

# Redrawing The Line: Retroactive Sentence Reductions, Mass Incarceration, and the Battle Between Justice and Finality

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*In Dorsey v. United States, the Supreme Court made clear that Congress possesses sole responsibility for drawing the line between justice and finality in sentencing. That is, when Congress passes a law reducing sentences, it must also choose whether to apply those reductions retroactively or to accept the sentence disparities between pre- and post-reform offenders that will otherwise inevitably result. Motivated by concerns about limited prosecutorial and judicial resources, Congress has consistently embraced a lopsided emphasis on finality, thus creating severe sentencing disparities and hindering bipartisan efforts to combat the crisis of mass incarceration.*

*The line must be redrawn. This Note contends that Congress need not choose between either justice or finality in sentencing, but rather should enact reform measures responsive to both of these competing values. By adopting retroactivity provisions that require courts to engage in only minimal backward-looking factual determinations, Congress can reduce sentencing disparities while placing limited strain on prosecutorial and judicial resources. Such an embrace of retroactive sentence reductions would accelerate decarceration and restore an appropriate balance between justice and finality in the federal sentencing regime.*

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## INTRODUCTION

On January 1, 2010, two men are separately arrested for selling five grams of crack cocaine. Each man is legally employed, provides economic and emotional support to his family, and presents compelling evidence that

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this first-time criminal offense was a singular mistake in his otherwise law-abiding life. Indeed, suppose everything about these two men is identical except for the date of their sentencing hearings: one is sentenced on August 1, 2010, while the other is sentenced just three months later on November 1, 2010. The first faces a statutory minimum sentence of five years in prison.<sup>1</sup> The second faces no mandatory minimum and is instead subject only to an advisory sentencing range from twenty-one to twenty-seven months. If he pleads guilty, the floor of this range could be even lower.<sup>2</sup>

Congress created this alarming disparity when it failed to make the Fair Sentencing Act of 2010 (FSA)<sup>3</sup> retroactive. The FSA—enacted on August 3, 2010—reduced the oft-criticized 100-to-1 sentencing disparity between crack and powder cocaine offenses<sup>4</sup> by increasing the quantity of crack cocaine necessary to trigger a five-year statutory mandatory minimum prison sentence.<sup>5</sup> But Congress was silent regarding whether the FSA’s reduced sentences would apply retroactively. As a result, courts were immediately divided on whether the FSA’s quantity-based adjustment to statutory minimums applied to defendants whose charged conduct occurred before the FSA’s enactment.<sup>6</sup>

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<sup>1</sup> See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1302(a)(2), 100 Stat. 3207 (1986).

<sup>2</sup> The sentencing range for the second man is based on the 2011 Sentencing Guidelines, see U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(12) (U.S. SENTENCING COMM’N 2011), which established a base offense level of 16 for distributing between 2.8 and 5.6 grams of cocaine base, and presumes a criminal history of I with no additional relevant conduct. The 2011 Guidelines are used here because they are the first to incorporate the reduced sentencing range made effective on November 1, 2010 by Amendment 750. See U.S. SENTENCING GUIDELINES MANUAL app. C, 393, amend. 750 (U.S. SENTENCING COMM’N 2016). For detailed instructions on calculating base offense levels, determining criminal history categories, and applying the Guidelines generally, see *id.* § 1B1.1.

<sup>3</sup> See Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372 (2010).

<sup>4</sup> See, e.g., Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 LAW & CONTEMP. PROBS. 27, 27 (2013) (“The cocaine Guidelines have been controversial . . . mostly because of the infamous ‘100-to-1’ crack-powder disparity, in which crack cocaine triggered weight-based penalties that required 100 times as much powder cocaine to trigger, resulting in substantial racial disparities in cocaine sentencing.”); see also Marcia G. Shein, *Racial Disparity in “Crack” Cocaine Sentencing*, 8 CRIM. JUST. 28, 31 (1993) (“These [substantial racial] disparities [in sentencing] are the result of the 100-to-1 sentencing ratio between powder cocaine and crack.”).

<sup>5</sup> See Fair Sentencing Act of 2010, Pub. L. No. 111–220, § 2, 124 Stat. 2372 (2010) (increasing the quantity of crack cocaine necessary to trigger the five-year mandatory minimum from 5 to 28 grams).

<sup>6</sup> See Carly Hudson, *Between a Rock and a Hard Place: Ensuring that Defendants Incorrectly Sentenced Between the Fair Sentencing Act of 2010 and United States v. Dorsey Achieve Re-Sentencing*, 48 COLUM. J.L. & SOC. PROBS. 141, 143 n.10 (2014) (*comparing United States v. Bullard*, 645 F. 3d 237, 248 (4th Cir. 2011) (“We . . . join all of our sister circuits to have addressed the issue in holding that the Savings Statute does indeed preclude retroactive application of the FSA.”) with *United States v. Douglas*, 644 F.3d 39, 42–44 (1st Cir. 2011) (“While Congress meant the new guidelines to control sentencings after November 1, 2010, it cannot have intended that its new mandatory minimums be ignored, for the new mandatory minimums were adopted in the same statute as the directive that new guidelines be adopted.”)).

In *Dorsey v. United States*,<sup>7</sup> a divided Supreme Court held (5–4) that the FSA’s sentence reductions applied to defendants sentenced *after* the FSA’s enactment on August 3, 2010—even if their charged conduct occurred *before* the law went into effect.<sup>8</sup> The Court unanimously agreed, however, that the provisions did not apply to defendants sentenced *before* the FSA became law.<sup>9</sup> The *Dorsey* majority was well aware of the “new set of disparities”<sup>10</sup> it created by distinguishing between individuals sentenced before and after the FSA’s effective date, but reasoned that, unless Congress provides otherwise, “those disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law changing sentences.”<sup>11</sup>

This Note is not concerned with whether *Dorsey* was rightly decided.<sup>12</sup> Rather, *Dorsey* starkly illustrates that Congress alone is responsible for drawing the line between justice and finality in sentencing. That is, if Congress chooses to pass a law reducing sentences, it must also choose between either applying those reductions retroactively or accepting the sentencing disparities between pre- and post-act defendants that will inevitably arise without retroactivity.<sup>13</sup> On one side of the line, retroactively applying sentence reductions matches an intuitive—and statutorily suggested<sup>14</sup>—sense of justice. Similar individuals found guilty of similar conduct should be sentenced similarly.<sup>15</sup> On the other side of the line, concerns about limited prosecutorial and judicial resources animate arguments in favor of sentence finality.<sup>16</sup> By failing to retroactively apply the FSA, Congress revealed the

<sup>7</sup> 567 U.S. 260 (2012).

<sup>8</sup> *Id.* at 273 (“Congress intended the Fair Sentencing Act’s more lenient penalties to apply to those offenders whose crimes preceded August 3, 2010, but who are sentenced after that date.”).

<sup>9</sup> *See id.* at 281 (“We consequently conclude that this particular new disparity (between those pre-Act offenders already sentenced and those not yet sentenced as of August 3) cannot make a critical difference.”); *id.* at 288 (Scalia, J., dissenting) (“In my view, the general saving statute . . . dictates that the new, more lenient mandatory minimum provisions do not apply to . . . pre-enactment offenders.”).

<sup>10</sup> *Id.* at 280.

<sup>11</sup> *Id.*

<sup>12</sup> For scholarship in that vein, see, e.g., Harold J. Krent, *Retroactivity and Crack Sentencing Reform*, 47 U. MICH. J.L. REFORM, 53, 55 (2013), which “argues that the strong presumption against retroactive application of reduced punishments reflected in *Dorsey* is neither historically grounded nor constitutionally compelled.”

<sup>13</sup> The necessity of a legislative solution is apparent from the Savings Statute of 1871—the interpretation of which provided the source of the disagreement between the *Dorsey* majority and dissent, *see supra* notes 7–11 and accompanying text—which requires Congress to “expressly provide” for retroactive sentence reductions. *See also* 1 U.S.C. § 109.

<sup>14</sup> *See* 18 U.S.C. § 3553(a)(6) (2010) (“[T]he [sentencing] court shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”).

<sup>15</sup> *But see* Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 Nw. U. L. REV. 1336, 1336–38 (1997) (arguing that the norm of “reducing disparity” is hollow unless supported by underlying philosophies of punishment, and that utilitarianism might support “a cruder (but less burdensome) method of confining judicial discretion” than the Sentencing Guidelines).

<sup>16</sup> *See, e.g.,* Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL’Y 179, 186 (2014) (“Respect for finality helps to conserve the scarce public resources available to the criminal justice system.”).

harsh disparities that can emerge when finality is chosen over justice, demonstrating the urgent need to recalibrate these sentencing values.

The gravity of this choice cannot be overemphasized given the crisis of mass incarceration. The number of people held in prisons and jails nationwide has exploded from fewer than 350,000 in 1972 to approximately 2 million today.<sup>17</sup> These numbers grow only more disturbing when one considers mass incarceration's disparate impact on communities of color.<sup>18</sup> In response, policymakers across the political spectrum have tried to reduce the staggering rate of American incarceration,<sup>19</sup> but these efforts will continue to fall short of their potential unless legislators relax finality's grip on retroactive sentence reductions.<sup>20</sup>

It is well past time for Congress to redraw the line between justice and finality by adopting sentencing reform that embraces—rather than eschews—retroactivity provisions. This need not be a radical proposition. Professor Douglas Berman, for example, has persuasively argued that a relaxed emphasis on sentencing finality can coexist with a practical, easily administrable sentencing regime.<sup>21</sup> But Professor Berman left open the task of charting a “precise course” for recalibrating justice and finality in sentencing reform.<sup>22</sup>

This Note marks that precise course. Specifically, it outlines the characteristics of retroactive sentencing reform that justly limits sentencing disparities while preserving the prosecutorial and judicial resources that proponents of finality aim to protect. If Congress crafts easily administrable retroactivity provisions that require courts to engage in only minimal backward-looking factual determinations, sentencing reform can accelerate decarceration and restore an appropriate balance between justice and finality in the federal sentencing regime.

<sup>17</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 9 (2010); see also THE SENTENCING PROJECT, *TRENDS IN U.S. CORRECTIONS* (2017), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>, archived at <https://perma.cc/CMW6-66EC>; Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 163 (2014) (citing DON STEMEN, *RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME* 1 (2007)).

<sup>18</sup> See *infra* notes 122–128 and accompanying text.

<sup>19</sup> See *infra* note 129 and accompanying text.

<sup>20</sup> See *infra* Part III.

<sup>21</sup> See generally Berman, *supra* note 17, at 169–70.

<sup>22</sup> *Id.* at 175–76 (“This Essay does not and cannot seek to fully chart a precise course for legislature, sentencing commissions, and courts to modernize existing laws and doctrines to better balance fitness, fairness, and finality for modern sentences.”). To the author’s knowledge, only Jeremy Haile has outlined a similar course toward justice and decarceration. See Jeremy Haile, *Farewell, Fair Cruelty: An Argument for Retroactive Relief in Federal Sentencing*, 47 U. TOLEDO L. REV. 635, 636 (2016). Haile similarly lauded the retroactive sentence reductions in the Sentencing Reform and Corrections Act (SRCA). See *id.* at 635 n.2 (citing Sentencing Reform and Corrections Act, S. 2123, 114th Cong. (2015)). But Haile’s essay—written before the most recent presidential election—smacks of an optimism regarding the bipartisan SRCA’s chances to become law that may no longer be warranted under the Trump administration’s renewed commitment to be “tough on crime.” See *infra* Part IV.

The Note proceeds in four Parts. Part I examines the current state of retroactive sentence reductions, including the factors that stimulate successful retroactive sentencing reform and the barriers individuals face when seeking sentence reductions. Part II evaluates the merits of finality in our criminal justice system, ultimately asserting that finality's persuasive power in sentencing is limited and depends heavily on the nature of sentencing reform. Part III argues that retroactively reducing prison sentences is vital to bipartisan efforts to counteract mass incarceration. Finally, Part IV turns to the bipartisan Sentencing Reform and Corrections Act (SRCA) as an example of both (1) the type of legislation Congress should more frequently adopt to reduce sentencing disparities and accelerate decarceration and (2) the way finality-based arguments continue to be successfully wielded against attempts at even moderate retroactive reform. The Note concludes that it is both possible and justifiable to redraw the line between justice and finality in sentencing, and that doing so is critical to bring the values animating our sentencing policy back into balance.

## I. THE CURRENT STATE OF RETROACTIVE SENTENCE REDUCTIONS

Though Congress, the United States Sentencing Commission, and courts have achieved moderate success implementing retroactive sentencing laws, avenues to retroactive relief remain limited. A lopsided emphasis on finality at the expense of justice persists, and individuals often face insurmountable barriers to securing retroactive sentence reductions.

The most viable current route for incarcerated individuals to seek retroactive sentence reductions is provided by 18 U.S.C. § 3582. Under § 3582(c)(2), a court may grant a motion requesting a retroactive sentence reduction<sup>23</sup> if the Sentencing Commission has amended the relevant guideline range and expressly provided that the new range applies retroactively.<sup>24</sup> Whether the Sentencing Commission will provide for this retroactive application depends on “the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range.”<sup>25</sup>

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<sup>23</sup> A sentence reduction under § 3582(c)(2) may be granted on the motion of the defendant, the Director of the Bureau of Prisons, or on the sentencing court's own motion. *See* 18 U.S.C. § 3582(c)(2) (2010).

<sup>24</sup> *See id.* Section 3582(c)(2) reductions are only available when “consistent with the applicable policy statements issued by the Sentencing Commission.” *Id.* Here, the applicable policy statement expressly limits the application of § 3582(c)(2) to amendments listed in § 1B1.10(d) of the Sentencing Guidelines Manual. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 (U.S. SENTENCING COMM'N 2016). Section 3582(c)(1) also allows for the modification of a previously imposed sentence for “extraordinary and compelling reasons” or for compassionate release. 18 U.S.C. § 3582(c)(2). Unlike the remedies in § 3582(c)(2), a defendant may not move for relief under § 3582(c)(1); 3582(c)(1) remedies are available only on the motion of the Director of the Bureau of Prisons. *Id.*

<sup>25</sup> 2016 SENTENCING GUIDELINES § 1B1.10, cmt. background.

Effective and efficient sentence reductions under § 3582(c)(2) are possible. For example, in 2014, the Sentencing Commission adopted Amendment 782, colloquially known as “Drugs Minus Two.”<sup>26</sup> Amendment 782 reduced by two the base offense level for virtually all drug-related offenses<sup>27</sup> and applied retroactively under § 3582(c)(2).<sup>28</sup> Since the amendment’s passage, 62.9% of § 3582(c)(2) motions based on Amendment 782 have been granted, resulting in an average sentence reduction of 25 months and more than 30,000 incarcerated individuals receiving reduced sentences.<sup>29</sup> This accomplishment in retroactive sentencing reduction could be even more robust if not for statutory mandatory minimums, which accounted for 15.7% of the denied motions under this amendment.<sup>30</sup>

Despite initial concerns that Amendment 782 would strain judicial, probation, and pretrial service systems,<sup>31</sup> the evidence suggests that federal courts have handled the almost 50,000 motions for resentencing with “relative ease.”<sup>32</sup> This was partly because retroactively applying Amendment 782 virtually never required a court to make backward-looking factual determinations or to engage in complicated legal analysis.<sup>33</sup> Instead, a sentencing court could retroactively reduce sentences based on drug quantity tables already used at original sentencings, making its role in retroactively reducing sentences “fairly circumscribed.”<sup>34</sup> United States Attorneys rarely objected to retroactive sentence reductions.<sup>35</sup> As a result, with limited exceptions, the

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<sup>26</sup> See *id.* Supp. to app. C, at 63–73, amend. 782.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* § 1B1.10(d).

<sup>29</sup> See U.S. SENTENCING COMM’N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT, tbl. 1 (2018) (hereinafter “RETROACTIVITY REPORT”); see also, Caryn Devins, *Lessons Learned from Retroactive Resentencing after Johnson and Amendment 782*, 10 FED. CTS. L. REV. 39, 45 (2017). Note that the percentage of motions granted may be inflated, as “[s]ome districts may not have reported all denials of motions seeking retroactive application of Amendment 782.” RETROACTIVITY REPORT, tbl. 1.

<sup>30</sup> See RETROACTIVITY REPORT, *supra* note 29, at Table 8. Only the amendment’s own restriction on applicability to defendants sentenced under the Armed Career Criminal provisions served to deny sentence reductions more frequently. *Id.* Other denials resulted from similarly straightforward reasons, including, for example, because the defendant had served or would serve the full prison term before the amendment’s applicability or because the defendant had already benefitted from a departure or variance. *Id.* A minute subset (less than 5%) of denials were based on what might be called discretionary reasons, including protection of the public or the defendant’s post-sentencing conduct. *Id.*

<sup>31</sup> See, e.g., *Retroactive Application of 2014 Drug Guidelines Amendment: Hearing Before the U.S. Sentencing Comm’n 2* (2014) (statement of Hon. Irene M. Keeley), <http://www.uscourts.gov/sites/default/files/keeley-testimony-ussc-retroactivity-2014-drug-guideline.pdf>, archived at <https://perma.cc/PG5F-HZK8> (“[T]he Committee is acutely aware of the diminishing resources of the probation and pretrial services system, and of the significant demands that will be imposed on that system by the retroactive application of the amendment.”).

<sup>32</sup> Haile, *supra* note 22, at 645–46. In fact, interviews with stakeholders across the federal court system revealed that Amendment 782 presented a situation in which “the interests of judicial economy and the rights of eligible individuals were often aligned.” Devins, *supra* note 29, at 91.

<sup>33</sup> See Devins, *supra* note 29, at 87.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 73–75.

process of implementing Amendment 782 was often more managerial or administrative than judicial.<sup>36</sup> The Sentencing Commission also contributed to this efficiency by providing courts with lists of individuals eligible for sentence reductions under the amendment. The courts could then retroactively reduce sentences either *sua sponte* or on the motion of an eligible individual.<sup>37</sup>

Ultimately, several factors enabled courts to efficiently and effectively manage the sheer volume of retroactive sentence reductions based on Amendment 782: the process required minimal legal analysis or backward-looking factual determinations; eligible individuals were easily identifiable and the Sentencing Commission facilitated that identification; courts had authority to retroactively reduce sentences *sua sponte*; and the absence of a strict statute of limitations gave courts time to establish centralized, predictable implementation procedures.<sup>38</sup> These factors sketch the outlines for future sentencing reform that accommodates efficiency-based arguments for sentence finality while avoiding the unjust disparity of subjecting similar individuals committing similar actions to dissimilar sentences.

Still, § 3582(c)(2)'s route to retroactive relief is narrow. First, in accordance with congressional guidance that retroactivity should not extend to "minor downward adjustment[s] in the guidelines," the Sentencing Commission does not retroactively apply "amendments that generally reduce the guideline range by less than six months."<sup>39</sup> And, even when the Sentencing Commission has expressly provided for retroactive application of a reduced sentencing range, the sentencing court retains discretion to deny the reduc-

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Courts adopted varying approaches to appointing counsel to assist eligible individuals in filing motions for retroactive reduction of their sentences—including some courts that did not appoint counsel—prompting objections from federal defenders concerned about the zealous representation of inmates' interests. But the appointment of counsel was only moderately important in securing a sentence reduction based on Amendment 782, given the widely observed norm of granting a full two-level reduction and the authorization granted by § 3582(c)(2) to courts to retroactively reduce a sentence *sua sponte*. *Id.*

<sup>38</sup> See generally *id.* Devins expertly compares the retroactivity of Amendment 782—in which these factors allowed for judicial efficiency and ease—with the retroactivity of the ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the imposition of the increased sentence under the residual clause of the Armed Career Criminal Act violated due process. See Devins, *supra* note 29, at 41–42. The factors facilitating the success of Amendment 782 cut sharply against the efficient implementation of *Johnson* retroactivity. *Id.* at 54–64. For example, elimination of the residual clause left in place difficult, backward-looking legal analysis, and made it difficult to identify individuals eligible for sentence reductions. *Id.* at 49–50, 61. Additionally, because retroactive sentence reductions based on *Johnson* required collateral attacks based on *Johnson*'s new constitutional holding, 28 U.S.C. § 2255 prevented courts from acting on their own motion and imposed a stringent one-year statute of limitations. *Id.* at 51. This distinction is consistent with the distinction between the merits of finality generally and in the sentencing context specifically. See *infra* Part II.

<sup>39</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.10, cmt. background (U.S. SENTENCING COMM'N 2016).

tion.<sup>40</sup> But the greatest restraint on § 3582(c)(2) sentence reductions is the requirement that those reductions be “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.”<sup>41</sup> Questions over the correct interpretation of this “based on” clause continue to drive litigation regarding the extent of retroactive relief promised by § 3582(c)(2).

Again, post-FSA sentencing for crack cocaine offenses provides a helpful illustration. Prior to the FSA, the Sentencing Guidelines for distribution of crack cocaine prescribed prison terms that corresponded closely with the prison terms required by statutory mandatory minimums. Thus, a court sentencing a defendant to 60 months in prison for distributing 5 grams of crack cocaine could usually base its decision on either the guidelines or the statute—both supported a 60-month sentence.<sup>42</sup> Following the FSA’s enactment, the Sentencing Commission adopted Amendment 750, which reduced crack cocaine sentencing guideline ranges to match the FSA’s reduction in statutory minimum sentences.<sup>43</sup> The Sentencing Commission expressly provided

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<sup>40</sup> See 18 U.S.C. § 3582(c)(2) (“[T]he court may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C. §] 3553(a) to the extent they are applicable.”). Section 3553(a) in turn provides:

The court shall impose a sentence sufficient, but not greater than necessary to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) [and (5) any relevant sentencing guidelines and pertinent policy statements set forth by the Sentencing Commission on the date the defendant is sentenced, subject to certain limitations]
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

*Id.* § 3553(a); see 2016 SENTENCING GUIDELINES § 1B1.10 cmt. n.1(B) (providing that a court considering whether to grant a retroactive sentence reduction “shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant’s term of imprisonment” and the “post-sentencing conduct of the defendant that occurred after the imposition of the term of imprisonment”).

<sup>41</sup> 18 U.S.C. § 3582(c)(2) (emphasis added).

<sup>42</sup> Under the 2010 Guidelines, a defendant convicted of distributing 5 grams of crack cocaine was assigned a base offense level of 24. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (U.S. SENTENCING COMM’N 2010). Even if that defendant had no criminal history and was subject to no sentence enhancements, he was subject to a Guidelines range of 51–63 months. See *id.* ch. 5, pt. A, Sentencing Table. A 60-month sentence was much more simply established by the statutory mandatory minimum. See 21 U.S.C. § 841(b)(1)(B)(iii) (2006) (establishing pre-FSA mandatory five-year minimum for distribution of 5 grams of crack cocaine).

<sup>43</sup> 2016 SENTENCING GUIDELINES app. C, amend. 750.



that Amendment 750 should be applied retroactively under § 3582(c)(2).<sup>44</sup> But, despite this provision—and despite the holding in *Dorsey* that pre-FSA offenders receiving post-FSA sentences were entitled to these reduced sentences—many of the defendants incorrectly sentenced between the enactment of the FSA and the *Dorsey* decision have been denied sentence reductions.<sup>45</sup>

The reason for these denials is a circuit split regarding the proper interpretation of § 3582(c)(2)'s "based on" clause. Some circuits, adopting a formalist approach, interpreted the clause to mean that it provided no relief to defendants who were sentenced based on *statutory* mandatory minimums rather than on the federal Sentencing Guidelines.<sup>46</sup> Others, adopting a functionalist approach, have held that defendants sentenced under pre-FSA statutory minimums may nevertheless seek relief under § 3582(c)(2), reasoning either (1) that Amendment 750 is not distinct from the FSA, but rather, the "method by which the FSA is put into practice" or (2) "that allowing resentencing under both the FSA and Amendment 750 is 'the only way to give effect to Congress' intent to achieve consistency with other Guidelines provisions.'" <sup>47</sup> The practical result is that thousands of individuals have been denied sentence reductions to which the Supreme Court has held they are entitled<sup>48</sup> for no reason other than the geographic region in which they happen to have been sentenced.<sup>49</sup>

Litigation continues to define the boundaries of § 3582(c)(2)'s "based on" clause. Just last term, the Supreme Court decided two cases considering § 3582(c)(2)'s effect on Amendment 782. In *Hughes v. United States*,<sup>50</sup> the Court expanded the pool of individuals eligible for a § 3582(c)(2) sentence reduction, holding that a sentence imposed pursuant to a "Type-C" plea

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<sup>44</sup> *Id.* § 1B1.10(d).

<sup>45</sup> See Hudson, *supra* note 6, at 146.

<sup>46</sup> *Id.* at 162–63, 169 (citing *United States v. Kelly*, 716 F.3d 180, 181 (5th Cir. 2013); *United States v. Mowatt*, 736 F. Supp. 2d 216, 217–18 (D.C. Cir. 2010); *United States v. Carpenter*, 396 F. App'x 743, 745 (2d Cir. 2010)).

<sup>47</sup> Hudson, *supra* note 6, at 162 (citing *United States v. Doe*, 731 F.3d 518, 526 (6th Cir. 2013)).

<sup>48</sup> See *Dorsey v. United States*, 567 U.S. 260, 273 (2012).

<sup>49</sup> Hudson, *supra* note 6, at 179. Theoretically, given the decision in *Dorsey*, the inability to achieve a sentence reduction via § 3582(c)(2) should be little more than a procedural inconvenience. Defendants could bypass a § 3582(c)(2) motion and directly appeal or collaterally attack their sentence based on *Dorsey*'s clear holding that they were not subject to the old mandatory minimums. But a staggering majority of criminal defendants are convicted subject to a guilty plea including a waiver of their right to appeal. *Id.* at 144 ("Ninety-seven percent of all convictions in federal court are pursuant to a plea agreement and in two-thirds of those plea agreements the defendant waives his or her right to appeal."). And even defendants not barred from appeal face stringent procedural obstacles, including a one-year statute of limitations to petition for habeas relief based on a newly announced substantive rule. See 28 U.S.C. § 2255(f); see also Note, *Suspended Justice: The Case Against 28 U.S.C. § 2255's Statute of Limitations*, 129 HARV. L. REV. 1090, 1096–98 (2016) (arguing that § 2255's statute of limitations barring habeas relief from unlawful sentences is an unconstitutional violation of the Suspension Clause).

<sup>50</sup> 138 S. Ct. 1765 (2018).

agreement<sup>51</sup> is “‘based on’ the defendant’s Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement.”<sup>52</sup> But in *Koons v. United States*,<sup>53</sup> decided the same day, the Court unanimously denied § 3582(c)(2)’s retroactive relief to defendants originally sentenced below a statutory minimum because of their “substantial assistance” to the government.<sup>54</sup> The Court reasoned that, in those circumstances, defendants’ sentences were “based on” their “substantial assistance” and the statutory minimum—not the sentencing range lowered by Amendment 782.<sup>55</sup> In both cases, justices argued that their opinions were consistent with justice or finality.<sup>56</sup>

Ultimately, § 3582(c)(2) cannot bear the weight of the sort of comprehensive sentencing reform—including retroactive sentence reductions—that this Note proposes.<sup>57</sup> As demonstrated by the illustrations above,

<sup>51</sup> In a so-called “C-Plea” or “Type-C agreement,” the Government and a defendant “agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply,” and “such a recommendation or request binds the court once the court accepts the plea agreement.” FED. R. CRIM. P. 11(c)(1)(C). When presented with a Type-C agreement, a court “may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.” *Id.* 11(c)(3)(A). The defendant may withdraw his guilty plea if the court rejects the Type-C agreement. *Id.* 11(c)(5)(B).

<sup>52</sup> *Hughes*, 138 S. Ct. at 1775. The Court previously considered the same question in *Freeman v. United States*, 564 U.S. 522 (2011), in which the Court split 4–1–4. *Hughes* was thus originally seen as a vehicle for the Court to reconsider the rule laid down in *Marks v. United States*, 430 U.S. 188, 193 (1977), which held that “[w]hen a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by the Members who concurred in the judgment on the narrowest grounds.” See also Justin Marceau, *Argument Analysis: “We Know How to Get to Five”—Justices Debate Precedent in the Absence of a Majority Opinion*, SCOTUSBLOG (Mar. 28, 2018), <http://www.scotusblog.com/2018/03/argument-analysis-we-know-how-to-get-to-five-justices-debate-precedent-in-the-absence-of-a-majority-opinion/>, archived at <https://perma.cc/7NEJ-HAL5>. But when Justices Gorsuch and Sotomayor joined Justice Kennedy’s functionalist interpretation of § 3582’s “based on” clause as applied to Type-C agreements in *Hughes*—shifting *Freeman*’s 4–1–4 division to a 6–3 majority—the Court no longer needed “to consider questions . . . regarding the proper application of *Marks*.” *Hughes*, 138 S. Ct. at 1772.

<sup>53</sup> 138 S. Ct. 1783 (2018).

<sup>54</sup> *Id.* at 1786–87. Under 18 U.S.C. § 3553(e), the Government may move to allow a sentencing court to “impose a sentence below a level established by a statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” *Id.*

<sup>55</sup> See *Koons*, 138 S. Ct. at 1788.

<sup>56</sup> See *id.* at 1790 (“[F]ar from creating unjustifiable sentencing disparities . . . our rule avoids such disparities.”); *Hughes*, 138 S. Ct. at 1779 (Sotomayor, J., concurring) (quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016)) (“The integrity and legitimacy of our criminal justice system depend upon consistency, predictability, and evenhandedness . . . . I therefore join the majority in full because doing so helps to ensure clarity and stability in the law and promotes ‘uniformity in sentencing imposed by different federal courts for similar criminal conduct.’”); *id.* at 1783 (Roberts, C.J., dissenting) (“But even if the district court ultimately decides against a reduction, the Government will be forced to litigate the issue in the meantime. . . . [T]he Government likely will have to recreate the state of play from the original plea negotiations and sentencing to make counterfactual ‘what if’ arguments—which, naturally, the defendant will then try to rebut. Settling this debate is unlikely to be as straightforward as the Court anticipates.”).

<sup>57</sup> See *infra* Part IV.

§ 3582(c)(2) is ill-suited to address sentences based on mandatory minimums, even when those mandatory minimums are later reduced.<sup>58</sup> And the contours of the retroactive relief promised by § 3582(c)(2) are uncertain, with litigation over its proper scope likely to continue.<sup>59</sup> But this statute's moderate success in retroactively reducing sentences demonstrates the possibility of relaxing sentence finality with limited strain on judicial and prosecutorial resources.<sup>60</sup> This possibility is one worth pursuing, especially given finality's limited necessity in the sentencing context.

## II. THE LIMITED MERITS OF FINALITY IN THE SENTENCING CONTEXT

The merits of sentencing finality depend upon the nature of sentencing reform. Arguments favoring finality are least compelling when reform consists only of easily administrable reductions that maintain the existing factual architecture of the sentencing regime.<sup>61</sup> On the other hand, when sentencing reform requires courts to make new factual determinations at sentencing, finality is more persuasive and demands careful crafting of easily administrable retroactivity provisions.<sup>62</sup> Ultimately, the possibility of judicially manageable retroactivity provisions—even in the case of comprehensive sentencing reform—suggests that an emphasis on finality can be relaxed without grinding the administration of justice to a halt.

Before criticizing policymakers' resistance to retroactivity in the sentencing context, it is helpful to understand why finality is persuasive in other contexts. A brief foray into the world of federal habeas corpus petitions illustrates, for example, finality's persuasive value in the context of criminal convictions.<sup>63</sup>

In the landmark decision of *Teague v. Lane*,<sup>64</sup> the Supreme Court limited retroactive application of new constitutional rules of criminal procedure—with narrow exceptions—to cases on direct review.<sup>65</sup> The Court held

<sup>58</sup> See *supra* notes 46–49, 53–55 and accompanying text.

<sup>59</sup> See *Koons*, 138 S. Ct. at 1788 n.1 (“The Government argues that defendants subject to mandatory minimum sentences can never be sentenced ‘based on a sentencing range’ that the Commission has lowered, because such defendants’ ‘sentencing range[s]’ are the mandatory minimums, which the Commission has no power to lower. We need not resolve the meaning of ‘sentencing range’ today.”) (internal citations omitted).

<sup>60</sup> See *supra* notes 26–38 and accompanying text.

<sup>61</sup> See *infra* note 92 and accompanying text.

<sup>62</sup> See *infra* notes 95–109 and accompanying text.

<sup>63</sup> Habeas petitions serve as a helpful comparator to sentence reductions in terms of the merits of finality and are used only for that purpose here. See also Berman, *supra* note 17, at 152–53 (distinguishing scholarly debate over finality in habeas review from finality in sentencing). Thus, this explanation of retroactivity in the habeas context is cursory; for more robust analysis of retroactivity doctrine in the habeas context, see, e.g., Note, *Rethinking Retroactivity*, 118 HARV. L. REV. 1642 (2005); Matthew R. Doherty, *The Reluctance Towards Retroactivity: The Retroactive Application of Laws in Death Penalty Collateral Review Cases*, 39 VAL. U. L. REV. 445 (2004).

<sup>64</sup> 489 U.S. 288 (1989).

<sup>65</sup> *Id.* at 310.

that these new constitutional rules did not apply to cases on collateral review unless they (1) placed “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe” or (2) constituted “watershed rules of criminal procedure” that “alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction . . . without which the likelihood of an accurate conviction is seriously diminished.”<sup>66</sup> Subsequent Supreme Court decisions and the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)<sup>67</sup> dramatically limited the application of these already-narrow exceptions,<sup>68</sup> ensuring that changes to constitutional rules of criminal procedure are extremely unlikely to be retroactively applied to cases on collateral review.<sup>69</sup> Once a conviction is final, it is rarely disturbed.<sup>70</sup>

Reasonable minds can disagree over when exactly a conviction should become final,<sup>71</sup> but the need to draw the line *somewhere* is apparent. First, without finality, there is no “visible end” to the criminal process, inhibiting the possibility of post-conviction rehabilitation and eliminating societal confidence “that once a conviction of guilt has been rendered under constitu-

<sup>66</sup> *Teague*, 489 U.S. at 311. The second exception for “watershed rules of criminal procedure” is effectively hollow; the Supreme Court has never held that a new rule satisfied the exception’s steep doctrinal requirements. See Ezra D. Landes, *A New Approach to Overcoming the Insurmountable “Watershed Rule” Exception to Teague’s Collateral Review Killer*, 74 MO. L. REV. 1, 10 (2009) (“Since *Teague*, the Court has never found a new rule to be watershed. Of the fourteen cases that posed the question, nine of the new rules considered have related to sentencing.”).

<sup>67</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>68</sup> See, e.g., Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 448–49 (2007) (“AEDPA repackaged the *Teague*-bar, formerly an interpretive rule of nonretroactivity, as a substantive limit on relief.”). Professor Kovarsky also points out that AEDPA is “more restrictive than *Teague*” because it (1) “bars relief unless a state decision is unreasonable in light of law that is ‘clearly established’ [while] *Teague* required only that the state decision not be dictated by precedent” and (2) “limits the authority that ‘clearly establishe[s]’ the relevant law to Supreme Court decisions [while] *Teague* allowed federal courts to look to circuit precedent.” *Id.* at 449 n.25 (citing 28 U.S.C. § 2254(d); *Teague*, 489 U.S. at 293–310). Though AEDPA is plainly more restrictive than *Teague*, see *id.*, the interaction between AEDPA and *Teague* is uncertain and it “remains unclear whether AEDPA incorporates *Teague*’s two exceptions.” Note, Kendall Turner, *A New Approach to the Teague Doctrine*, 66 STAN. L. REV. 1159, 1170 (2014).

<sup>69</sup> Doherty, *supra* note 63, at 460–61.

<sup>70</sup> See *id.*

<sup>71</sup> *Teague* prompted a sea of valid criticism, particularly from scholars concerned about its impact on clients facing capital punishment, given the obvious consequences of combining finality and the death penalty. See, e.g., Doherty, *supra* note 63, at 471 (arguing that “when the penalty is death, greater flexibility should be given to the incarcerated individual so that he should have the opportunity to apply a new law retroactively on collateral review”); Michael Admirand & G. Ben Cohen, *The Fallibility of Finality*, 10 HARV. L. & POL’Y REV. ONLINE S53, S74 (2015–2016) (arguing that the Court’s “fixation on finality will assure [its] fallibility”); James S. Liebman, *More than “Slightly Retro:” The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 541 (1991) (“[T]he Court’s innovation [in *Teague*] threatens to make close to a legal irrelevancy of the fact that many or most state capital sentences in this country are meted out in violation of the Constitution.”).

tionally fair procedures, that verdict will be left untouched.”<sup>72</sup> Additionally, finality conserves already limited judicial and prosecutorial resources for current controversies rather than allowing those resources to be “drained litigating past trial procedures that were constitutional when implemented.”<sup>73</sup> Finally—and perhaps most persuasively for those who favor progressive rules of criminal procedure—finality stimulates the development of constitutional law.<sup>74</sup> It is doubtful, for example, that the Supreme Court would have established *Miranda*’s robust protection of a defendant’s right against self-incrimination if it meant “opening the floodgates” to retry every criminal convicted by a pre-*Miranda* confession.<sup>75</sup>

In other words, finality is not a bogeyman; it is a necessary, practical consideration in any conversation about retroactivity. But whatever finality’s merits in the conviction context,<sup>76</sup> it loses much of its persuasive power in the sentencing context.<sup>77</sup> Mere sentence reductions do not erase convictions or eliminate culpability; a person who receives a sentence reduction is still held responsible for their criminal conduct. But they are held responsible in a manner that (1) reflects the evolving understanding of Congress and the Sentencing Commission as to what sentence will achieve the optimal deterrent, retributive, rehabilitative, and incapacitative effect,<sup>78</sup> and (2) avoids “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”<sup>79</sup> Thus, even if a retroactive sentence reduction results in an individual’s immediate release

<sup>72</sup> Doherty, *supra* note 63, at 471–72 (quoting Christopher S. Strauss, *Collateral Damage: How the Supreme Court’s Retroactivity Doctrine Affects Federal Drug Prisoners’* Apprendi Claims on *Collateral Review*, 81 N.C. L. REV. 1220, 1253 (2003)).

<sup>73</sup> Strauss, *supra* note 72, at 1232.

<sup>74</sup> Doherty, *supra* note 63, at 474.

<sup>75</sup> Doherty, *supra* note 63, at 474–75. Some commentators contend the Warren Court intentionally restricted the application of retroactivity in order to expand procedural protections for defendants. See *id.* at 474 n.164 (citing Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999)).

<sup>76</sup> Some commentators would argue that finality is overemphasized in the habeas context as well. See, e.g., Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.–C.L. L. REV. 339, 361 (2006) (“The large numbers of appeals created by mass incarceration, a political culture that is preoccupied by insidious finality concerns, and judicial fears about docket control have trumped the needs of prisoners desperately seeking review and remedy.”).

<sup>77</sup> See Berman, *supra* note 17, at 167–70 (contrasting the backward-looking determination of guilt at trial with the forward-looking imposition of a sentence).

<sup>78</sup> See 18 U.S.C. § 3553(a)(2); U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. background (U.S. SENTENCING COMM’N 2016) (providing that a provision for retroactive application of sentence reduction “reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing”); Haile, *supra* note 22, at 646–47 (“Once Congress rejects harsh penalties as unnecessary to keep society safe, there is little benefit in keeping thousands of individuals imprisoned under the obsolete law.”). The merits of these sentencing purposes are beyond the scope of the Note and the subject of vigorous scholarly disagreement. See generally WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT (Michael Tonry ed. 2011); Robert Weisburg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203 (2012). For now, it is enough to point out that 18 U.S.C. § 3553(a)(2) establishes these philosophies as the purposes of sentencing.

<sup>79</sup> 28 U.S.C. § 991(b)(1)(B).

from incarceration, it is not “only because effective retrial is impossible years after the offense.”<sup>80</sup> It is because they have already served the time determined to be appropriate by Congress and the Sentencing Commission.

Furthermore, retroactive sentence reductions need not disturb the “visible end” of the criminal process, as they often require minimal or no re-litigation of trial issues.<sup>81</sup> Indeed, under the current statutory framework, retroactively reducing a sentence does not even require a full resentencing.<sup>82</sup> To retroactively reduce the sentence of a person sentenced to a pre-FSA mandatory minimum, for example, a prosecutor need not track down witnesses, secure potentially destroyed drug evidence, or investigate other relevant conduct already considered at the time of the original sentencing—as might be required if the individual collaterally attacked his conviction. Instead, a court could simply recalibrate the offender’s sentence within a new sentencing range, as courts successfully did when implementing Amendment 782.<sup>83</sup>

As with Amendment 782, the opportunity to levy a sentence more consistent with evolving understandings of ideally calibrated sentencing ranges outweighs any minimal strain on prosecutorial and judicial resources required to proportionally reduce an individual’s sentence within an existing sentencing regime.<sup>84</sup> The passage of time may be the enemy of backward-looking factual determinations of guilt. But time is the ally of forward-looking determinations about what does—and more importantly, what does not—constitute just punishment.<sup>85</sup>

Admittedly, not all retroactive sentence reductions can sweep the merits of finality so tidily under the rug. First, resentencing may sometimes require the sort of backward-looking factual determinations that support finality in criminal convictions.<sup>86</sup> In 1993, for example, the Sentencing Commission adopted Amendment 488, which changed how district courts calculated the quantity of lysergic acid diethylamide (LSD) for sentencing determina-

<sup>80</sup> Doherty, *supra* note 63, at 473–74 (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977)).

<sup>81</sup> See Berman, *supra* note 17, at 169–70.

<sup>82</sup> *Dillon v. United States*, 560 U.S. 817, 826 (2010) (“Section 3582(c)(2)’s text, together with its narrow scope, show that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding.”); U.S. SENTENCING COMM’N, PRIMER ON RETROACTIVITY (2016) (citing 2016 SENTENCING GUIDELINES § 1B1.10(a)(3)) (“[P]roceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.”).

<sup>83</sup> See *supra* notes 26–38 and accompanying text.

<sup>84</sup> Berman, *supra* note 17, at 169–70.

<sup>85</sup> *Id.* at 170. Admittedly, the constitutional prohibition on ex post facto criminal punishment sets up a one-way ratchet; previously imposed sentences can conform to legislators’ evolving understandings of punishment only if that understanding favors greater leniency. See U.S. Const. art. I § 9, cl. 3; *Peugh v. United States*, 569 U.S. 530, 538–39 (2013) (quoting *Calder v. Bull*, 3 Dall. 386, 390 (1798)). But, if the goal is decarceration—as the author contends it ought to be—this distinction is more feature than bug.

<sup>86</sup> Cf. Scott, *supra* note 16, at 203.

tions.<sup>87</sup> LSD is distributed and consumed via carrier media (including blotter paper or sugar cubes) that vary widely in weight and bear little relationship to the dosage they contain.<sup>88</sup> Before Amendment 488, courts determined the quantity of LSD by determining the weight of the carrier media rather than the LSD alone, causing defendants to receive disparate sentences even when they possessed or distributed the same dosage of LSD.<sup>89</sup> To eliminate these disparities, Amendment 488 imposed a dose-based—rather than weight-based—calculation,<sup>90</sup> and the Commission provided that the Amendment would apply retroactively.<sup>91</sup>

The ease of retroactively applying this amendment depended on information available from the original sentencing. If, at a defendant's original sentencing, the prosecution presented both the carrier medium's weight *and* the LSD dosage, then resentencing under this amendment would be as simple as resentencing under the FSA or Amendment 782.<sup>92</sup> But if, at an original sentencing, the prosecution presented only the weight of the carrier medium without quantifying the dosage, the resentencing court would have to make a new factual determination regarding dosage to properly resentence the defendant. Moreover, if the drug evidence had been destroyed post-sentencing, the court would have to make a backward-looking factual determination based on stale or missing evidence<sup>93</sup>—precisely the sort of concern that animates arguments favoring finality.<sup>94</sup>

This problem of backward-looking factual determinations at sentencing is presented starkly by proposals to reform the Sentencing Guidelines for possession of child pornography.<sup>95</sup> Responding to the understandable horror and public outrage at crimes victimizing children, over the past three de-

<sup>87</sup> U.S. SENTENCING COMMISSION GUIDELINES MANUAL app. C, amend. 488 (U.S. SENTENCING COMM'N 2011).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* § 1B1.10(d).

<sup>92</sup> *Cf. supra* notes 26–38. This was evident when Amendment 488 was tested in the Eighth Circuit in *United States v. Coohy*, 11 F.3d 97 (8th Cir. 1993). The Eighth Circuit remanded the case to the district court for a discretionary determination of whether to grant retroactive relief to Coohy, but noted that Coohy was originally sentenced based on 5,950 *doses* of LSD weighing 38.675 grams (including carrier medium). *Id.* at 99. The court further reasoned that retroactive application of Amendment 488 would change “the weight of LSD for which Coohy [was] responsible for sentencing purposes,” reducing it to 2.38 grams and “mak[ing] him eligible for a shorter prison term.” *Id.* at 101.

<sup>93</sup> Similar circumstances characterized the Sentencing Commission's adoption of Amendment 516, which changed the method of calculating marijuana quantity based on the number of marijuana plants. *See* Julian A. Cook, III, *Plea Bargaining, Sentence Modifications, and the Real World*, 48 WAKE FOREST L. REV. 65, 92–95 (2013) (citing *United States v. Gilliam*, 513 F. Supp. 2d 594 (W.D. Va. 2007), *aff'd*, 275 F. App'x 214 (4th Cir. 2008)).

<sup>94</sup> *See* Scott, *supra* note 16, at 203.

<sup>95</sup> *See* U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES, at xvii–xxi (2012) [hereinafter 2012 PORNOGRAPHY REPORT]. For the existing Sentencing Guidelines for child pornography offenses, *see* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (U.S. SENTENCING COMMISSION 2016).

cares policymakers have steadily ratcheted up sentencing ranges for child pornography offenses.<sup>96</sup> The resulting sentencing regime has prompted calls for reform from commentators,<sup>97</sup> the Sentencing Commission,<sup>98</sup> and federal judges.<sup>99</sup> Proponents of reform criticize ubiquitous “enhancements” triggered by conduct inherent to the possession or receipt of child pornography and that “fail to distinguish between commercial distributors of child pornography and defendants whose ‘core conduct [is] consumption.’”<sup>100</sup> These enhancements include, for example, a two-level enhancement for the use of a computer<sup>101</sup> and a five-level enhancement for 600 or more images (counting a single video as 75 images).<sup>102</sup> Sentence enhancements like these mean a typical first time offender will often face a Sentencing Guidelines range near or even *above* the statutory maximum of twenty years imprisonment<sup>103</sup>—a more severe sentence than would be imposed for repeated sexual contact with a child.<sup>104</sup>

To address these concerns, the Sentencing Commission has proposed reforms designed to better reflect the spectrum of culpability presented by

<sup>96</sup> See Steiker, *supra* note 4, at 37–42.

<sup>97</sup> See *id.*; see also Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853 (2011); Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 RICH. J.L. & TECH. 1 (2010).

<sup>98</sup> See 2012 PORNOGRAPHY REPORT, *supra* note 95.

<sup>99</sup> See Steiker, *supra* note 4, at 37 (citing U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010, question 8: Appropriateness of Guideline Ranges (2010)) (“In a comprehensive 2010 survey of federal trial court judges conducted by the Sentencing Commission, the Guidelines for child pornography were designated as inappropriately high by 70% of the judges for possession offenses and 69% of the judges for receipt offenses. The only other sentences in the same ballpark of judicial disapproval for harshness were the crack cocaine penalties.”).

<sup>100</sup> *Id.* at 41–42. These proponents contend that consumers of child pornography present a low risk of harm to society relative to producers of child pornography. *Id.* (arguing that consumers of child pornography present “a very low risk of harm to society”); see also Marcia G. Shein, *The Changing Landscape of Sentencing Mitigation in Possession of Child Pornography Cases*, 35 CHAMPION 32, 33 (2011) (“This failure to differentiate between a ‘viewer’ and an actual ‘maker’ of child pornography is a clear sign that something is amiss.”).

<sup>101</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6) (U.S. SENTENCING COMM’N 2016). The 2012 report to Congress revealed that 96.3% of § 2G2.2 child pornography sentences applied this enhancement. 2012 PORNOGRAPHY REPORT, *supra* note 95, at 209.

<sup>102</sup> 2016 SENTENCING GUIDELINES § 2G2.2(b)(7)(D); *id.*, cmt. n.6(B). The 2012 report to Congress revealed that 96.9% of § 2G2.2 child pornography sentences applied this enhancement. 2012 PORNOGRAPHY REPORT, *supra* note 95, at 209.

<sup>103</sup> Shein, *supra* note 100, at 33 (“It is not uncommon for the run-of-the-mill child pornography defendant charged with possession to end up with an offense level of 40, simply by applying the enhancements for involvement of a minor under 12, use of computer, material depicting violence, 600 images or more, and expectation of value. This results in a recommended sentence range of 292–365 months, assuming a Criminal History Category of I . . . . Even the low end of this range is above the statutory mandatory maximum of 20 years that Congress enacted for convicted child pornographers.”).

<sup>104</sup> See Steiker, *supra* note 4, at 42 (citing *United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2010)) (“As the Second Circuit noted, the Guidelines for child pornography are so high that they treat an offender who never had any contact with a child more severely than the Guideline sentences for repeated sex with a child or for aggravated assault with a firearm that results in bodily injury.”).



child pornography offenses.<sup>105</sup> For example, the Commission recommended decreasing the focus on whether an offender used a computer, and increasing the focus on the offender's history of abusive or exploitative sexual conduct, the type and volume of an offender's collection of child pornography, and the degree of an offender's involvement with other offenders.<sup>106</sup>

Whether these reforms should be adopted is beyond the scope of this Note.<sup>107</sup> But if Congress were to adopt such a fundamental restructuring of the sentencing regime and apply it retroactively, sentencing courts would be forced to make backward-looking factual determinations with respect to questions not considered at the original sentencing. For example, if the original sentencing court focused on the number of images and whether the defendant used a computer,<sup>108</sup> it likely paid little attention to the nature and extent of the defendant's involvement in online communities of child pornographers or to the defendant's history of exploitative sexual conduct.<sup>109</sup> Arguments for finality in sentencing are at their most persuasive in circumstances like this, where an entirely new sentencing scheme would require significant backward-looking factual determinations that were not considered at the original sentencing.

Still, retroactive sentence reductions need not be all or nothing. Though it may well be impracticable to allow all previously sentenced offenders to seek resentencing under a new framework that requires novel, extensive factual determinations, policymakers can still pursue limited, easily administrable retroactivity provisions. In the context of LSD sentencing reform, if courts needed to rely on original sentencing records lacking dosage calculations, policymakers could adopt a moderate presumptive reduction for heavier, low-dose carrier media. That is, policymakers could craft a retroactivity provision that required a resentencing court lacking dosage evidence to presume an LSD-laced sugar cube contained  $x$  doses.<sup>110</sup> In the context of child pornography, if sentencing reform resulted in lower statutory maxima, policymakers could craft a retroactivity provision that allowed a previously imposed sentence to be retroactively reduced such that it no longer exceeded

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<sup>105</sup> See 2012 PORNOGRAPHY REPORT, *supra* note 95, at xvii–xix.

<sup>106</sup> *Id.* at xvii–xviii. More robust reform will likely require legislative action, as many of the existing guidelines were created either in response to congressional directives or through legislation amending the guidelines directly. See *id.* at xviii (“[T]he Commission believes that Congress should enact legislation providing the Commission with express authority to amend the current guideline provisions that were promulgated pursuant to specific congressional directives or legislation directly amending the guidelines.”). Note however, that the Sentencing Commission contends that it maintains the ability to enact more limited reform based on guidelines promulgated on the Commission's own initiative. *Id.*

<sup>107</sup> For additional reform arguments from commentators, see *supra* note 97.

<sup>108</sup> See *supra* note 101 and accompanying text.

<sup>109</sup> See *supra* note 106 and accompanying text.

<sup>110</sup> Of course, in crafting such a provision, policymakers could examine cases that included information about carrier media and corresponding dosage to establish a reasonable dosage presumption. The point here is merely that simplifying the factual analysis for the court reduces finality-based concerns about retroactive sentence reductions.

the reformed sentencing regime's lower statutory maxima. These approaches would avoid examination of new factual questions based on long-stale evidence, while also allowing for some retroactive recalibration of sentences originally imposed under frameworks ill-suited to the criminal conduct they aimed to address.

Having established that relaxing sentence finality in favor of retroactive sentence reductions is both practically possible and doctrinally justifiable, the Note turns next to why redrawing the line between these competing values is desirable. Beyond normative arguments that sentencing disparity is simply unfair,<sup>111</sup> retroactive sentence reductions provide a promising solution to the moral and economic problem of mass incarceration.

### III. RETROACTIVITY'S ROLE IN REDUCING MASS INCARCERATION

Solving a problem requires attention to its underlying causes, and the crisis of mass incarceration stems as much from the length of sentences of people *already* incarcerated as from new entries into the penal system.<sup>112</sup> Thus, while strategies to reduce incarceration at the "front end" of sentencing are laudable, meaningfully addressing the problem of mass incarceration will require robust "back end" reforms addressing extant sentences.

Though well documented,<sup>113</sup> the scope of the problem of mass incarceration bears reiteration. The number of people held nationwide in prisons and jails has exploded, from fewer than 350,000 in 1972 to around 2 million today.<sup>114</sup> This expansion largely resulted from punitive political responses to crime and drug crises in the 1970s, 1980s, and 1990s,<sup>115</sup> which prompted "an

<sup>111</sup> See, e.g., Haile, *supra* note 22, at 640 ("Retroactivity is, first and foremost, a matter of fairness.").

<sup>112</sup> See *infra* notes 116–121 and accompanying text.

<sup>113</sup> See, e.g., ALEXANDER, *supra* note 17. Professor Alexander's book prompted unprecedented public awareness of mass incarceration and a wave of scholarship examining the staggering rate at which the United States locks human beings in cages. See, e.g., James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond The New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012); Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531 (2016); Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381 (2015); Donald F. Tibbs, *Hip Hop and the New Jim Crow: Rap Music's Insight on Mass Incarceration*, 15 U. MD. L.J. RACE, RELIG., GENDER & CLASS 209 (2015).

<sup>114</sup> ALEXANDER, *supra* note 17, at 8; TRENDS IN U.S. CORRECTIONS, *supra* note 17; Berman, *supra* note 17, at 163 (quoting DON STEMEN, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 1 (2007)).

<sup>115</sup> Cynical political maneuvering during these decades makes it difficult to determine the extent to which the crises were real rather than manufactured. For example, top Nixon advisor John Ehrlichman acknowledged:

The Nixon campaign in 1968, and the Nixon White House after that had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after

increase in sentence lengths [including harsh mandatory minimums], reaffirmation of the death penalty, an expansion of criminal offenses and a change in the stated purposes of corrections.”<sup>116</sup> The United States now incarcerates more of its citizens than any other country in the world.<sup>117</sup> This carceral expansion is driven not only by more individuals entering the carceral system, but also by dramatic increases in sentence lengths.<sup>118</sup> More than a quarter of adult prisoners are serving a sentence of 20 years or more.<sup>119</sup> More than 150,000 people in prison are serving life sentences, and over 30% of those individuals have no possibility for parole.<sup>120</sup> In fact, the number of prisoners serving lengthy sentences “suggest[s] there may now be more individuals condemned to die in America’s prisons based on their current ‘final’ sentences than the *total* prison population in the 1960s.”<sup>121</sup>

These numbers are even more disturbing given the disparate impact mass incarceration has had on communities of color. While Black<sup>122</sup> and Hispanic or Latinx Americans respectively make up 13.4% and 18.1% of the American population, they account for 35.4% and 21.6% of the national

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night on the evening news. Did we know we were lying about the drugs? Of course we did.

Dan Baum, *Legalize it All: How to Win the War on Drugs*, HARPER’S MAG., Apr. 2016, <https://harpers.org/archive/2016/04/legalize-it-all/>, archived at <https://perma.cc/W4S3-ASXS>. Others who worked on drug policy for the Nixon Administration and knew Ehrlichman have since denied this assertion, contending that Ehrlichman was “known for using biting sarcasm to dismiss those with whom he disagreed, and it [was] possible the reporter misread his tone.” Hilary Hanson, *Nixon Aides Suggest Colleague Was Kidding About Drug War Being Designed to Target Black People*, HUFFINGTON POST, Mar. 25, 2016, [http://www.huffingtonpost.com/entry/richard-nixon-drug-war-john-ehrichman\\_us\\_56f58be6e4b0a3721819ec61](http://www.huffingtonpost.com/entry/richard-nixon-drug-war-john-ehrichman_us_56f58be6e4b0a3721819ec61), archived at <https://perma.cc/5ZZU-UN2U>.

<sup>116</sup> Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL’Y REV. 375, 386 (2017).

<sup>117</sup> Stevenson, *supra* note 76, at 340.

<sup>118</sup> Berman, *supra* note 17, at 163.

<sup>119</sup> *Id.* (citing MARC MAUER ET AL., THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 11 (2004)).

<sup>120</sup> *Id.* at 164 (citing ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 2, 5 (2013), [http://www.sentencingproject.org/doc/publications/inc\\_Life%20Goes%20On%202013.pdf](http://www.sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf), archived at <https://perma.cc/RZ3R-38EN>).

<sup>121</sup> *Id.*

<sup>122</sup> The author has chosen to use the capitalized adjective “Black” to refer to Americans of the African diaspora, while using the lowercased adjective “white” to refer to Americans of European ancestry. While this choice deserves more thorough analysis than it receives here, the author relies on persuasive arguments in support of this decision, *see, e.g.*, Lori L. Tharps, *The Case for Black With a Capital B*, N.Y. TIMES, Nov. 18, 2014, <https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html>, archived at <https://perma.cc/SAU7-63XJ>; John H. McWhorter, *Why I’m Black, Not African American*, MANHATTAN INST. (Sept. 8, 2004), <https://www.manhattan-institute.org/html/why-im-black-not-african-american-0153.html>, archived at <https://perma.cc/UKB5-NH4Y>, while acknowledging that this typographical decision may provoke meritorious disagreement, *see, e.g.*, Lee Sigelman et al., *What’s in a Name? Preference for “Black” versus “African-American” Among Americans of African Descent*, 69 PUB. OPINION Q. 429 (2005); Merrill Perlman, *Black and white: Why Capitalization Matters*, COLUM. JOURNALISM REV. (June 23, 2015), [https://www.cjr.org/analysis/language\\_corner\\_1.php](https://www.cjr.org/analysis/language_corner_1.php), archived at <https://perma.cc/Q2VY-9SCL>.

prison population,<sup>123</sup> and the disproportional imprisonment of Hispanic or Latinx individuals increases significantly at the federal level.<sup>124</sup> In federal court, Black defendants are considerably more likely to face harsh mandatory minimum sentences than white or Hispanic or Latinx defendants.<sup>125</sup> A 2011 study revealed that, while 39.5% of white defendants and 46.3% of Hispanic or Latinx defendants received “safety valve” relief<sup>126</sup> from mandatory minimum sentences, only 14.4% of Black defendants received the same.<sup>127</sup> Black children shoulder a disproportionate burden of the carceral state: while they account for only 16% of the children in the United States, they make up 28% of all juvenile arrests, 35% of children tried as adults, 58% of children sent to adult prison facilities, and are six times as likely as white children to be sentenced to prison for identical crimes.<sup>128</sup>

The scope of the problem has prompted widespread and bipartisan support for policies aimed at reducing the prison population.<sup>129</sup> In the face of growing public outrage and shrinking financial resources,<sup>130</sup> policymakers have started to implement sentencing reform designed to prospectively re-

<sup>123</sup> United States Census, QuickFacts, <https://www.census.gov/quickfacts/fact/table/US/PST045216>, archived at <https://perma.cc/5Y7C-LBBL>; BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2015, 6 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>, archived at <https://perma.cc/T2Z3-MFZ9> [hereinafter PRISONERS IN 2015]. These percentages were calculated using the raw figures in Table 3.

<sup>124</sup> U.S. SENTENCING COMM’N, QUICK FACTS: FEDERAL OFFENDERS IN PRISON 1 (2017) (“Hispanic offenders make up the largest group of the federal prison population (34.8%), followed by Black offenders (34.5%), White offenders (27.1%), and Other Races (3.6%).”); U.S. SENTENCING COMM’N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 159 (2011) [hereinafter 2011 REPORT].

<sup>125</sup> 2011 REPORT, *supra* note 124, at 159.

<sup>126</sup> For specific drug crimes that did not result in injury to any person, the so-called “safety valve” statute permits certain individuals to secure a sentence below the mandatory minimum, provided they have no more than 1 criminal history point, did not use violence or possess a weapon, were not an organizer or leader in the offense, and fully cooperated with the government. *See* 18 U.S.C. § 3553(f) (2010); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (U.S. SENTENCING COMM’N 2016).

<sup>127</sup> Chief Judge Patti B. Saris, *Sentencing Reform*, 59 BOSTON BAR J. xli, xlii (2015). Judge Saris, a former chair of the Sentencing Commission, draws these statistics from a 2011 report by the Sentencing Commission. *See* 2011 REPORT, *supra* note 124, at 159.

<sup>128</sup> ALEXANDER, *supra* note 17, at 118.

<sup>129</sup> *See* Sheldon Whitehouse, *Foreword*, 11 HARV. L. & POL’Y REV. 359, 366–67 (2017). It is important to note, however, that widespread support for reducing the prison population without addressing the collateral consequences of being labeled a felon is an incomplete response to the system of racial control presented by mass incarceration. ALEXANDER, *supra* note 17, at 14 (“Merely reducing sentence length, by itself, does not disturb the basic architecture of the New Jim Crow. So long as large numbers of African Americans continue to be arrested and labeled drug criminals, they will continue to be relegated to a permanent second-class status upon their release, no matter how much (or how little) time they spend behind bars.”); *see also* Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563 (2018) (forthcoming).

<sup>130</sup> Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modifications as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 465 (2010) (“Now, in the wake of unprecedented budget shortfalls, state governments have been forced to confront a difficult reality: the ever-increasing prison population has come at too high a price.”); *see also* Stevenson, *supra* note 76, at 340 (“Corrections spending by state and federal governments has risen from \$6.9 billion in 1980 to \$57 billion in 2001.”).

duce sentences, and in some cases, divert criminal defendants away from prison entirely.<sup>131</sup> These reforms at the “front end” of sentencing have been particularly robust at the state level, where the financial constraints of mass incarceration are felt more acutely.<sup>132</sup> Many states have legalized, decriminalized, or reclassified drug offenses and have eliminated harsh mandatory sentencing laws, especially for low-level drug offenses.<sup>133</sup> Others have strengthened existing diversion programs to redirect drug offenders away from prison, and some have even provided for presumptive probation in lieu of prison time for low-level drug offenses.<sup>134</sup>

But states have recognized that these “front end” reforms can only carry them so far toward the goal of decarceration. Accordingly, states have begun experimenting—and finding success—with more robust “back end” sentencing reforms. Rhode Island, for example, enacted legislation allowing inmates to earn seventeen days of early release credit each month by participating in anger management and other programs.<sup>135</sup> As a result, Rhode Island has seen a 17% drop in its prison population alongside a 6% decrease in rates of recidivism.<sup>136</sup> Mississippi, which had adopted “truth-in-sentencing” legislation requiring offenders to serve 85% of their sentence before becoming parole eligible, has since reauthorized early parole eligibility for all non-violent offenders, including first time offenders who have served 25% or more of their sentence.<sup>137</sup> As a result, Mississippi’s prison population began declining.<sup>138</sup> Maryland and Wisconsin continue to use long-established mechanisms granting discretion to trial courts to reconsider and retroactively reduce prison sentences.<sup>139</sup> These “back-end” reforms, though limited,<sup>140</sup> re-

<sup>131</sup> Stemen, *supra* note 116, at 403–04.

<sup>132</sup> ALEXANDER, *supra* note 17, at 239 (“With budgets busting, more than two dozen states have reduced or eliminated harsh mandatory minimum sentences, restored early release programs, and offered treatment instead of incarceration for some drug offenders.”).

<sup>133</sup> See Whitehouse, *supra* note 129, at 364 (“[Reforms] have included reclassifying certain drug offenses (as in Utah, Nebraska, Ohio, and North Carolina, among other states), revising mandatory minimums (as in Oregon, Georgia, Hawaii, and Louisiana, for instance), . . . and reducing the crack-powder cocaine sentencing disparity (as in Missouri, Ohio, and South Carolina). In 2015, Alabama enacted reforms that included establishing a new felony class for certain low-level drug offenses and authorizing certain incarcerated persons to serve ‘split’ prison-probation sentences from drug convictions.”).

<sup>134</sup> *Id.*; Stemen, *supra* note 116, at 403–04.

<sup>135</sup> Whitehouse, *supra* note 129, at 364–65. Delaware, Louisiana, and Washington have also expanded “good time” availability. See Klingele, *supra* note 130, at 489.

<sup>136</sup> Whitehouse, *supra* note 129, at 364–65.

<sup>137</sup> Klingele, *supra* note 130, at 487–88.

<sup>138</sup> *Id.* at 488. Mississippi’s prison population has declined from 22,829 as of July 31, 2008, MISS. DEP’T OF CORR., DAILY INMATE POPULATION: JULY 2008 4 (2008), <http://www.mdoc.ms.gov/Admin-Finance/DailyInmatePopulation/2008-07%20Daily%20Inmate%20Population.pdf>, archived at <https://perma.cc/X6LN-WCBH>, to 19,583 as of July 1, 2018, MISS. DEP’T OF CORR., DAILY INMATE POPULATION: JULY 2018 2 (2018), <http://www.mdoc.ms.gov/Admin-Finance/DailyInmatePopulation/2018-07%20Daily%20Inmate%20Population.pdf>, archived at <https://perma.cc/94T5-J3Z6>. This is a nearly 15% decrease. See *id.*

<sup>139</sup> Klingele, *supra* note 130, at 503–09. It is “extremely difficult” to determine how frequently these mechanisms are used, because “rulings on such motions are rarely appealable and therefore leave no record in appellate case law,” and most local counties and parishes—

veal both the necessity and political viability of retroactively reducing sentences as a means of reducing the prison population.

“Back end” sentencing reform may also address the racially disparate impact of mass incarceration. Retroactive application of Amendment 782, for example, appears to have been at least moderately effective at counteracting the racial disparities in sentencing. Of the 30,803 reductions granted under Amendment 782, 12,662 (41.1%) were granted to Hispanic or Latinx defendants and 10,149 (32.9%) were granted to Black defendants, while 7,200 (23.4%) were granted to white defendants.<sup>141</sup>

These successes in sentencing reform—at both the front and back end of the carceral state—are only a first step toward meaningfully reducing the prison population. Many of these reforms have either focused directly on drug offenses<sup>142</sup> or have been limited to nonviolent drug offenders.<sup>143</sup> But the vast majority of currently incarcerated people were convicted of violent offenses.<sup>144</sup> There is therefore little doubt that substantial decarceration will require massive, nationwide sentencing reform and a difficult national conversation about our overreliance on incarceration even as a response to violent crime.<sup>145</sup> But, as a starting point, it is clear that each successive step toward sentencing reform and decarceration must include strategies on the “front end” as well as on the “back end” to maximize the impact on the prison population. Policymakers who are serious about combatting mass incarceration should thus incorporate retroactive sentence reductions into any sentencing reform strategy adopted.

#### IV. MOVING FORWARD BY LOOKING BACKWARD

Congress has already written legislation beginning to redraw the line between justice and finality in sentencing. The Sentencing Reform and Corrections Act (SRCA)<sup>146</sup>—hailed as one of “the most significant pieces of

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the entities that maintain trial court records—“do not track either filings our outcomes related to motions for sentence modification.” *Id.* at 502 & n.164.

<sup>140</sup> For example, Professor Klingele points to the relatively limited use of judicial sentence modification, *see id.* at 505, 508–09, and predictable political backlash against even limited early release programs when small numbers of early released individuals commit violent crimes, *see id.* at 496–97.

<sup>141</sup> *See* RETROACTIVITY REPORT, *supra* note 29, at tbl. 5.

<sup>142</sup> *See supra* notes 133–134 and accompanying text.

<sup>143</sup> *Id.*

<sup>144</sup> PRISONERS IN 2015, *supra* note 123, at 14. *See generally* JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (critiquing descriptive accounts of mass incarceration that focus too heavily on nonviolent drug-related offenses and sentence lengths).

<sup>145</sup> *See generally* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

<sup>146</sup> The Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015) was reintroduced in 2017 as The Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. (2017).

sentencing reform legislation in a generation”<sup>147</sup>—embraces many of this Note’s proposals. It makes retroactive the Fair Sentencing Act’s reduced mandatory minimums for crack cocaine offenses<sup>148</sup> and significantly reduces mandatory minimum sentences for other drug crimes.<sup>149</sup> It also applies these new reductions retroactively.<sup>150</sup> But the SRCA has become a battleground in the ongoing war between justice and finality. A resurgence of “tough on crime” political rhetoric brings with it a familiar and lopsided emphasis on finality at the expense of justice, hindering bipartisan efforts to balance these competing values.

First, the good news. The SRCA’s retroactivity provisions are consistent with the factors that have facilitated effectiveness and efficiency of retroactive sentence reductions in the past: they require minimal backward-looking factual determinations,<sup>151</sup> they empower courts to retroactively reduce sentences *sua sponte*,<sup>152</sup> and they clearly identify—without difficult legal analysis—who is eligible for a reduced sentence.<sup>153</sup> Furthermore, these provisions significantly reduce mandatory minimums, meaning retroactive application would result in correspondingly significant reductions in sentence lengths, and thus, the overall prison population.<sup>154</sup> And, given that Black defendants were the least likely to receive relief from mandatory minimums on the front end of sentencing,<sup>155</sup> they are likely to disproportionately benefit from a back-end reduction, correcting, at least in part, current racial disparities in sentencing.<sup>156</sup> In other words, Congress was poised to do with the

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<sup>147</sup> *FAMM Praises Senate Sentencing Reform Compromise, Calls Mandatory Sentence Reforms Long Overdue*, FAMILIES AGAINST MANDATORY MINIMUMS (Oct. 1, 2015), <https://famm.org/famm-praises-senate-sentencing-reform-compromise-calls-mandatory-sentencing-reforms-long-overdue/>, archived at <https://perma.cc/JM4P-948F>.

<sup>148</sup> Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. § 105 (2017).

<sup>149</sup> Reductions of mandatory minimums include, for example, from life to 25 years for third-strike drug felonies, *id.* § 101(a)(2)(A)(ii), and from 20 years to 15 years for second-strike drug felonies, *id.* § 101(a)(2)(A)(i).

<sup>150</sup> *Id.* § 101(c)(2).

<sup>151</sup> Though the SRCA requires “the Government [to] conduct a particularized inquiry of the facts and circumstances of the original sentencing of the defendant . . . including a review of any prior criminal conduct or any other relevant information,” this inquiry is limited to “whether a reduction in sentence would be consistent with” the SRCA’s provisions allowing retroactive sentence reductions. *See id.* § 101(c)(2)(B). These provisions are similar to those of § 3582(c)(2), compare S. 1917 § 101(c)(2)(A)(i)(II) (allowing defendant, Director of Bureau of Prisons, or court to move for retroactive sentence reduction and requiring court to consider § 3553(a) factors before granting motion), with § 3582(c)(2) (same), except that the SRCA adds an additional condition that a defendant may only secure a sentence reduction if they have not “been convicted of any serious violent felony,” *see* S. 1917 § 101(c)(2)(A)(i)(I).

<sup>152</sup> *See, e.g.*, Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. § 101(c)(2)(A)(i)(II) (2017).

<sup>153</sup> *Cf. supra* note 38 and accompanying text.

<sup>154</sup> *See supra* notes 149–150 and accompanying text.

<sup>155</sup> *See supra* note 127 and accompanying text.

<sup>156</sup> *Cf. supra* note 141 and accompanying text.

SRCA almost exactly what this Note would call on it to do, at least as a first step.<sup>157</sup>

But the winds of support have shifted, and the progress of the SRCA has stalled in the face of renewed “tough on crime” rhetoric.<sup>158</sup> Initially, the SRCA was remarkably bipartisan. Authored by Chuck Grassley (R-IA), it was co-sponsored by a bipartisan group of political heavyweights, including Senators Dick Durbin (D-IL), Mike Lee (R-UT), Sheldon Whitehouse (D-RI), Lindsay Graham (R-SC), Patrick Leahy (D-VT), Jeff Flake (R-AZ), Cory Booker (D-NJ), Tim Scott (R-SC), Dianne Feinstein (D-CA), and Roy Blunt (R-MO).<sup>159</sup> Senator Grassley described the bill as a “perfect compromise” between Democrats and Republicans. Indeed, the SRCA was voted out of committee by a margin of 16 to 5 votes<sup>160</sup> and encountered a warm reception on Capitol Hill.<sup>161</sup> Instead of the too-familiar cries of “soft on crime,” both sides of the aisle praised the SRCA.<sup>162</sup> Senator Lee (R-UT) said, in support of the bill, “Our current federal sentencing laws are out of date, they are often counterproductive, and in far too many cases . . . they are unjust.”<sup>163</sup> Senator Leahy (D-VT) lauded the bill saying, “It is time we fix our mistakes. And it is essential that this fix apply retroactively—so that those currently paying the price for those mistakes are given a second chance.”<sup>164</sup>

These justice-based arguments have floundered when confronted by a presidential administration that has repeatedly emphasized “law and or-

<sup>157</sup> Admittedly, for proponents of decarceration, the SRCA requires taking some bitter with the sweet; its expansion of safety valve relief from mandatory minimums does not apply retroactively, SRCA § 102, and it creates new mandatory minimums for crimes involving domestic violence, *id.* § 106, and drug crimes involving fentanyl, *id.* § 109. But even the president of Families Against Mandatory Minimums acknowledged that this compromise comes with significant progress, saying that, although “[i]t’s a shame that some lawmakers have not broken their addiction to mandatory minimums despite mountains of evidence proving they aren’t necessary or proven to deter crime,” the bill nevertheless “is a substantial improvement over the status quo and will fix some of the worst injustices created by federal mandatory sentences.” *FAMM Praises Senate Sentencing Reform Compromise*, *supra* note 147 (referring to SRCA in its initial 2015 form).

<sup>158</sup> See Lars Trautman, *Incentivized Early Release the Right Path to Sentencing Reform Under Trump-Sessions*, THE HILL, (Apr. 6, 2018), <http://thehill.com/opinion/criminal-justice/381975-incentivized-early-release-the-right-path-to-sentencing-reform-under>, archived at <https://perma.cc/5V6T-K8PC> (“The heated ‘tough on crime’ rhetoric of the president and many in his administration has greatly complicated criminal justice reform efforts and left Congress scrambling to figure out how to make sentencing reform palatable to the White House.”).

<sup>159</sup> Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. (2017).

<sup>160</sup> *Grassley’s Impassioned Case for Passing Sentencing Reform*, IOWA PUBLIC TELEVISION (May 11, 2018) [hereinafter *Grassley’s Impassioned Case*], <http://www.iptv.org/iowapress/story/30619/grassleys-impassioned-case-passing-sentencing-reform>, archived at <https://perma.cc/4PAM-ZDFG>.

<sup>161</sup> Haile, *supra* note 22, at 635.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 636.



der.”<sup>165</sup> Historically, the slogan has accompanied punitive responses to crime and the adoption of harsh mandatory minimums; now it is being used to fan the flames of finality-based opposition to the SRCA. In a letter to Congress opposing the bill, then Attorney General Jeff Sessions argued that retroactive sentence reductions threatened public safety because they “adversely impact[ed] limited prosecutorial resources in combatting current problems such as rising violent crime, transnational criminal organizations like MS-13, and the opioid epidemic.”<sup>166</sup> Despite historical examples of easily administrable retroactive sentence reductions that posed minimal strain on prosecutorial resources,<sup>167</sup> including some that preceded no change,<sup>168</sup> or even a *decrease*, in criminal recidivism,<sup>169</sup> Sessions issued the familiar refrain of finality: “The Department’s prosecutors should be devoting their time to investigating and trying current cases instead of re-litigating cases that were lawfully closed years earlier.”<sup>170</sup>

This Note has argued that a lopsided emphasis on finality—like that articulated by Sessions—presents a false choice. Respect for the resource-conscious merits of finality can be accomplished without vilifying retroactivity. Senator Grassley—who was “incensed” by Sessions’ attack on retroactivity<sup>171</sup>—embraced such a balance between justice and finality with his response:

You can be tough on crime, but our bill is not soft on crime. It just admits that there’s a lot of unfairness and not compassion with mandatory minimums. . . . [A]ll we’re doing is giving the person convicted another bite at the apple . . . and maybe instead of a twenty-year sentence, he can get it reduced to ten, and bring some

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<sup>165</sup> *Remarks of Donald Trump*, 2016 Presidential Debate, YOUTUBE (Sept. 26, 2016), <https://www.youtube.com/watch?v=4eM8tTzM4q0>, archived at [<https://perma.cc/BK45-Z9P2>], (“We need law and order—if we don’t have it we’re not going to have a country.”). In the same answer, then-candidate Trump said, “Inner cities, African Americans, Hispanics are living in hell because it’s so dangerous, you walk down the street you get shot,” advocated using “stop and frisk” in Chicago, and warned of “gangs roaming the streets” with guns. *Id.*; see also Chris Hayes, *What “Law and Order” Means to Trump*, N.Y. TIMES, Mar. 17, 2018, <https://www.nytimes.com/2018/03/17/opinion/sunday/chris-hayes-trump-law-order.html>, archived at <https://perma.cc/SX8S-X9WD>.

<sup>166</sup> Letter from Jeff Sessions, United States Att’y Gen., to Charles Grassley, United States Sen. (Feb. 14, 2018), <https://www.politico.com/f/?id=00000161-966d-da6b-ade9-fefd38e20001>, archived at <https://perma.cc/749L-68HQ>.

<sup>167</sup> See *supra* notes 26–38 and accompanying text.

<sup>168</sup> See Haile, *supra* note 22, at 643 (“But in a 2014 recidivism study, the [U.S. Sentencing] Commission found no difference in recidivism rates for those individuals released under the reduced penalties compared to those individuals whose sentences were not reduced. In other words, shorter prison terms did not increase crime rates. . . . Such results are unsurprising as there is little evidence that harsh penalties, particularly for drug offenses, have a significant impact on crime reduction.”)

<sup>169</sup> See *supra* notes 135–136 and accompanying text.

<sup>170</sup> Sessions, *supra* note 166.

<sup>171</sup> Laura Jarrett, *Sessions and Grassley Square Off on Criminal Justice Reform*, CNN (Feb. 14, 2018), <https://www.cnn.com/2018/02/14/politics/jeff-sessions-grassley-criminal-justice-reform/index.html>, archived at <https://perma.cc/XP6R-BRF7>.

fairness to the system . . . [Y]ou can be tough on crime and still be fair and compassionate.<sup>172</sup>

This argument—that Congress can adopt moderate, easily administrable retroactive sentence reductions without undermining the effectiveness of the criminal justice system—balances the competing merits of justice and finality and allows for the line between these competing values to be ideally drawn.

Unfortunately, sentencing reform embracing this delicate balance has been pushed to the side by prison reform that overvalues sentence finality.<sup>173</sup> Prison reform proposals, including the FIRST STEP Act,<sup>174</sup> focus on treatment opportunities for incarcerated individuals and facilitation of more successful re-entry procedures upon release.<sup>175</sup> Though these reform measures may well improve prison conditions and the services available to incarcerated individuals, they do nothing to address harsh sentence lengths or unwarranted sentencing disparities. Instead, these reforms wholeheartedly embrace finality.<sup>176</sup> As articulated by President Trump, “We will continue to be very

<sup>172</sup> *Grassley’s Impassioned Case*, *supra* note 160.

<sup>173</sup> See Todd A. Cox, *Sentencing Reform is Moving in the Wrong Direction*, THE HILL (May 6, 2018), <http://thehill.com/opinion/criminal-justice/386443-sentencing-reform-is-moving-in-the-wrong-direction>, archived at <https://perma.cc/8GH2-KN82>. It can hardly be doubted that prison reform has pushed sentencing reform to the side; Senator John Cornyn (R-TX)—a co-sponsor of the 2015 but not the 2017 SRCA—co-sponsored the FIRST STEP Act and said, “I’m worried that if we just revisit the Sentencing Reform and Corrections Act, which failed during the Obama administration, given this change in the new administration and their views on the sentencing reform component of it, that we’re going to end up with nothing to show for our efforts.” Jarrett, *supra* note 171.

<sup>174</sup> Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (FIRST STEP) Act, H.R. 5682, 115th Cong. (2018); Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (FIRST STEP) Act, S. 2795, 115th Cong. (2018).

<sup>175</sup> H.R. 5682; S. 2795; see Press Release, *Bipartisan Prison Reform Bill Introduced in House and Senate* (May 7, 2018), <https://dougcollins.house.gov/media-center/press-releases/bipartisan-prison-reform-bill-introduced-house-and-senate>, archived at <https://perma.cc/B9EY-SNSU>.

<sup>176</sup> As this Note goes to print, Senator Grassley (R-IA) has introduced a revised version of the FIRST STEP Act, S. 3649, 115th Cong. (2018). Though the text of the bill was not yet available at the time of publication, the most significant revisions include retroactive application of the FSA and expanded availability of the “safety valve” from mandatory minimums. See S. COMM. ON THE JUDICIARY, 115TH CONG. THE REVISED FIRST STEP ACT OF 2018 (S. 3649), <https://www.judiciary.senate.gov/imo/media/doc/S.%203649%20-%20First%20Step%20Act%20Summary.pdf>, archived at <https://perma.cc/MB3N-3FT7>. President Trump has indicated a willingness to sign such a bill. See Kevin Breuninger, *Trump Pushes Mitch McConnell and Chuck Schumer to Pass “Badly Needed” Bipartisan Criminal Justice Reform Bill That’s Stalled in the Senate*, CNBC (Nov. 23, 2018), <https://www.cnn.com/2018/11/23/trump-pushes-senate-to-pass-stalled-criminal-justice-reform-bill.html>, archived at <https://perma.cc/63WD-M9WP>. But Senate Majority Leader Mitch McConnell has indicated he is either unwilling or unable to bring the bill to the Senate floor before the 116th Congress takes over in January. See Nicholas Fandos, *McConnell Feels the Heat from the Right to Bring Criminal Justice Bill to a Vote*, N.Y. TIMES, Nov. 20, 2018, <https://www.nytimes.com/2018/11/20/us/politics/grassley-mcconnell-criminal-justice-bill.html>, archived at <https://perma.cc/DBW2-K3A8>. And the bill has found only lukewarm support from its proponents, see, e.g., Sherrilyn Ifill, *NAACP Legal Defense Fund Statement on First Step Act*, NAACP LEGAL DEF. FUND

tough on crime, but we will provide a ladder of opportunity for the future.”<sup>177</sup> Said another way, the Trump administration will only support reform efforts that insist upon the finality of previously imposed, severe, and sometimes disparate sentences.

This debate over sentencing and prison reform exemplifies the tension between justice and finality in sentencing. But choosing between finality and justice in sentencing is a mistake. Reform efforts that demand perfect justice—at least insofar as justice means eliminating all sentencing disparities, however slight the disparity or factually complex the retroactivity provision—will face significant obstacles to practical implementation. On the other hand, reform efforts that place a lopsided emphasis on finality will unnecessarily lock in severe, disparate sentences and hamper our ability to meaningfully address mass incarceration. Instead of debating whether to embrace justice or finality, we ought to strike a balance, maximizing just modifications to disparate sentences while respecting the pragmatic resource concerns that counsel in favor of finality. The SRCA is but one example of how the line between those values might be redrawn. To recalibrate our sentencing values, to address the crisis of mass incarceration, and to correct the unjust disparities left in the wake of *Dorsey* and the Fair Sentencing Act—it is critically important that we take that first step.

#### CONCLUSION

When policymakers recognized the injustice of the disparity between sentences for crack and powder cocaine, they passed the Fair Sentencing Act to correct that injustice.<sup>178</sup> But the ongoing failure to make that law retroactive created a new injustice with a “new set of disparities.”<sup>179</sup> Congress can eliminate unjust disparities like these without straining the limited judicial and prosecutorial resources that animate arguments in favor of finality. This is particularly the case when retroactive sentence reductions call for few backward-looking factual determinations, when courts have flexibility to establish predictable procedures for implementation, and when reductions are available to an easily identifiable group of incarcerated people. Adopting sentence reform that includes such retroactivity provisions will allow Congress to reduce the prison population and start to reverse the racially dispa-

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(Nov. 16, 2018), <https://www.naacpldf.org/press-release/naacp-legal-defense-fund-statement-first-step-act/>, archived at <https://perma.cc/6MM4-M2YS> (praising retroactive application of FSA before criticizing revised bill for use of risk assessments and refusal to apply some provisions retroactively). Only time will tell whether the FIRST STEP Act can in fact become the sort of first step this Note calls for.

<sup>177</sup> Gregory Korte et al., *Trump Tackles Prison Reform: “We Can Break This Vicious Cycle,”* USA TODAY, Jan. 11, 2018, <https://www.usatoday.com/story/news/politics/2018/01/11/trump-prison-reform-roundtable-jared-kushner-initiative/1023747001/>, archived at <https://perma.cc/YR4W-PKR8>.

<sup>178</sup> See *supra* notes 3–5 and accompanying text.

<sup>179</sup> *Dorsey v. United States*, 567 U.S. 260, 280 (2012).

rate impact of harsh mandatory minimum sentences. Congress need not choose between justice *or* finality in sentencing. Instead, it should redraw the line between these two competing values and restore an appropriate balance between justice *and* finality in the federal sentencing regime.