

**EQUAL PROTECTION FALLING THROUGH THE CRACK:
A CRITIQUE OF THE CRACK-TO-POWDER SENTENCING DISPARITY**

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I. INTRODUCTION

The language of the Equal Protection Clause of the Fourteenth Amendment reinforces the notion that all men are created equal. However, the Equal Protection Clause currently affords little protection to individuals seeking to challenge legislation which, although lacking in overt suspect classifications, is likely the product of implicit racial bias. As a consequence, the American mantra that “all men are created equal” is rendered increasingly shallow. Facially neutral laws are frequently enacted and applied in a manner that subjugates marginalized groups, operating to maintain the existing cultural and social hegemony.¹ Given the shortcomings of equal protection jurisprudence, such laws survive rational-basis review and continue to serve as untimely reminders that racism has not been entirely expunged from America’s collective conscious.

The crack cocaine sentencing legislation is largely representative of this unfortunate reality. Although crack sentencing legislation is facially neutral, it has resulted in a racially skewed pattern of arrests, convictions and sentencing.² This racial imbalance is highlighted by the marked sentencing disparity that exists between crack cocaine, associated with impoverished black America, and powder cocaine, associated with middle-class white America.³ Throughout the past two decades, equal protection challenges launched against the crack-to-powder sentencing disparity have historically

1. See DORIS MARIE PROVINE, *UNEQUAL UNDER LAW 2* (2007).
2. *Id.* at 92.
3. See *id.* at 133.

failed.⁴ These challenges are met with resistance from the judiciary who, after determining that crack sentencing legislation implicates neither an infringement of fundamental rights nor suspect classifications, concludes that a rational basis arguably exists for implementing more severe penalties for crack cocaine.⁵ Since current equal protection jurisprudence provides no mechanism for striking legislation borne from implicit racial bias, any sustainable solution for policing such legislation will likely lie outside traditional methods of recourse.

This paper examines the current state of equal protection jurisprudence in relation to the racially disparate impact of the federal crack sentencing regime and seeks to develop a practical solution for responding to statutory sentencing inequities. Part I provides a brief overview of the War on Drugs and the conservative party's racial casting of America's crack epidemic. Part II discusses the Anti-Drug Abuse Act (ADAA) of 1986 and its enactment of the 100:1 crack-to-powder sentencing disparity. Part III explores the interim years between the ADAA's passage and the Fair Sentencing Act, focusing on the dissolving justifications underlying the crack-to-powder sentencing disparity. Part IV introduces the Fair Sentencing Act's 18:1 crack-to-powder sentencing disparity and the issues claimants will likely face in asserting equal protection challenges against it. Lastly, this paper analyzes possible solutions to issues posed by current equal protection jurisprudence, and ultimately advocates for granting increased authority to the Sentencing Commission in order to avoid legislative and judicial obstacles associated with traditional equal protection challenges.

II. THE WAR ON DRUGS

America currently has the highest incarceration rate in the world.⁶ The percentage of imprisoned Americans has vigorously increased since the mid-1980s, when the Reagan administration implemented its anti-drug campaign.⁷ Prior to the 1984 election, President Reagan's focus was on strengthening and expanding the Republican Party in the wake of Watergate.⁸ In an attempt to appeal to both fiscal and moral conservatives, the Reagan administration began

4. Kyle Graham, *Sorry Seems to be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 783 (2011).

5. *Id.*

6. Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J., 353, 353 (2010).

7. *Id.* at 354.

8. PROVINE, *supra* note 1, at 104.

implementing policies aimed at amplifying social ills correlated with poverty and minority status.⁹ This political strategy obliquely capitalized on racial tensions, without openly admitting a racial agenda.¹⁰ The anti-drug campaign, mainly targeting crack cocaine, traced this objective.¹¹

Despite fervent attempts by the Reagan administration to raise drug awareness, public concern surrounding the ills of drug use remained relatively low.¹² This all changed in 1986, when crack became a headline story across the country after the University of Maryland's star basketball player, Len Bias, died of a crack overdose hours after being selected by the Boston Celtics as second overall in the NBA draft.¹³ Due to the University of Maryland's close proximity, the Washington, D.C. media covered the story with particular interest.¹⁴ The Bias story resulted in an unprecedented media explosion covering the largely manufactured crack epidemic¹⁵ and led to increased coverage of the broader issue of crack usage throughout the country.¹⁶ Newspapers and magazines began to run stories on how crack was destroying urban areas and advancing quickly into the suburbs.¹⁷ The term "crack baby" became common parlance as medical experts were quoted frequently in the media about the potential for an entire generation of permanently disabled people being born in urban areas.¹⁸ An overarching theme began to emerge, and this theme proposed "that immoral, mostly nonwhite users and dealers were laying siege to middle-class white America."¹⁹

III. ANTI-DRUG ABUSE ACT OF 1986

The growing media frenzy surrounding the crack "epidemic" placed an immense amount of pressure on the government to take action, and both houses of Congress convened hearings on the matter during the summer of 1986.²⁰ In the fall of 1986, the Anti-Drug Abuse Act of 1986 (ADAA) was

9. *Id.*

10. *Id.*

11. *Id.*

12. *See id.* at 105.

13. LaJuana Davis, *Race, Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, J. GENDER RACE & JUST., 375, 381 (2011).

14. *Id.*

15. PROVINE, *supra* note 1, at 105-06.

16. Davis, *supra* note 13, at 381.

17. *Id.* at 380.

18. Davis, *supra* note 13, at 381.

19. PROVINE, *supra* note 1, at 106.

20. Graham, *supra* note 4, at 771-72.

introduced in the House²¹ proposing changes to drug sentencing laws.²² Under the ADAA, twenty-nine mandatory minimum sentences were created for drug-related crimes.²³ While prior to 1986 federal sentencing rules did not differ among crimes involving crack and powder cocaine, the new legislation made clear distinctions between the two largely indistinguishable types of cocaine, treating crack as the greater of two evils.²⁴ The crack sentencing discussions that took place in Congress following the ADAA's proposal have been described as embodying the "distillation of every fear, anger, and resentment that members of Congress felt about their impotence to solve the scary things in life."²⁵

Initially, the ADAA did not contain any sentencing disparity between crack and cocaine.²⁶ However, following further discussion in Congress, the finalized Act created a 100:1 crack-to-powder sentencing disparity.²⁷ As a result, a defendant caught with five grams of crack cocaine (about the weight of a nickel) would be sentenced to the same five-year mandatory minimum applied to defendants caught with five-hundred grams of powder cocaine (weighing more than a pound).²⁸ Two years after the ADAA was passed, Congress amended the crack sentencing provision by adding a five-year mandatory minimum for simple possession.²⁹ This amendment singled out crack as the only drug for which first-time offenders would be subject to a five-year mandatory minimum.³⁰ These mandatory minimums were adopted wholesale into the Federal Sentencing Guidelines.³¹

In its haste to pass anti-drug legislation before the November 1986 elections, Congress set the low quantity threshold for the mandatory minimum crack sentence more or less arbitrarily.³² "At most, there existed an inchoate sense that crack implicated different and greater dangers than powder cocaine, and that crimes involving crack should be punished accordingly."³³ During hearings in the House of Representatives, various unfounded assertions were

21. Davis, *supra* note 13, at 382.

22. *Id.*

23. *Id.* at 383.

24. Graham, *supra* note 4, at 773-74.

25. Davis, *supra* note 13, at 382.

26. *Id.* at 383.

27. *Id.*

28. Graham, *supra* note 4, at 774.

29. Davis, *supra* note 13, at 384.

30. *Id.*

31. Graham, *supra* note 4, at 776.

32. *Id.* at 774-75.

33. *Id.* at 775.

made that highlighted why crack was more of a threat than powder cocaine.³⁴ These assertions noted that: (1) crack was more addictive, (2) crack produced different and more severe psychological effects, (3) crack was cheaper and thus attracted people who wouldn't otherwise be able to afford powder cocaine, especially young people, and (4) crack caused more crime.³⁵

Most of these assertions have since been discredited. For instance, the assumption that first-time crack users would instantly fall victim to addiction was subsequently dismantled, since no definite link exists between crack and psychological addiction.³⁶ Furthermore, both the 2002 and 2007 Sentencing Commission Reports to Congress found that no difference existed between the rate of addiction for crack cocaine and powder cocaine.³⁷ An additional fear was displaced when those same Sentencing Commission Reports revealed that the majority of crack offenses did not involve aggravating conduct like bodily injury, weapon involvement, or distribution to protected individuals.³⁸

IV. EVOLVING CONCERNS AND THE INTERIM YEARS

When the ADAA was first passed, the severe penalties set by the crack cocaine sentencing rules did not present the same political adversity they would later acquire.³⁹ Within the two decades following the passage of the ADAA, a movement aimed at rectifying the sentencing disparity began gaining momentum. Even prior to the ADAA, the criminal system was arresting and convicting blacks for crack offenses in a number disproportionate to their involvement in crack use generally.⁴⁰ This imbalance was amplified under the new crack sentencing laws.⁴¹ When the war on drugs was at its peak, blacks comprised around 90 percent of the crack offenders being federally convicted and incarcerated.⁴² Even though whites made up the majority of crack traffickers and about half of crack users, black crack users endured the brunt of the harsher sentencing laws.⁴³ In some cities, such as Chicago and Los

34. *Id.* at 772.

35. *Id.* at 772-73.

36. Davis, *supra* note 13, at 386.

37. Letter from Marc Mauer, Exec. Dir. of the Sentencing Project, to the Honorable William K. Sessions III (Oct. 8, 2010) (on file with author), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20101013/SentencingProject_Comments100810.pdf.

38. *Id.*

39. Graham, *supra* note 4, at 778.

40. Davis, *supra* note 13, at 388.

41. *Id.*

42. *Id.*

43. *Id.* at 389.

Angeles, no whites were federally prosecuted under the crack provisions for a period of seven years (1988-1995).⁴⁴

Interest groups and the public at large began to question the precarious rationales behind crack-to-powder sentencing disparities as the racially disparate impact of the guidelines became more evident. In addition, civil rights groups worked vehemently to draw attention to the disparity's racial injustice.⁴⁵ Similarly, lobbyists began employing aggressive strategies calling for the complete elimination of the crack-to-powder sentencing disparity.⁴⁶ Due to the pressures posed by lobbyists, legislation addressing the issue was introduced into each congressional session for over a decade.⁴⁷ Even though no legislative action would be taken until 2009, interest groups and advocates made certain that sentencing disparity concerns remained on the congressional radar.⁴⁸

Despite Congress' period of reformatory inaction, sentencing concerns started to influence the Supreme Court, and opinions were issued that began eroding the legislative force of sentencing laws.⁴⁹ For example, in 2005, the case of *United States v. Booker* led to a holding that endowed judges with greater discretion in sentencing.⁵⁰ The Supreme Court in *Booker* ultimately held that judges must treat the Federal Sentencing Guidelines as presumptive rather than determinative.⁵¹ However, while most judges viewed the Court's decision favorably, many still continued to make decisions within the range of the federal guidelines to avoid Congressional scrutiny and political disfavor.⁵²

Two years after *Booker*, the Court directly addressed the crack-to-powder sentencing disparity, albeit in dicta. In *Kimbrough v. United States*, the Court stated that judges could consider the existing disparity in ascertaining whether a sentence falling within the guidelines' range was stricter than necessary.⁵³ The African American defendant in *Kimbrough* was charged with possession with intent to distribute more than fifty grams of crack cocaine.⁵⁴ Under the Federal Sentencing Guidelines, Kimbrough would be subject to anywhere from

44. *Id.* at 388.

45. Kara Gotsch, *Breakthrough in U.S. Drug Sentencing Reform: The Fair Sentencing Act and the Unfinished Reform Agenda*, THE SENTENCING PROJECT, 5 (Nov. 2011), http://sentencingproject.org/doc/dp_WOLA_Article.pdf.

46. *Id.* at 5-6.

47. *Id.* at 6.

48. *Id.*

49. Levy-Pounds, *supra* note 6, at 360-61.

50. *United States v. Booker*, 543 U.S. 220 (2005).

51. *Id.* at 245.

52. Levy-Pounds, *supra* note 6, at 361.

53. *Kimbrough v. United States*, 552 U.S. 85, 90-91 (2007).

54. *Id.* at 91.

19 to 22.5 years in prison.⁵⁵ The Court in *Kimbrough* determined that a sentence falling within the federal range was greater than necessary and commented on the “disproportionate and unjust effect that crack cocaine guidelines have on sentencing.”⁵⁶ Ignoring the severe sentence imposed by the federal guidelines, the District Court instead sentenced Kimbrough to fifteen years in prison.⁵⁷

On appeal, the Fourth Circuit vacated the sentence after determining that sentencing outside the guidelines was per se unreasonable.⁵⁸ The Supreme Court granted certiorari to determine whether the crack-to-powder disparity had been rendered advisory given the decision in *Booker*.⁵⁹ The Court held that the Fourth Circuit had erred in concluding that the crack and powder sentencing guidelines were mandatory.⁶⁰ By holding that the crack and cocaine sentencing guidelines were advisory, the Court resolved a dispute that had divided the Circuits since *Booker* was decided. Following the *Kimbrough* decision, the Sentencing Commission took steps in 2007 to pass an amendment to the federal guidelines intended to reduce the disparity between crack and powder sentencing.⁶¹ Even before *Kimbrough*, the Sentencing Commission had played an active role as one of the most vigorous advocates against the crack-to-powder sentencing disparity. After the passage of the ADAA, and within the span of twelve years, it had issued four separate reports urging Congress to reform the crack sentencing guidelines because of the law’s disparate impact on blacks.⁶²

Following its 2007 report, the Sentencing Commission changed the guidelines, reducing the average crack cocaine sentence by fifteen months.⁶³ This amendment was applied retroactively to allow prisoners who met certain criteria to seek sentencing reductions.⁶⁴ As of October 31, 2014, the amendment had been retroactively applied to reduce the sentencing ordered in 7,748 cases.⁶⁵ These retroactive applications have resulted in an average

55. *Id.* at 90-91.

56. *Id.* at 93.

57. *Id.* at 92.

58. *Id.*

59. *Id.*

60. *Id.* at 90.

61. Gotsch, *supra* note 45, at 5.

62. *Id.* at 4.

63. *Id.* at 5.

64. *Id.*

65. *Final Crack Retroactivity Data Report*, UNITED STATES SENTENCING COMMISSION, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf (last visited Sept. 20, 2015).

sentence decrease of thirty months.⁶⁶ While many critics feared a rise in crime as a result of these early releases, recidivism rates among those released on crack charges has decreased compared to the recidivism rate prior to the revised guidelines.⁶⁷ Although the Sentencing Commission's amendment marked a step in the right direction, it regrettably had no effect on the mandatory minimums set by Congress.⁶⁸ Fortunately, however, it began to raise awareness, and further emboldened Congress to seriously consider reforming the sentencing laws.⁶⁹

V. THE FAIR SENTENCING ACT

Following the Commission's interim measure of amending the guidelines, two years passed before responsive action would be taken by Congress.⁷⁰ Finally, in 2009, Illinois Democratic Senator Dick Durbin introduced a bill that would abrogate the 100:1 crack-to-powder sentencing disparity.⁷¹ Durbin's proposition was supported by the Attorney General, Eric Holder, who began publicly addressing the issue.⁷² By openly acknowledging the disparity, Holder sent a message to the Democratic Congress that reforming the sentencing laws should be a civil rights priority.⁷³ Negotiations began in the Senate, and in August 2010 Durbin's legislation, now called the Fair Sentencing Act, became effective.⁷⁴ It garnered bipartisan approval in the House, was unanimously supported by the Senate, and marked the first time in forty years that Congress had eliminated a mandatory minimum.⁷⁵

The act was obliquely described by Congress as "an act to restore fairness to Federal cocaine sentencing."⁷⁶ Despite touting the new legislation's comparative fairness, the disparity was not eliminated entirely. The legislation altered the pre-existing crack-to-powder disparity in two fundamental ways. First, it increased the amount of crack needed to trigger the mandatory

66. *Id.*

67. *See* Gotsch, *supra* note 45, at 5 (The recidivism rate among those released under the amended guidelines was 30.4 percent compared to 32.6 percent recidivism rate among inmates released on crack charges prior to the guideline revision).

68. *Id.*

69. *Id.*

70. *Id.* at 6.

71. *Id.*

72. *Id.*

73. *Id.*

74. Kip Nelson, *Empowering the Sentencing Commission: A Different Resolution to the Cocaine Sentencing Drama*, 38 RUTGERS L. REC. 1, 13 (2010).

75. *Id.* at 14.

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

minimum from five grams to twenty-eight grams.⁷⁷ By increasing the amount, Congress essentially eliminated the mandatory minimum for simple possession of crack cocaine.⁷⁸ Authorities believed that the increase from five to twenty-eight grams of crack cocaine would lead to mandatory minimums being imposed on dealers, rather than casual drug users.⁷⁹ The cocaine mandatory minimum was left untouched by Congress, and the quantity trigger remained set at five hundred grams.⁸⁰ The practical effect of the legislation changed the 100:1 disparity to an 18:1 crack-to-powder sentencing disparity.⁸¹

While the Fair Sentencing Act signified a step in the right direction, it initially failed to account for retroactivity.⁸² Recognizing this injustice, the Sentencing Commission reached a unanimous decision in June 2011 to apply the new sentencing guidelines to individuals currently incarcerated under the old crack sentencing regime.⁸³ Unfortunately, retroactive application has not escaped conservative backlash, and members of the public and Congress alike began expressing fears regarding the retroactive application's effect on public safety.⁸⁴ In opposition to these fearful perceptions, more than 40,000 citizens and organizations sent comments in favor of retroactivity to the Sentencing Commission.⁸⁵ The Commission also addressed the public's unfounded fears as it began publicly emphasizing certain safeguards, which minimize any public risk of retroactive application, including the requirement that each offender's case be separately considered by a federal district court.⁸⁶

A. The Fair Sentencing Act: Equal Protection Implications and Difficulties of Proof

While the Fair Sentencing Act operates to decrease the offensive crack cocaine sentencing disparity previously in place, a significant disparity still exists. From a practical standpoint, the new guidelines are objectionable because they do little to curb law enforcement's focus on low-level offenders,

77. Nelson, *supra* note 73, at 13.

78. *Id.*

79. Peter Baker, *Obama Signs Law Narrowing Cocaine Sentencing*, THE CAUCUS (Aug. 3, 2010, 12:55 PM), <http://nyti.ms/1pIP0B4>.

80. Nelson, *supra* note 73, at 13.

81. Gotsch, *supra* note 45, at 6.

82. *Id.* at 7.

83. *Id.*

84. *Id.* at 8.

85. *Id.*

86. Cynthia Gordy, *Dueling Views on New Crack Sentencing Decision*, THE ROOT (Jul. 5, 2011, 3:34 PM), <http://www.theroot.com/blogs/attorney-general-eric-holder/split-views-new-crack-sentencing-decision>.

which results in drained resources that could be better spent targeting high-level distributors.⁸⁷ From a more theoretical standpoint, the guidelines present an unfortunate reflection of the Legislature's inability to acknowledge and address the misperceptions surrounding crack. Congress's failure to entirely eliminate the disparity was due to the unjustified beliefs held by some Congress members.⁸⁸ "[G]iven its customary methods of distribution and administration," some members of Congress still believe that crack is "at least somewhat more powerful, more addictive, and more closely tied to violent crime than powder cocaine."⁸⁹ These beliefs are eerily reminiscent of the unfounded rationales used to justify the former 100:1 disparity under the ADA.

The lack of scientific and empirical support for justifications underlying the existing crack-to-powder sentencing disparity raises concerns regarding the existence of purposeful or unconscious racial bias among members of Congress.⁹⁰ The undeniable racial impact produced by the former crack sentencing laws will likely carry over, to a lesser degree, under the Fair Sentencing Act. While the remaining 18:1 disparity should raise serious equal protection concerns, any challenges to the new sentencing structure will likely prove unsuccessful. This is especially true considering the response by federal courts to equal protection challenges attacking the more offensive 100:1 sentencing disparity.⁹¹ In response to past equal protection challenges, the majority of courts concluded that the 100:1 disparity was not unconstitutional.⁹² In these previous equal protection challenges, "the defendants always have lost, and the opinions generally have been both unanimous and short."⁹³ Moreover, the Supreme Court applied a demanding standard in earlier cases, which required black defendants to demonstrate discriminatory intent on behalf of prosecutors in applying the severe sentencing laws.⁹⁴

Generally speaking, equal protection challenges attacking the validity of federal criminal statutes are rarely successful.⁹⁵ When legislation does not infringe fundamental rights or involve suspect classifications, courts employ

87. Gotsch, *supra* note 45, at 7.

88. Graham, *supra* note 4, at 793.

89. *Id.*

90. Davis, *supra* note 13, at 397-98.

91. Nelson, *supra* note 73, at 6.

92. *Id.*

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

94. *See United States v. Armstrong*, 517 U.S. 456, 465 (1996).

95. Davis, *supra* note 13, at 391-92.

rational basis review.⁹⁶ Because the Fair Sentencing Act is formally race-neutral, rational basis review would be applied to determine the Act's consistency with equal protection. This form of review is the most deferential and presupposes the constitutional validity of a challenged law.⁹⁷ As a result, any equal protection challenges launched against the Fair Sentencing Act's 18:1 crack-to-powder disparity will likely be met with judicial restraint.⁹⁸

Courts will uphold legislation under rational basis review if a legitimate governmental purpose exists and the statute does not otherwise contravene constitutional requirements.⁹⁹ Under rational basis review, Congress' actual motive for enacting a law is not determinative.¹⁰⁰ Accordingly, in applying rational basis review, courts determine whether any rational basis could have existed for enacting the law.¹⁰¹ For the sake of argument, the Fair Sentencing Act's crack sentencing laws could have partially resulted from the beneficent intent on behalf of some members of Congress to rid society of crack abuse.¹⁰² This argument, in conjunction with the Act's stated purpose of restoring fairness to federal cocaine sentencing, would likely protect the 18:1 crack-to-powder disparity from being struck down under rational basis review.¹⁰³

Since the Fair Sentencing Act is facially race-neutral, its racially disparate impact provides the most obvious evidence of an equal protection violation. Unfortunately, defendants who rely solely on this method of proof will face a multitude of challenges.¹⁰⁴ While the Supreme Court has not specifically invalidated disparate impact theory as a method of proving discriminatory intent in equal protection challenges, additional hurdles make disparate impact arguments difficult.¹⁰⁵ Under the current trend of equal protection jurisprudence, evidence of racial disparity remains constitutionally insignificant unless it is accompanied by evidence of disparate treatment or intentional discrimination.¹⁰⁶

Numerous cases illustrate this limitation. For example, while the Court in *Washington v. Davis* stated that evidence of disproportionate impact might be

96. *Id.* at 392.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Christopher J. Schmidt, *Analyzing the Text of the Equal Protection Clause: Why the Definition of "Equal" Requires a Disproportionate Impact Analysis When Laws Unequally Affect Racial Minorities*, 12 CORNELL J. L. & PUB. POL'Y 85, 94 (2002).

102. *See Davis*, *supra* note 13, at 391.

103. *Id.*

104. *Id.* at 392-93.

105. *See id.*

106. *Id.*

significant when discrimination is “very difficult to explain on nonracial grounds,” it nevertheless concluded that facially neutral laws do not violate the Equal Protection Clause merely by disproportionately affecting a certain group or race.¹⁰⁷ Similarly, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Court held that disproportionate impact evidence could not be “the sole touchstone of an invidious racial discrimination.”¹⁰⁸ Instead, “[a] racially discriminatory intent, as evidenced by such factors as disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers, must be shown.”¹⁰⁹

While both *Washington* and *Village of Arlington Heights* involve equal protection challenges outside of the criminal sphere, cases like *McCleskey v. Kemp* depict the reluctance of the Supreme Court to accept racially disparate impact as evidence that criminal sentencing laws violate equal protection.¹¹⁰ *McCleskey* involved a black defendant convicted of murder and sentenced to death under Georgia’s sentencing laws.¹¹¹ The defendant brought an equal protection challenge against the Georgia capital punishment statute, using disparate impact evidence to demonstrate the racially uneven application of Georgia’s death sentence.¹¹² In a display of judicial restraint, the Court determined that this evidence did not demonstrate a “constitutionally significant risk of racial bias,” and noted that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system.”¹¹³

By discounting *McCleskey*’s equal protection argument, the Supreme Court exhibited a “psychological[] resign[ation] to the inevitability of race discrimination in criminal cases.”¹¹⁴ *McCleskey* suggests that any attempts to challenge the crack-to-powder sentencing disparity would face insurmountable difficulties. The Supreme Court’s current approach to disparate impact analysis would require defendants to either prove purposeful discrimination by prosecutors or demonstrate that purposeful discrimination motivated Congress’ failure to completely eliminate the crack cocaine sentencing imbalance.¹¹⁵

107. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

108. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

109. *Id.* at 253.

110. *See McCleskey v. Kemp*, 481 U.S. 279, 291 (1987).

111. *Id.* at 279.

112. *Id.* at 292-93.

113. *Id.* at 312, 313.

114. *Davis*, *supra* note 13, at 395.

115. *See id.*

Therefore, in addition to presenting disparate impact evidence, claimants would need to argue that purposeful discrimination influenced Congress' failure to completely eliminate the sentencing disparity when it passed the Fair Sentencing Act.¹¹⁶

This argumentative strategy would likely prove unsuccessful since “[r]ealistic difficulties arise when attempting to assign a single intent to the hundreds of members of Congress.”¹¹⁷ Additionally, the statute’s disparate impact is probably influenced by myriad other factors, which would lessen any argument that the impact is the result of racial animus.¹¹⁸ For example, some scholars suggest that heavy police presence in minority neighborhoods, coupled with the conspicuous nature of crack sales, “exacerbates racial differences in the numbers of minorities arrested and prosecuted.”¹¹⁹ Targeting buyers and sellers in street markets is much easier than in drug markets that function “more discreetly in more middle-class, and whiter, neighborhoods.”¹²⁰ The practice of law enforcement in capitalizing on these realities would be difficult to attribute to lawmakers or the statute itself.¹²¹

B. Possible Solutions to Facilitate Crack Sentencing Reform

Clearly, any equal protection challenge to the Fair Sentencing Act will be fraught with limitations and challenges. In response to these challenges, legal scholars, judges, and critics alike have posed possible solutions to bypass current limitations and facilitate further crack sentencing reform. One solution, proposed by Christopher Schmidt, requires a redefining of “equal” in the Constitution to allow for a disparate impact analysis when laws disproportionately affect minorities.¹²² Schmidt argues that a hybrid textualist approach should be applied to defining the word “equal” in the Constitution.¹²³ Instead of merely requiring laws to be “neutrally intended and drafted,” the hybrid textualist approach would also require legislation be “evenly proportioned” and “uniform in operation or effect.”¹²⁴ This approach encompasses a meaning of “equal” that was in effect prior to 1868 when the

116. *Id.*

117. *Id.* at 396.

118. *Id.*

119. *Id.*

120. William J. Stuntz, *Terry’s Impossibility*, 72 ST. JOHN’S L. REV. 1213, 1220 (1998).

121. Davis, *supra* note 13, at 396.

122. *See* Schmidt, *supra* note 101, at 87.

123. *Id.* at 105.

124. *Id.* at 103-04.

Fourteenth Amendment was ratified, and that is still in effect today.¹²⁵

If this interpretation were adopted, facially neutral laws like the Fair Sentencing Act could be challenged under the Equal Protection Clause by employing a disparate impact standard.¹²⁶ This standard would allow claimants to offer statistical data and testimony demonstrating the law's lack of uniformity and proportionality in operation and effect.¹²⁷ Once this is proven, strict scrutiny review would be applied to determine whether the law meets constitutional muster.¹²⁸ Implementing this approach might be difficult given past judicial resistance towards the use of disparate impact arguments in independently establishing equal protection violations. Nevertheless, Schmidt's approach offers a mechanism to address unconscious and overt racial biases on behalf of lawmakers operating under the guise of facially neutral legislation.

Another solution to facilitate sentencing reform and overcome current equal protection limitations is the adoption of a negligent indifference standard.¹²⁹ This standard was described by Randall Kennedy in his influential work, *Race, Crime, and the Law*.¹³⁰ The negligent indifference standard recognizes that "Congress' failure to change the crack provisions after learning of the disproportionate impact on blacks has as damaging an impact as intentional discrimination."¹³¹ In lieu of a discriminatory intent requirement, the negligent indifference standard would allow judges to consider a law's subsequently realized detrimental impact on protected groups regardless of whether such impact was unintentional at the time the law was enacted.¹³²

Second Circuit Judge Guido Calabresi offered subtle support for the negligent indifference standard in his concurring opinion in *United States v. Then*.¹³³ While *Then* involved an equal protection challenge asserted against the 100:1 crack-to-powder disparity, Calabresi's concurrence is likewise applicable to the current 18:1 disparity. Calabresi's acknowledges that, given the information available at the time, Congress did not act irrationally in passing the 100:1 disparity.¹³⁴ He recognizes, however, that "what is known today about the effects of crack and cocaine, and about the impact that the

125. *Id.* at 105.

126. *Id.* at 112.

127. *Id.*

128. *Id.*

129. *See Davis, supra* note 13, at 400.

130. *Id.*

131. *Id.*

132. *Id.*

133. *United States v. Then*, 56 F.3d 464, 467 (2d Cir. 1997) (Calabresi, J., concurring).

134. *Id.*

crack/cocaine sentencing rules have on minority groups, is significantly different from what was known when the 100-to-1 ratio was adopted.”¹³⁵ Consequently, “constitutional arguments that were unavailing in the past may not be foreclosed in the future.”¹³⁶

Judge Calabresi’s concurrence suggests that Congress’ subsequent resistance to repealing crack sentencing provisions, despite the “dramatically disparate impact among minority groups of enhanced crack penalties and of the limited evidence supporting such enhanced penalties,” might serve as proof of purposeful discrimination.¹³⁷ When applied to the current crack sentencing laws, this analysis suggests that Congress’ failure to completely eliminate the disparity might indicate purposeful discrimination. This indication is reinforced through recent findings by the Sentencing Commission aimed at dismantling the previous justifications for heightened crack sentencing.¹³⁸ Some scholars have taken Calabresi’s argument further by advocating for the application of heightened scrutiny in circumstances where Congress, acting with the benefit of foresight and with knowledge of the law’s disparate impact on a protected group, fails to eliminate an unwarranted sentencing disparity.¹³⁹

While the negligent indifference standard provides a tenable solution, it is not without shortcomings.¹⁴⁰ Demonstrating that Congress’ inaction is the product of purposeful discrimination might still prove difficult. Oftentimes, passing legislation is a slow process and legislative inaction is easily attributable to other factors such as “new pressing legislative priorities, lack of awareness of the harm [posed by the legislation], or members’ fear of political damage by revisiting crime legislation.”¹⁴¹ Moreover, federal courts have not been receptive to these arguments, and judicial restraint will likely keep such arguments from succeeding.¹⁴² As a result, demonstrating that Congress’ inaction was entirely due to racial bias would be a challenging feat for defendants.¹⁴³ Despite such challenges, the negligent indifference standard

135. *Id.*

136. *Id.*

137. *Id.* at 468.

138. *See* Mauer, *supra* note 37, at 3.

139. *See* David H. Angeli, *A “Second Look” at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211, 1215 (1997) (arguing that Calabresi’s concurrence provides support for the application of a heightened scrutiny in equal protection challenges to congressional inaction after gaining awareness that crack sentencing laws had a disparate impact on black defendants).

140. Davis, *supra* note 13, at 401.

141. *Id.*

142. *See id.*

143. *See id.*

provides an argumentative option that seeks to hold Congress accountable for failing to remedy racial consequences of legislation founded on inaccurate assumptions.

Due to multiple jurisprudential issues hindering the success of equal protection arguments challenging federal sentencing laws, some scholars have proposed more prophylactic solutions. One such solution advocates for delegating increased authority to the Sentencing Commission for establishing sentencing for drug offenses.¹⁴⁴ Even though “mandatory minimums and maximum[s] . . . are complex policy decisions . . . most likely within Congress’ purview, the legislature is not required to delineate sentences with such specificity as is currently constituted.”¹⁴⁵ The Sentencing Commission embodies certain attributes, absent in members of Congress, which place it in a better position to set sentencing ranges.¹⁴⁶ For example, the Commission’s makeup is one of expertise and political neutrality.¹⁴⁷ Since members are not elected and held politically accountable, they are insulated from political pressures.¹⁴⁸ This enables the Commission to make sentencing decisions that are more reflective of public consensus.¹⁴⁹ Additionally, because the Commission is made up of a diverse mixture of academics, judges, and practicing attorneys, it is more capable of attaining political and social equilibrium in its sentencing decisions.¹⁵⁰

An increased grant of authority to the Sentencing Commission would allow for more flexibility so that sentencing statutes could be appropriately tailored to meet newly developing community norms.¹⁵¹ Instead of waiting for Congress to repeal unsatisfactory criminal statutes, Congress could grant the Sentencing Commission the authority to amend them.¹⁵² Granting the Commission power to amend statutes would likely result in faster, fairer responses to public disapproval of unfair sentencing laws.¹⁵³ Since the inception of the crack-to-powder sentencing disparity, the Sentencing Commission has made repeated recommendations urging Congress to re-examine the crack-to-powder sentencing regime.¹⁵⁴ The Sentencing Commission’s proactive role in motivating Congress to take action in the past

144. Nelson, *supra* note 73, at 17.

145. *Id.*

146. *Id.* at 18.

147. *Id.*

148. *Id.*

149. *Id.*

150. *See id.* at 21.

151. *Id.* at 19.

152. *Id.* at 19.

153. *Id.*

154. *See id.* at 7-8.

indicates the likelihood that it would respond expediently and efficiently to sentencing inequities in the future.

While some critics may voice concerns regarding the danger that the Commission might become too powerful if increased authority is granted, numerous safeguards are already in place to assuage these concerns.¹⁵⁵ For example, Sentencing Commission members are appointed by the President and approved by the Senate.¹⁵⁶ This system of requiring congressional approval allows the Legislature to approve appointees that more closely exemplify current legislative goals.¹⁵⁷ Moreover, each commissioner's appointment lasts only six years, allowing for eventual replacement of appointees if problems arise.¹⁵⁸ Lastly, since any action taken by the Commission will require the approval of Congress, the Legislature will retain a fair degree of control over the Sentencing Commission's authority.¹⁵⁹ Since all these factors appropriately limit the Sentencing Commission's power, granting increased authority would not lead to the creation of a sovereign sentencing body. If given the increased authority to amend criminal statutes, the Sentencing Commission would likely make decisions that strike a fair and appropriate balance between the Legislature's wishes and the will of the people.

Any sustainable solutions for reforming the crack-to-powder sentencing disparity arguably lie outside the courtroom. This is especially true in light of the judiciary's opposition towards disparate impact evidence in equal protection challenges, and current impositions requiring claimants to perform the impossible by proving purposeful discrimination on behalf of the Legislature and prosecutors. Consequently, the best solution would be for Congress to grant increased authority to members of the Sentencing Commission to amend sentencing statutes and set sentencing ranges that more closely conform to social realities. Despite constant pleas from the Sentencing Commission, lobbyists, interest groups, and the public, Congress waited nearly fifteen years before reforming the sentencing disparity under the Anti-Drug Abuse Act. Americans cannot afford to wait another fifteen years before the remaining crack-to-powder sentencing disparity is completely abolished.

If granted increased authority, the Sentencing Commission could facilitate change and bring more complete crack sentencing reform to fruition. If the protections afforded by the Equal Protection Clause are ever to regain substance, unsuccessful equal protection challenges against the crack-to-powder sentencing disparity must end. Clearly, the current state of equal

155. *See id.* at 21.

156. *Id.*

157. *See id.*

158. *See id.*

159. *Id.*

protection jurisprudence provides little protection to individuals seeking to challenge facially neutral sentencing laws that produce consistently unjust racial outcomes. Since the Sentencing Commission has historically been at the forefront of championing an overhaul of the crack sentencing regime, it is in the best position to protect against unjust racial outcomes in sentencing. While it remains to be seen how Congress will respond to inevitable future attacks against the Fair Sentencing Act's crack-to-powder disparity, one thing is certain: the Sentencing Commission exists as "a hero waiting in the wings," a hero that Congress ought to utilize in order to ensure equality in sentencing and justice for its constituents.¹⁶⁰ If increased authority is granted to the Sentencing Commission, Americans can be certain that equal protection limitations will be lessened and sentencing legislation will finally begin to exemplify the notion that all men are created equal.

160. *Id.* at 23.