended Targets and the 1986 Act

"Drug mandatory minimum penalties applied more broadly than Congress may have anticipated."[222] This was the Sentencing Commission's polite way of saying that federal prosecutors were using the 1986 Act to target low-level drug-trafficking participants, and not the major and kingpin traffickers as intended by Congress. To reach this finding, the Commission analyzed the offender function (defined as the offender's drug trafficking activity coupled with the drug amount associated with the offender) of individuals subjected to a 1986 Act mandatory minimum penalty in fiscal year 2016. The Commission found that the majority (55%) of the subjected individuals were low-level participants: street-level dealers, brokers, couriers, mules, and workers performing menial and manual labor tasks.[223] In comparison, wholesalers, high-level suppliers/importers, growers/manufacturers, and organizers/leaders collectively constituted a distant 41.1% of individuals subjected to a 1986 Act mandatory minimum that year—a difference of 14 percentage points.[224]

218. *See supra* Sections V.A–V.B.

219. *See supra* Sections V.A–V.B.

220. *See* Simon v. United States, 361 F. Supp. 2d 35, 44 (E.D.N.Y. 2005).

221. *See id.*; *supra* Sections V.A–V.B.

222. U.S.S.C., OCT. 2017 MINIMUM PENALTIES, *supra* note 164, at 6.

223. *See id.* at 45. The particular break-down as per the report: street-level dealers (16.2 percent); courier (18.6%); mule (9.7%); and employee/worker (9.0%). *See id.*

224. *See id.* The particular break-down as per the report: high-level supplier/importer (12.5 percent); organizer/leader (2.3 percent), grower/manufacturer (1.9%), wholesaler (22.4%), manager/supervisor (2.0%). *See id.*

As noted by the Supreme Court, a key reason the powder cocaine-crack ratio is not punishing a large number of major or kingpin crack traffickers is that "[d]rug importers and traffickers generally deal in powder cocaine, which is converted into crack by street-level sellers."[225] In other words, because crack is primarily manufactured at the retail level, the 1986 Act's most severe punishments are largely confined to retail crack dealers, and rarely reach the major suppliers of the powder cocaine that are used to make crack. Due to this practicality of cocaine trafficking, the powder-crack ratio results in "retail crack dealers [receiving] longer sentences than wholesale drug distributors who supply them the powder cocaine from which their crack is produced."[226] This result, the Supreme Court noted, is "inconsistent with the 1986 Act's goal of punishing major drug traffickers more severely than low-level dealers."[227]

Judge Cahill reached the same conclusion after analyzing his district's prosecution and sentencing data.[228] Scant were defendants from the "upper echelons" of illegal drug trafficking organizations.[229] Instead, the data showed that the staggering majority of the crack prosecutions in the judge's district involved small amounts of crack.[230] Even more troubling was that nearly all of the charged crack defendants were black.[231] The data compelled Judge Cahill to seek answers from the district's U.S. Attorney's Office.[232] However, when Judge Cahill pressed for the answers, the district's federal prosecutors simply refused to explain their standards and procedures for selecting crack cases to prosecute.[233] The refusal, according to the judge, at best "raises an inference that unconscious racism may have influenced" the prosecutors' charging decisions.[234] At worst, the refusal allows "the logical inference . . . that the prosecutors in federal courts are selectively prosecuting black defendants who were involved with crack, no matter how trivial the

225. Kimbrough v. United States, 552 U.S. 85, 98 (2007).

226. *Id.*

227. *Id.*

228. *See* United States v. Clary, 846 F. Supp. 768, 788 (E.D. Mo. 1994), *rev'd by*, 34 F.3d 709 (8th Cir. 1994).

229. *Id.*

230. *See id.*

231. *Id.* at 787–91.

232. *See id.* at 790.

233. *See id.*:

> There may be rational explanations for these disproportionate figures. That is why this Court repeatedly requested the U.S. Attorney's Office to make available its standards or principles for the selection of crack cocaine cases. But the prosecutor refused to divulge this information (an *in camera* submission would have been sufficient), citing prosecutorial discretion.

Id.

234. *Id.*

amount, and ignoring or diverting whites when they do the same thing."[235]

3. Prosecutorial Discretion and the 1986 Act

An informative example of how prosecutorial discretion is not a permanent or reliable cure for the racial injustice that flows from the 1986 Act is when Senator Jeff Sessions (R-Alabama) succeeded Eric Holder as United States Attorney General in 2017.[236]

In 2012, Attorney General Holder implemented a "Smart on Crime" policy that instructed federal prosecutors to reserve charging drug offenses carrying mandatory minimum sentences pursuant to the 1986 Act for drug offenders who met one or more of the following: (1) the offender's charged conduct involved violence or possession of a weapon; (2) the offender is a leader, manager, supervisor or organizer of a criminal organization; (3) the offender has significant ties to large drug trafficking organizations, gangs, or cartels; and/or (4) the offender has a significant criminal history.[237] Holder explained that the policy was needed, in part, because the 1986 Act's mandatory minimum scheme was "result[ing] in unduly harsh sentences and perceived or actual disparities that do not reflect" federal prosecution principles.[238]

Holder's policy contributed to a significant decrease in drug trafficking offenders convicted of an offense carrying a mandatory minimum sentence between 2013 and 2016.[239] In 2012, prior to Holder's policy, only 38.5% of federal drug cases carried no mandatory minimum sentence. Under the Holder policy, that percentage jumped to 48.7% in 2014, and then to 53.1% in 2015. In fact, the percentage of drug offenders convicted of an offense carrying a mandatory minimum in 2016 (i.e., 45%), was the lowest mark since 1993.[240] Holder's policy had its intended effect: federal prosecutors used the discretion provided by the policy to charge drug offenses carrying mandatory minimums less

235. *Id.*

236. Sessions succeeded Holder as Attorney General when the Trump Administration succeeded the Obama Administration in 2017. *See* Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Capping Bitter Battle*, N.Y. TIMES (Feb. 8, 2017), https://perma.cc/FV7F-238F.

237. *See* Memorandum from U.S. Attorney General Eric H. Holder to the U.S. Attorneys and Assistant Attorneys General for the Criminal Division re: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases 2 (Aug. 12, 2013), https://perma.cc/T9LY-REP6.

238. *Id.* at 1.

239. *See* U.S.S.C., OCT. 2017 MINIMUM PENALTIES, *supra* note 164, at 16–18.

240. *See* U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2016, at 6–7 (2017), https://perma.cc/333R-V5QQ.

frequently.[241] The policy embodied using prosecutorial discretion to reduce racial injustice outcomes and narrow the gap between congressional intent for a criminal statute and its use by federal prosecutors.

On February 7, 2017, Sessions was confirmed to succeed Holder as U.S. Attorney General.[242] Three months later, Sessions voided his predecessor's groundbreaking charging policy.[243] In its place, Attorney General Sessions implemented a policy requiring federal prosecutors to "charge and pursue the most serious, readily provable offense."[244] The change eliminated the discretion federal prosecutors had under Holder's policy to decide whether a drug offender deserved a charge carrying a mandatory minimum penalty based on whether the offender's conduct involved violence, the offender's role in the criminal drug organization, the offender's ties to gangs, cartels, and large criminal organizations, and the offender's criminal history.[245]

Sessions's policy change drew bipartisan criticism as a return to the ineffective "war on drug[s]" approach of the 1980s and 1990s that led to drastic increases and racial disparities in the country's prison population.[246] The criticisms proved prescient. By 2019, under Sessions's policy, the percentage of drug offenders convicted of an offense carrying a mandatory minimum penalty among all drug offenders was 65.6%—an outstanding increase from the historic low of 45% from just years prior under the Holder policy.[247]

The Holder-to-Sessions policy change reflects the fickleness of prosecutorial discretion. Prosecutorial discretion is subject to the whims (and bias) of who is in charge, who sets policy, and the changing winds of public fear and perception that influence prosecutorial prerogatives and actions.[248] Prosecutorial discretion's transient nature renders it an

241. *See* Press Release, Off. Pub. Affs., Dep't of Just., New Smart on Crime Data Reveals Federal Prosecutors Are Focused on More Significant Drug Cases and Fewer Mandatory Minimums for Drug Defendants (Mar. 21, 2016), https://perma.cc/V93W-RPUV.

242. Lichtblau & Flegenheimer, *supra* note 236.

243. *See* Memorandum from U.S. Attorney General Jeff Sessions to All Federal Prosecutors re: Department Charging and Sentencing Policy 1–2 (May 10, 2017), https://perma.cc/6G4E-Z5VH; *see also* Sari Horwitz & Matt Zapotosky, *Sessions Issues Sweeping New Criminal Charging Policy*, WASH. POST (May 12, 2017), https://perma.cc/VFR6-YRBX.

244. *See* Memorandum from Jeff Sessions, *supra* note 243, at 1.

245. *See id.* For terms of the Holder's charging policy, see generally Memorandum from Eric H. Holder, *supra* note 267.

246. Horwitz & Zapotosky, *supra* note 243.

247. *See* U.S. SENT'G COMM'N, QUICK FACTS: DRUG TRAFFICKING OFFENSES [Fiscal Year 2019] 1, https://perma.cc/3F9M-QF6J.

248. *See* Myers, *supra* note 24, at 1354 ("Trusting prosecutors to fairly enforce the law may be efficient, but it leads to concentrations of power and perceptions that such

unreliable source for racial justice and not a suitable alternative to sunset provisions.[249]

G. Failed Efforts to Mitigate the Racial Injustice of 1986 Act's Cocaine Ratio

Nothing highlights the need for incorporating sunset provisions into federal criminal drug laws more than the tortured history of Congress trying to address and reduce the racial injustices caused by the 1986 Act's powder cocaine-crack sentencing ratio.

For more than two decades (until the passage of the Fair Sentencing Act in 2010 (discussed later)), calls to reduce and eliminate the disparity went largely unheeded by Congress, and legislative attempts to narrow or eliminate the disparity failed. The Sentencing Commission, for instance, has consistently maintained since 1995 that the 100:1 ratio failed to meet congressional objectives, was unwarranted, and created unjustified racial sentencing and imprisonment disparities.[250] The Commission submitted four reports to Congress (1995, 1997, 2002, 2007) criticizing the ratio, showing how the ratio and the rationale behind it were unsupported by scientific and medical data, highlighting the disparate racial impact of the ratio, and advocating for greatly narrowing the ratio.[251] Congress ignored the Commission's advice for decades.

Moreover, when the Commission acted on its own to narrow the ratio and mitigate its harms, Congress summarily reversed the Commission's action. Acting on the findings of its 1995 report to Congress, the Commission voted to amend the federal sentencing guidelines (which the Commission is statutorily authorized to do) to adopt a 1:1 ratio.[252] Congress quickly responded by passing a law that nullified the Commission's action.[253] From the nullification bill's introduction in Congress to its signing into law by President William J. Clinton took just 42 days, and the bill faced no real opposition in the House or Senate.[254]

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concentration leads to the rule of men, not laws."). *See generally* Brown, *supra* note 119 (discussing the limits of, and problems with, prosecutorial discretion).

249. *See* United States v. Clary, 846 F. Supp. at 787–98 (noting that federal prosecutors were not using their prosecutorial discretion to use the 1986 Act to focus on kingpins and major drug traffickers, but were instead focusing on low level dealers).

250. U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010, at 3 (2015) [hereinafter U.S.S.C., 2015 REPORT], https://perma.cc/9EKT-3QS9.

251. *See id.*

252. *See id*. at 6.

253. *See* Pub. L. No. 104-38, 109 Stat. 334, 334–35 (1995).

254. *See Actions Overview: S. 1254, 104th Cong. (1995–1996)*, CONGRESS.GOV, https://perma.cc/Y5V6-FCBY (last visited Nov. 29, 2025). During the legislative process, Representative John Conyers (D-MI) introduced an amendment designed to take the

Legislative attempts to narrow or eliminate the ratio disparity prior to the Fair Sentencing Act were equally unsuccessful. Both Democrats and Republicans made attempts, including lawmakers who are generally seen as "tough on crime." From the GOP side of the aisle, Representative Roscoe Bartlett (R-Maryland), repeatedly introduced in 2002, 2003, twice in 2005, 2007, and 2009, the Powder-Crack Cocaine Penalty Equalization Act, which would have eliminated the ratio disparity.[255] In 2001, 2006, and 2007, then-Senator Jeff Sessions (R-Alabama), who is no bleeding heart when it comes to crime policy, introduced bills to narrow the ratio by decreasing the amount of powder cocaine and increasing the amount of crack needed to trigger the mandatory minimum penalties set by the 1986 Act.[256] A similarly tough-on-crime Republican, Senator Orin Hath (R-Utah), introduced in 2007 a bill that would have increased by a factor of five the amount of crack required to trigger the five and ten-year mandatory minimum penalties.[257] In 2021, Senator Tom Cotton (R-Arkansas) sought to completely eliminate the ratio disparity.[258] Even though these bills were introduced by prominent Republican lawmakers, none of them came close to becoming law. Most were not even considered or voted on by a congressional committee.

Efforts by Democrat lawmakers were similarly unavailing prior to 2010. Then Senator Joseph Biden (D-Delaware) introduced two bills to eliminate the ratio disparity.[259] Senator Ben Cardin (D-Maryland) also

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force out of the legislation by deleting the provisions in the bill that disapproved of the Commission's action. His amendment was defeated by a vote of 98-316. *See* Proposed House Amendment 878 to H.R. 2259, 104th Cong. (1995), https://perma.cc/D6ZS-MGZ3.

255. *See* Powder-Crack Cocaine Penalty Equalization Act of 2002, H.R. 4026, 107th Cong. (as introduced in the House, Mar. 20, 2002); Powder-Crack Cocaine Penalty Equalization Act of 2003, H.R. 345, 108th Cong. (as introduced in the House, Jan. 27, 2003); Powder-Crack Cocaine Penalty Equalization Act of 2005, H.R. 48, 109th Cong. (as introduced in the House, Jan. 4, 2005); Powder-Crack Cocaine Penalty Equalization Act of 2005, H.R. 1501, 109th Cong. (as introduced in the House, Apr. 6, 2005); Powder-Crack Cocaine Penalty Equalization Act of 2007, H.R. 79, 110th Cong. (as introduced in the House, Jan. 4, 2007); Powder-Crack Cocaine Penalty Equalization Act of 2009, H.R. 18, 111th Cong. (as introduced in the House, Jan. 6, 2009).

256. *See* Drug Sentencing Reform Act of 2001, S. 1874, 107th Cong. (as introduced in the Senate, Dec. 20, 2001); Drug Sentencing Reform Act of 2006, S. 3725, 109th Cong. (as introduced in the Senate, July 25, 2006); Drug Sentencing Reform Act of 2007, S. 1383, 110th Cong. (as introduced in the Senate, May 14, 2007).

257. *See* Fairness in Drug Sentencing Act of 2007, S. 1685, 110th Cong. (as introduced in the Senate, June 25, 2007).

258. *See* Equal Enforcement of Cocaine Laws Act, S. 2156, 117th Cong. (as introduced in the Senate, June 22, 2021).

259. *See* Crime Control and Prevention Act of 2007, S. 2237, 110th Cong. (as introduced in the Senate, Oct. 25, 2007); Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, S. 1711, 110th Cong. (as introduced in the Senate, June 27, 2007).

sought to legislatively eliminate the ratio disparity in 2015.[260] Congress rejected a legislative effort in 1995 to eliminate the ratio disparity by increasing the sentencing penalties for powder cocaine to match those for crack cocaine. Introduced by Representative John Breaux (D-Louisiana), the proposed bill would have set the five-year mandatory minimum penalty for both powder cocaine and crack at five grams, and the 10-year mandatory minimum for both forms of cocaine at 50 grams.[261] The bill died shortly after its introduction.

The string of legislative failures ended in 2010 with the passage of the Fair Sentencing Act ("FSA"). But it was only a partial success. The FSA reduced the powder cocaine-crack ratio disparity from 100:1 to 18:1, so that today one gram of crack is equal to 18 grams of powder cocaine instead of 100 grams.[262] So despite the overwhelming data that the powder cocaine-crack ratio was resulting in unjustifiable racial disparities in sentencing and imprisonment, the FSA narrowed, but did not eliminate, the ratio disparity. As noted by one federal judge, the FSA "was a step forward, but it did not finish the job."[263]

A more recent congressional effort to address the ratio disparity has drawn wide support from members of Congress, the public, and other interested parties, but it too has repeatedly fallen short of becoming law. First introduced in 2021 by Senator Cory Booker (D-New Jersey) and Representative Hakeem Jeffries (D-New York), the Eliminating a Quantifiably Unjust Application of the Law Act ("EQUAL Act") would eliminate the ratio disparity by setting the triggers for the mandatory minimum penalties for both crack and powder cocaine at the current weight levels for powder cocaine.[264] Six months after it was introduced, the House Judiciary Committee favorably reported the bill out of committee (by a vote of 36 to 5) with a recommendation that the full House pass the legislation.[265] The next day, the full House overwhelmingly voted (361 to 66) to pass the legislation.[266]

There was great optimism that the EQUAL Act would pass the Senate and become law. The lopsided House vote reflected the wide

260. Building and Lifting Trust In Order to Multiply Opportunities and Racial Equality Act of 2015, S. 1610, 114th Cong. (as introduced in the Senate, June 18, 2015).

261. *See* S. 1398, 104th Cong. (1995).

262. *See* Fair Sentencing Act of 2010, Pub. L. 111-220, § 2, 124 Stat. 2372, 2372.

263. United States v. Blewett, 719 F.3d 482, 488 (6th Cir. 2013), *vacated by*, 746 F.3d 647 (6th Cir. 2013).

264. *See* Eliminating a Quantifiably Unjust Application of the Law Act (the "EQUAL Act"), H.R. 1693, 117th Cong. (2021); Eliminating a Quantifiably Unjust Application of the Law Act (the "EQUAL Act"), S. 79, 117th Cong. (2021).

265. *See* H.R. REP. NO. 117-128(I) (2021).

266. *See* Stef W. Kight, *By the Numbers: Cocaine Sentencing Disparities*, AXIOS (Sep. 28, 2021), https://perma.cc/MEF2-Q2L7.

bipartisan support for the legislation.[267] It had significant law enforcement support, including support from the Justice Department.[268] The bipartisan support in the Senate appeared filibuster-proof.[269] President Biden also supported the legislation.[270] Unfortunately, the companion bill in the Senate died on the floor without a vote just days before the Christmas holiday.[271] The failure to obtain a vote is largely attributed to bad political timing: the forthcoming contentious midterm elections, where crime was a top concern of voters.[272] Supporters of the legislation on both sides of the aisle got cold feet about appearing soft on crime.[273] This fear was captured by Senator Tom Cotton (R-Arkansas), who, despite introducing a bill in 2021 to eliminate the ratio disparity, claimed that it was the wrong time to address the ratio disparity because in his view the Equal Act goes "easier on crack cocaine traffickers including gangs and cartels which is only going to exacerbate our problems."[274] Senator Booker and Representative Jeffries reintroduced the EQUAL Act in February 2023.[275] Despite its long list of bipartisan co-sponsors, the bill never emerged from the Senate Judiciary Committee.[276]

The continuing survival of the ratio disparity is consistent with history's lesson that it is a fool's errand trying to repeal an existing

267. *See* Carl Husle, *Drug Sentencing Bill Is in Limbo as Midterm Politics Paralyze Congress*, N.Y. TIMES (Apr. 29, 2022), https://perma.cc/9US6-7AJE.

268. *Id.*; *see also* Cory Booker, Letter to the Editor, *There Is No Excuse for Allowing the Savage Cocaine Injustice to Persist*, WASH. POST (Sep. 20, 2022), https://perma.cc/6G4W-HM4Y.

269. *See* Husle, *supra* note 267.

270. *Id.*; *see also* Sean Sullivan & Seung Min Kim, *Biden Administration Endorses Bill to End Disparity in Drug Sentencing Between Crack and Powder Cocaine*, WASH. POST (June 22, 2021), https://perma.cc/7LEZ-PF5N.

271. *See* Eliminating a Quantifiably Unjust Application of the Law Act (the "EQUAL Act"), S. 79, 117th Cong. (2021); *see also* Carrie Johnson, *A Bill That Would Have Impacted Racial Disparity in Cocaine Crimes Died in the Senate*, NPR (Jan. 10, 2023), https://perma.cc/2NH4-BG3X.

272. *See* Husle, *supra* note 267.

273. *See id.*

274. *See* Johnson, *supra* note 271.

275. *See* EQUAL Act, S. 524, 118th Cong. (2003); EQUAL Act, H.R. 1062, 118th Cong (2003).

276. The co-sponsors included: Senators Dick Durbin (D-IL), Lindsey Graham (R-SC), Thom Tillis (R-NC), Chris Coons (D-DE), Cynthia Lummis (R-WY), and Rand Paul (R-KY), and Representatives Kelly Armstrong (R-ND), Don Beacon (R-NE), and Bobby Scott (D-VA). *See* Press Release, Cory Booker, U.S. Senate, Booker, Durbin, Armstrong, Jeffries Announce Reintroduction of Bipartisan Legislation to Eliminate Crack and Powder Cocaine Sentencing Disparity (Feb. 17, 2023), https://perma.cc/25JK-KUBU (on file with author); EQUAL Act, S. 524 118th Cong. (2003) (showing, in the legislative history of the bill, that it died in committee).

law.[277] Repeal requires the passage of a new law to nullify a prior law, and therefore requires a tremendous investment of time, effort, and resources. "[A]nd as scholars of the American legislative process have long recognized . . . it is generally easier for a minority to kill a new legislative proposal than for a majority to secure its adoption."[278]

It is particularly difficult to repeal a *criminal statute* due to its public visibility, symbolic influence, and "tough on crime" politics.[279] As explained by Professors Richard Myers, William Stuntz, and other scholars, criminal laws have both an instrumental function and an expressive function.[280] The instrumental function criminalizes conduct deemed harmful to society and provides the means for the government to prosecute and punish such conduct.[281] The expressive function reflects a consensus that the conduct is immoral, and the perpetrator is no longer worthy of full participation in the social order.[282] The expressive function is home to the political quagmire that hampers repeal, especially of federal criminal drug statutes.[283] Voting to repeal a criminal statute "has the potential to be seen as condoning the behavior, and even politicians who take pains to explain a different basis for their decision run the risk that their opponents will assert that they condone the behavior."[284] Voting to repeal a criminal drug statute, in particular, is often seen as "tantamount to condoning" drug conduct.[285]

The persistence of a powder cocaine-crack disparity aptly reflects the difficulty of repealing a criminal law, particularly a drug statute enacted in response to widespread public panic.[286] This persistence has played out in the courtroom as well. Following the passage of the FSA,

277. *See* Eyal-Cohen, *supra* note 18, at 1202–08; Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1240 (2004) ("Because it is so much harder to get legislatures to do something that it is to get them not to do something, statutes linger on the books long after they should be revised or removed."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH L. REV. 505, 557 ("When the issue is subtracting crimes rather than adding them, legislative inertia is probably stronger in criminal law than elsewhere, since even groups with good reason to seek decriminalization hesitate to do so."); Myers, *supra* note 24, at 1329 ("Once on the books, criminal law is difficult to repeal."); O'Hear, *supra* note 85, at 74–75.

278. O'Hear, *supra* note 85, at 74–75.

279. *Id.*; *see also* Stuntz, *supra* note 277, at 556 ("The same factors that make it hard for interest groups to organize in opposition to new criminal legislation also make it hard to organize in support of narrowing or repealing existing statutes. The result is that once crimes are in place, they tend to be permanent.").

280. *See* Myers, *supra* note 24, at 1335–38 (citing Stuntz, *supra* note 277, at 528–29).

281. *See id.*

282. *See id*.

283. *See id*.

284. *Id*. at 1337.

285. *Id*.

286. *See supra* Section VI.G.

federal courts were split on whether the narrowed ratio applied to offenders whose criminal conduct predated the law taking effect.[287] Some courts held that the harsher 100:1 ratio applied to criminal conduct that predated the FSA's enactment, despite the repeated findings of the Sentencing Commission, multiple judges, and members of Congress that the ratio was either inherently racially discriminatory or produced unjustified racial disparities.[288] To one federal circuit judge, that retroactivity was even doubted by some courts laid bare that racial animus was at play:

> The Fair Sentencing Act was a step forward, but it did not finish the job. The racial discrimination continues by virtue of a web of statutes, sentencing guidelines, and court cases that maintain the harsh provisions for those defendants sentenced before the Fair Sentencing Act. If we continue now with a construction of the statute that perpetuates the discrimination, there is no longer any defense that the discrimination is unintentional. The discriminatory nature of the old sentencing regime is so obvious that it cannot seriously be argued that race does not play a role in the failure to retroactively apply the Fair Sentencing Act. A "disparate impact" case now becomes an intentional subjugation or discriminatory purpose case. Like slavery and Jim Crow laws, the intentional maintenance of discriminatory sentences is a denial of equal protection.[289]

In short, when Congress chooses to mitigate rather than eliminate the racial injustice stemming from a criminal statute, federal courts remain an obstacle to the mitigation realizing its full racial justice potential.[290]

H. How a Sunset Provision Would Have Helped

It is beyond debate that the powder cocaine-crack sentencing ratio results in unjustifiable punishment disparities along racial lines, with black and Latino offenders receiving longer prison sentences than white offenders, where the only difference in criminal conduct is the form of cocaine involved.[291] It is also equally clear that the justifications for the ratio (i.e., crack is more addictive, crack trafficking is more dangerous

287. *See* Dorsey v. United States, 567 U.S. 260, 264 (2012) ("The question here is whether the Act's more lenient penalty provisions apply to offenders who committed a crack cocaine crime before [the date of enactment] but were not sentenced until after [the date of enactment].").

288. *See id*. at 273.

289. United States v. Blewett, 719 F.3d 482, 485 (6th Cir. 2013), *vacated by*, 746 F.3d 647 (6th Cir. 2013).

290. *See* Stuntz, *supra* note 277, at 557–58 (discussing the limits of a court's ability to restrain the legislative's natural bias toward overcriminalization).

291. *See supra* Sections VI.D, VI.E.

and violent, crack is more attractive to juveniles, and crack is more physiologically and psychologically harmful) are misguided, unfounded, unsupported by science, and steeped in biased (racist) beliefs.[292]

Credit must be given to successful efforts, such as the Fair Sentencing Act, to narrow the ratio disparity.[293] However, a ratio disparity (18:1) still exists, is the law of the land, and is a tool that is regularly used by federal prosecutors. The ratio disparity survives even though its foundation is widely acknowledged as baseless and racist, and despite the broad and deep support for eliminating the disparity among the public, law enforcement, bipartisan lawmakers, and other stakeholders and interested parties.[294] Indeed, a ratio disparity still survives despite many members of Congress publicly acknowledging that the 100:1 ratio was "racially discriminatory and not based on any coherent rationale."[295] This includes the senator who chaired the Senate Judiciary Committee at the time of the 1986 Act's enactment, who more recently stated that the 100:1 ratio was "one of the most notorious symbols of racial discrimination in the modern criminal justice system."[296] The continuing survival of a ratio disparity shows, as explained in the previous section, that the road to legislatively repealing or even mitigating a federal criminal drug law is littered with entrenched obstacles and regularly leads to a dead end.[297]

Therein lies the beauty, efficiency, and efficacy of incorporating sunset provisions into federal criminal drug laws. Sunset provisions can protect the instrumental function of a federal drug law by serving as a guardrail against federal prosecutors using a statute to prosecute types and categories of offenders not intended by Congress. If prosecutors are

292. *See supra* Sections VI.D, VI.E; *see also* U.S.S.C., 2002 REPORT, *supra* note 88, at 93–97.

293. *See* U.S.S.C., 2015 REPORT, *supra* note 250, at 26 (demonstrating that the Sentencing Commission has estimated that the FSA resulted in a reduction of 29,653 prison bed-years for those convicted under the 1986 Act; and, despite the flaw of not completely eliminating the powder cocaine-crack ratio disparity, the narrowing of the ratio has yielded significant racial benefits, especially since 2011, when the FSA was made retroactive to reach individuals sentenced under the 1986 Act prior to the enactment of the FSA); *see also* U.S. SENT'G COMM., FINAL CRACK RETROACTIVITY DATA REPORT, FAIR SENTENCING ACT, at *8 tbl. 5 (2014) [hereinafter U.S.S.C., 2014 DATA REPORT], https://perma.cc/EJ8P-ZPT6 (showing that, for example, of the 7,712 individuals granted an FSA sentencing reduction as of December 2014, 6,607 (85.7 percent) were black).

294. *See* United States v. Blewett, 719 F.3d 482, 488 (6th Cir. 2013) ("[T]here can be no doubt that the [100:1 ratio] was racially discriminatory in effect."), *vacated by*, 746 F.3d 647 (6th Cir. 2013); Dorsey v. United State, 567 U.S. 260, 268 (2012) ("[T]he public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences.").

295. *Blewett*, 719 F.3d at 485.

296. 156 CONG. REC. S1683 (daily ed. Mar. 17, 2010).

297. *See also* U.S.S.C., 2015 REPORT, *supra* note 250, at 6.

using a statute outside the intent of Congress, a sunset provision, depending on the type involved, would end the practice or require the executive branch to demonstrate why a statute's lifespan should be extended despite the gap between intent and execution. The political benefit matches the legislative benefit. Sunset provisions would allow members of Congress to avoid the proverbial rock-hard place when facing a vote to repeal or amend a criminal drug statute. No longer would a member have to choose between facing the "soft on crime" political backlash that endangers that member's hold on office, versus allowing an unwarranted, unjustified, overly punitive, and (often) racially discriminatory practice to continue.

If a sunset provision had been incorporated in the 1986 Act, it would have rendered unnecessary all the time, effort, and resources expended over the past few decades trying to correct, mitigate, narrow, and eliminate the crack-powder cocaine disparity. It would have also saved thousands of convicted (mostly black and Latino) federal defendants from serving unjustified and unwarranted extended prison sentences. Finally, a sunset provision would have reversed the legislative onus by forcing supporters of the power cocaine-crack ratio disparity to justify saving or re-enacting the ratio as the sunset period approached or passed.

Given the panic of the time, it is hard to imagine that Congress would have included a blanket sunset provision that would have completely terminated the 1986 Act after a set time period. It is certainly conceivable, however, that Congress would have been open to incorporating a sunset provision that would have required periodic review and re-authorization of the 1986 Act, such as every ten years after enactment.[298] A recurring ten-year reauthorization requirement would have allowed Congress to react to the public panic connected to illegal drugs, particularly crack, while also building a release valve into the legislation for when the panic subsided.[299] Moreover, a reauthorization sunset provision would have provided Congress the option of extending the 1986 Act at each review deadline if public panic remained high and/or the law was shown to be effective, while also providing a less burdensome and easier legislative path (compared to repeal) to remove the law if the public panic dissipated and/or the law was shown to be ineffective or resulting in unjustified racial disparities.[300]

So what would have happened if the 1986 Act had included a recurring ten-year reauthorization sunset provision? Admittedly, there is

298. *See* O'Hear, *supra* note 85, at 75 (arguing that a 10-year sunset provision is "an ideal period of time" for criminal laws enacted due to public panic).

299. *See id.*

300. *See id.*

little reason to believe that Congress would have allowed the 1986 Act to expire at the law's first ten-year reauthorization deadline. By 1996, the racial sentencing disparity consequences of the crack-powder ratio were evident, with blacks constituting 88.3% of crack offenders sentenced under the law compared to a distant 4.1% being white.[301] However, the data and the racial injustice it reflected engendered little sympathy or calls for change by members of Congress at that time. Indeed, when the Sentencing Commission in 1995 passed an amendment eliminating the ratio disparity from the sentencing guidelines, Congress quickly reversed the commission's action to preserve the 100:1 ratio within the sentencing guidelines.[302] Congress had no appetite in 1996 to eliminate or even narrow the powder cocaine-crack ratio, even in the face of indisputable evidence of the ratio's racial injustice impact.

The second ten-year reauthorization mark would have been a completely different story. By 2006, criticism of the powder cocaine-crack ratio was wide, vigorous, and backed by significant evidence.[303] The Sentencing Commission was openly and strongly critical of the ratio, and the agency had compiled mounds of data and evidence to support its criticism and calls for reform. The Commission submitted three reports to Congress by 2006 that criticized the ratio, documented the ratio's racial disparity impact, and called for reforming the ratio.[304] The 2002 report was particularly critical, as the Commission charged that the ratio overexaggerated the harmfulness of crack compared to powder cocaine, was mostly punishing low-level dealers and not major traffickers and kingpins, overstated the seriousness of crack-related criminal conduct (especially violent conduct), and was punishing black offenders at overwhelmingly disproportionate rates.[305]

By 2006, members of Congress were not only open to addressing the ratio, but some took legislative steps to stop the harmful and unjust consequences of the ratio. For instance, Representative Roscoe Bartlett (R-Maryland) and Senator Jeff Sessions (R-Alabama) separately introduced multiple bills to narrow or eliminate the ratio between 2001 and 2006.[306] Calls by members of Congress and the Sentencing

301. *See* U.S.S.C., 1995 SPECIAL REPORT, *supra* note 141, at 156, 161 tbl. 13.

302. *See* O'Hear, *supra* note 86, at 73; *supra* note 250 and accompanying text; *supra* Part VI.

303. *See, e.g.*, Simon v. United States, 361 F. Supp. 2d 35, 43 (E.D.N.Y. 2005) ("The disparity between sentences imposed for equivalent amounts of powder versus crack cocaine is now approaching common knowledge, and a source of popular and scholarly concern.").

304. The reports were submitted in 1995, 1997, and 2002. *See* U.S.S.C., 2015 REPORT, *supra* note 250, at 3.

305. U.S. SENT'G COMM., SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at v–viii (2002) [hereinafter U.S.S.C., 2002 SPECIAL REPORT].

306. *See supra* notes 255–56 and accompanying text; *supra* Part VI.

Commission to reduce or eliminate the ratio received widespread support from the public, criminal justice advocates, racial justice advocates, and sectors of law enforcement.[307]

A key factor that developed by 2006 supports hypothesizing that the 1986 Act would have faced a significant danger of expiring at a second ten-year reauthorization deadline: judicial displeasure with the powder cocaine-crack ratio. By 2006, a growing contingent of judges, who had personal experience applying the ratio and witnessing its collateral consequences (particularly the racial sentencing disparities), had soured on the ratio, were critical of the ratio, and were seeking ways to circumvent the sentencing guidelines stemming from the ratio.[308] The soured judges saw the large gap between the guideline sentencing calculations for crack offenders compared to the lower calculations for powder cocaine offenders as inconsistent and conflicting with the statutory requirement that judges avoid unwarranted sentencing disparities among offenders convicted of similar conduct.[309] One of the soured judges was the Honorable Raymond A. Jackson, who in a seminal case that would end up at the Supreme Court and change crack sentencing going forward, imposed a sentence on a crack offender that was well below the advisory sentencing guideline range because he found the range was unjustly disproportionate to the range had the offender's conduct involved the same amount of powder cocaine.[310] The

307. *See, e.g.*, Sterling & Steward, *supra* note 147; *see also* U.S.S.C., 2002 SPECIAL REPORT, *supra* note 305, app. D; United States v. Perry, 389 F. Supp. 2d 278, 300–01 (D.R.I. 2005) ("The crack/powder cocaine controversy has long been fodder for criticism within both the criminal law community, in general, and the Sentencing Commission, in particular. Recently, that controversy has even emerged in mainstream media.").

308. *See, e.g.*, United States v. Smith, 359 F. Supp. 2d 771, 781 (E.D. Wisc. 2005) ("I concluded that adherence to the guidelines would result in a sentence greater than necessary and would also create unwarranted disparity between defendants convicted of possessing powder cocaine and defendants convicted of possessing crack cocaine."); *Perry*, 389 F. Supp. 2d at 304–08.

309. 18 U.S.C. § 3553(a) (delineating the factors a federal judge must consider in sentencing a convicted defendant, including "the need to avoid unwarranted sentence disparities among defendants . . . who have been found guilty of similar conduct"); *see Smith,* 359 F. Supp. 2d at 781 (concluding that the guidelines create an unwarranted disparity between powder cocaine and crack cocaine defendants); *Perry,* 389 F. Supp. 2d at 304–08.

310. *See* Kimbrough v. United States, 552 U.S. 85, 93 (2007) ("[Judge Jackson] contrasted Kimbrough's Guidelines range of 228 to 270 months with the range that would have applied had he been accountable for an equivalent amount of powder cocaine: 97 to 106 months."). Judge Jackson sentenced Mr. Kimbrough to 180 months (15 years) in prison, which was far below the 228 to 270 months called for by the guidelines. *See id.* at 93. The Fourth Circuit vacated the sentence. *See* United States v. Kimbrough, 174 Fed. App'x. 798, 798–99 (4th Cir. 2006). According to the Fourth Circuit, 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." *Id.* at 799. The case reached the Supreme Court and was argued in 2007. The Supreme

soured judges who acted on their displeasure with the ratio were not anomalies by 2006. The Judicial Conference of the United States—the voice for federal judges for communicating to Congress—went on record in 2002 criticizing the ratio and calling for reform.[311] As noted by one federal judge in 2005, "[t]he growing sentiment in the district courts [was] clear: the advisory Guideline range for crack cocaine based on the 100:1 ratio cannot withstand scrutiny imposed by the sentencing courts when [statutory sentencing factors] are applied."[312]

Due to the changing tide in Congress and the courts, coupled with the growing public and interest group condemnation of the ratio, there are reasons to doubt that the 1986 Act would have survived a reauthorization review in 2006 without major changes to the powder-crack ratio. A recurring ten-year reauthorization sunset provision, therefore, would have drastically altered the history and impact of the 1986 Act.

This brings us to the next question in this exercise: what racial justice benefits would have flowed from Congress eliminating the disparity ratio during the 1986 Act's second ten-year reauthorization? It is very difficult to quantify, but data about the retroactive application of the Fair Sentencing Act's narrowing of the crack-powder cocaine ratio to 18:1 provides insightful clues.[313] Between 2011 and 2014, 7,710

Court reversed the Fourth Circuit, holding, in part, that a sentencing judge may consider the impact of the 100:1 ratio and impose a sentence that satisfies the mandatory minimum, but is below the recommended advisory guideline sentence for a crack offense. *See Kimbrough*, 552 U.S. at 100–08. In reaching its decision, the Supreme Court highlighted how the justifications for the ratio had largely been debunked, how the ratio led to sentencing guidelines with no empirical foundation, how the ratio was leading to racial disparities in sentencing that were endangering trust in the criminal justice system, and the multiple efforts by the Sentencing Commission to narrow the ratio.

311. *See* U.S.S.C., 2002 REPORT, *supra* note 88, at D-1. The Judicial Conference "consider[s] administrative and policy issues affecting the court system, and to make recommendations to Congress concerning legislation involving the Judicial Branch." *About the Judicial Conference of the United States*, U.S. CTS., https://perma.cc/TH4P-K5CL. The Conference is comprised of the Chief Justice of the Supreme Court, chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit. *See id.*

312. *Perry*, 389 F. Supp. 2d at 307; *see id.* (blessing the approach in 2005 by holding that a sentencing judge may consider the impact of the 100:1 ratio and disagree with the ratio to impose a sentence that satisfies the mandatory minimum, but is below the recommended guideline sentence for a crack offense); *Kimbrough,* 552 U.S. at 85.

313. *See* U.S.S.C., 2014 DATA REPORT, *supra* note 293, at *2–8. In 2011, the United States Sentencing Commission promulgated an amendment to make the guidelines implementing the FSA's narrower crack-powder cocaine ratio (18:1) retroactive to reach individuals sentenced under the 1986 Act prior to the enactment of the FSA. Thousands of convicted crack offenders who were sentenced under the 100:1 ratio filed motions seeking reduced sentences when the Sentencing Commission retroactively amended the guidelines for crack and cocaine offenses consistent with the FSA's narrower 18:1 ratio. *See id.*

convicted crack offenders received a sentencing reduction pursuant to retroactive application of the FSA guidelines. Of these offenders, *85% (6,607 offenders) were black and only 5.6% (435) were white.*[314] If that same rate is applied to crack offenders who were granted a reduction between 2006 (the hypothetical expiration date) and 2014, then about 4,333 black offenders would have originally received much shorter sentences had the 1986 Act included a recurring ten-year sentencing sunset provision.[315]

A valid criticism is that any racial justice benefits following the elimination of the powder cocaine-crack ratio in 2006 would have been outweighed by the racial injustices that accumulated during the law's 20 year tenure prior. But this criticism misunderstands the racial justice value of sunset provisions advocated here. This Article does not argue or suggest that sunset provisions will eliminate all racial injustice consequences flowing from federal criminal drug laws. That is an impossible expectation to place on sunset provisions alone. Instead, the racial justice value point made here is that sunset provisions provide a mechanism to end the accumulation of racial injustice consequences that is easier to trigger than legislative alternatives, such as repealing a law, and is more reliable, transparent, and permanent than prosecutorial discretion. In short, sunset provisions are an efficient, politically feasible, and effective tool to avoid the "horror of continuing" with federal criminal drug laws that result in racial disparities and injustice.[316]

VII. CONCLUSION

Sunset provisions force legislatures to evaluate whether a law or agency is effective, meets the goals sought by the legislature, is still necessary given changes over time, and does not result in unjustified and damaging collateral consequences. Such forced evaluation is desperately needed when it comes to our federal criminal drug laws. Often conceived and enacted in panic and too easily influenced by racial stereotypes and fears about people of color, federal criminal drug laws too often lead to unjust racial disparities in enforcement, prosecution, sentencing, and imprisonment. Without sunset provisions, these laws and their racial injustice consequences have no end date. Nowhere is this more evident than in the continuing history of the Anti-Drug Abuse Act of 1986 and its powder cocaine-crack sentencing ratio. Had a sunset provision been incorporated into the law, many (but not all) of the racial injustices that have flowed from the law would have been avoided or diminished.

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314. *See id.* at *8 tbl. 5.

315. *See id.* (stating the average sentence reduction following a grant for retroactive application of the 18:1 ratio guidelines was 30 months); *id.* at *11 tbl. 8.

316. United States v. Clary, 846 F. Supp. 768, 796 (E.D. Mo. 1994).

Unfortunately, history is apt to repeat itself, particularly when it comes to federal criminal drug laws. Today, the country is in the midst of a panic about opioids, especially fentanyl.[317] The rapid increase of fentanyl and other opioid-related deaths and overdoses, especially among white juveniles, has reached the "crisis" and "epidemic" point in the minds of the American public and its legislators.[318] True to the panic legislation playbook that birthed the 1986 Act, the legislative response to the opioid and fentanyl crisis is increased criminalization with harsh and long sentencing schemes as the foundation.[319] Indeed, Congress is flooded with proposals seeking to increase sentencing penalties for fentanyl and other opioid-related drugs, including bills to permanently classify fentanyl and fentanyl-analogous as Schedule I controlled substances (which in turn would trigger significant sentencing penalties, including mandatory minimums).[320] Congress did enact public health-focused legislation in 2018—the SUPPORT Act—that dedicated $20 billion to treatment, prevention, and recovery as a response to the opioid epidemic. In an interesting twist, considering the point of this Article, the law contained a five-year sunset provision, which caused it to expire in 2023 when Congress failed to reauthorize the law.[321] Sadly, the substance and tone of the bills and rhetoric to increase the criminalization of opioids and fentanyl offer little hope that Congress will incorporate similar sunset provisions into the criminal laws it passes to address the opioid epidemic. Congress simply has yet to fully learn the lessons of the 1986 Act's powder cocaine-crack ratio, or fully appreciate the racial injustices that continue to flow from it.

317. *See, e.g.*, Noah Weiland, *U.S. Recorded Nearly 110,000 Overdose Deaths in 2022*, N.Y. TIMES (May 17, 2023), https://perma.cc/Z6KH-6FX7; Sara Green, *How Fentanyl Became Seattle's Most Urgent Public Health Crisis*, SEATTLE TIMES (Apr. 16, 2023, at 06:00 PT), https://perma.cc/BKK6-WX83; *see also* Claire Klobucista & Michael Ferragamo, *Fentanyl and the U.S. Opioid Epidemic*, COUNCIL FOREIGN RELATIONS, https://perma.cc/6XSR-QDWT (last updated Oct. 30, 2025).

318. *Cleary*, 846 F. Supp. at 763–84.

319. *See* Jan Hoffman, *Harsh New Fentanyl Laws Ignite Debate Over How to Combat Overdose Crisis*, N.Y. TIMES (June 21, 2023), https://perma.cc/TH4A-5VGD.

320. *See id.*; Karoun Demirjian, *House Passes Bill to Make Penalties Permanent for Fentanyl-Related Drugs*, N.Y. TIMES (May 25, 2023), https://perma.cc/PDH2-L4XK; Lucius T. Outlaw III, *We Have a Growing Fentanyl Problem so Let's Not Repeat Past Mistakes*, HILL (July 29, 2019), https://perma.cc/CGX2-WUTF; Trân Nguyễn, *Punishment or Prevention: California Debates Fentanyl Crisis*, L.A. TIMES (Apr. 27, 2023, at 19:19 ET), https://perma.cc/7AA9-88L2.

321. *See* David Trone et al., *Congress Still Has Time To Save Lives from Drug Overdose*, NEWSWEEK (Dec. 12, 2023), https://perma.cc/H5NN-X9QG; Carmen Paun, *The Opioid Crisis Has Gotten Much, Much Worse Despite Congress' Efforts to Stop It*, POLITICO (Oct. 22, 2023, at 07:00 ET), https://perma.cc/HUK4-K6US.