BEYOND THE 100:1 RATIO: TOWARDS A RATIONAL COCAINE SENTENCING POLICY

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"It may profit us very little to win the war on drugs if in the process we lose our soul."[1]

In the Violent Crime Control and Law Enforcement Act of 1994,[2] Congress directed the United States Sentencing Commission ("Sentencing Commission" or "Commission") to study federal sentencing policy as it relates to possession and distribution of all forms of cocaine.[3] Specifically, Congress asked the Commission to examine "the current federal structure of differing penalties for powder cocaine and crack cocaine offenses and to provide recommendations for retention or modification of these differences."[4] This was, of course, a directive to re-examine the controversial 100:1 quantity ratio, contained in Section 2D1.1(c) of the Federal Sentencing Guidelines, which

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1. These were the comments of United States District Court Judge William W. Schwarzer as he sentenced a 48-year-old longshoreman with no prior criminal convictions to ten years in prison pursuant to a federal mandatory minimum sentencing statute. The man had given an acquaintance a ride to a fast food restaurant where the acquaintance made a drug deal with a federal undercover agent. The drug-selling acquaintance escaped arrest, but the longshoreman, who testified that he knew nothing about the drug cargo, was convicted of conspiracy to traffic in narcotics. Judge Schwarzer, who was reduced to tears as he pronounced the sentence, summed up his feelings by saying that "in this case the law does anything but serve justice." Katharine Bishop, *Mandatory Sentences in Drug Cases: Is the Law Defeating Its Purpose?*, N.Y. TIMES, June 8, 1990, at B16.

2. Pub. L. No. 103–322, 109 Stat. 1796 (1994).

3. The Act provides that "the United States Sentencing Commission shall submit a report to Congress on issues relating to sentences applicable to offenses involving the possession or distribution of all forms of cocaine. The report shall address the differences in penalty levels that apply to different forms of cocaine and include any recommendations that the Commission may have for retention or modification of such differences in penalty levels." *Id.* § 280006.

4. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY i (1995).

provides the same punishment for someone who is convicted of possessing or distributing one gram of crack cocaine as for someone who is convicted of possessing or distributing one hundred grams of powder cocaine.[5]

On February 28, 1995, the Commission delivered to Congress its report, *Cocaine and Federal Sentencing Policy*, in which it "strongly recommend[ed] against a 100-to-1 quantity ratio,"[6] even though it concluded that crack "may be more harmful than powder cocaine."[7] In place of the 100:1 ratio, the Commission proposed an unspecified lesser ratio as well as the addition of several offense- and offender-specific guideline enhancements that address "as many of the discrete, substantial harms associated with crack offenses as reasonably can be handled in a guideline system."[8] The Commission justified its offender-specific approach with the claim that it "is distinctly fairer and more consistent with the more uniform but appropriately individualized sentencing approach Congress envisioned under the Sentencing Reform Act."[9]

On May 1, 1995, the Commission transmitted to the Senate Judiciary Committee "legislation to revise the penalty statutes for offenses involving crack cocaine."[10] In addition, the Commission separately submitted to Congress amendments to the sentencing guidelines, including "Amendment Five" which abolished the 100:1 ratio.[11] In fashioning the changes to the guidelines, the Commission set out to identify characteristics typically associated with crack, and adopted by a 6-1 vote (Commissioner Mazzone dissenting), new enhancements for a defendant's use of a firearm and use of a juvenile in the offense, as well as language allowing an upward departure if the defendant caused bodily injury in committing the offense.[12]

Although the Commission unanimously agreed that the 100:1 ratio had to be changed, there was disagreement as to what the new ratio should be. A four Commissioner majority, composed of Chairman Richard Conaboy, Commissioners Wayne Budd and Michael Gelacak, and Judge David Mazzone, believed that the base sentence for crack and powder should be the same because the two forms of cocaine are not sufficiently different to justify different penalties. The majority also felt that certain harms associated with crack were adequately addressed by existing guideline provisions. For instance,

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5. *See* UNITED STATES SENTENCING COMM'N GUIDELINES MANUAL § 2D1.1(c) (1994) [hereinafter GUIDELINES MANUAL]. The 100:1 ratio is also found in the governing criminal statute. In the Omnibus Crime Prevention Act of 1986, Congress established a five-year mandatory minimum penalty for trafficking in five grams of crack cocaine or 500 grams of powder cocaine, and a ten-year mandatory minimum penalty for trafficking in fifty grams of crack cocaine or five kilograms of powder cocaine. 21 U.S.C. § 841(b)(1)(B), (b)(1)(A) (1994).

6. U.S. SENTENCING COMM'N, *supra* note 4, at 198.

7. *Id.* at 196.

8. *Id.* at 198. The Sentencing Commission specifically mentioned the problems of offenders who use juveniles to distribute crack, and offenders who expose infants to cocaine. The Commission also proposed adding enhancements for type of weapon, discharge of weapon, injury to victims, injury to bystanders, and operating a crack house or shooting gallery. *Id.* at 199.

9. *Id.*

10. *U.S. Sentencing Commission: Materials Concerning Sentencing for Crack Cocaine Offenses*, 57 Crim. L. Rep. (BNA) 2127, 2127 (May 31, 1995).

11. Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,075–25,076 (1995). In all, the Commission submitted twenty-seven amendments to Congress for consideration. *Id.* at 25,074–25,090.

12. *U.S. Sentencing Commission*, *supra* note 10, at 2131, 2133.

Chairman Conaboy observed that crack offenders generally have more serious criminal histories and thus pose more of a threat to society. The majority felt, however, that the current guidelines sufficiently provided for enhanced penalties for offenders with extensive criminal histories.[13] Moreover, the majority was influenced by their belief that "there really is not much of a distinction, at least pharmacologically, between powder and crack cocaine...."[14] And they were troubled that one of the unintended effects of the 100:1 ratio was that high-level powder distributors were being sentenced less severely than some of the crack retailers they supplied. At bottom, however, the majority felt that "the issue was one of basic fairness and a deep conviction that Government must treat each citizen fairly."[15] The majority's view was that since the 100:1 ratio impacts almost entirely on minorities, it must be reduced to 1:1.[16]

A three-Commissioner minority comprised of Judge Deanell Tacha, Judge Julie Carnes, and Commissioner Michael Goldsmith, dissented from Amendment Five and the related legislative recommendation. In a statement by Judge Tacha, the dissenters expressed dismay that the question had been "publicly framed by some as a racial issue."[17] Judge Tacha counterframed the problem as "trying to craft a race-neutral sentencing policy that appropriately accounts for the societal harms associated with a particular crime."[18] She identified the "market, the dosages, the prices, and the means of distribution" as elements of crack's harm that distinguish it from powder. Given the differences and crack's enhanced harmfulness, the minority felt that the proposed 1:1 ratio would result in penalties that are often too low.

The minority argued that the guideline enhancements for the use of a firearm and a defendant's use of a juvenile in the offense do not fully account for crack's increased harmfulness. Judge Tacha further argued that crack's greater addictiveness, ease of manufacture and lower cost-per-dose cannot be captured by offender-specific enhancements.[19] In addition, she noted that its ease of manufacture and low cost-per-dose make crack more marketable than powder to a greater segment of the population, and that these same qualities make it appealing to the most vulnerable members of society—the young and the poor.[20] She observed that the proposed enhancements did not account for these harms.

Judge Tacha further argued that a 1:1 ratio would provide insufficient punishment for crack distributors. She provided the following illustration: if the proposed 1:1 ratio had been applied to federal crack defendants in 1994, "over 73% would have been eligible for quantity-based sentences of less than five years incarceration, and only 10% would have been subject to sentences of

13. *Id.* at 2129.
14. *Id.* at 2130.
15. *Id.*
16. *Id.* at 2131.
17. *Id.*
18. *Id.*
19. Judge Tacha found that, even though injecting powder is just as addictive as smoking crack, it is not proper to compare the two methods of administration because three times as many people smoke crack as inject powder, making it much more of a threat to society. *Id.*
20. In further support of her point, Judge Tacha argued that crack is the cause of a plethora of social ills, including increased criminal activity, more emergency room visits, parental neglect, high-risk sexual behavior, and domestic abuse. *Id.* at 2131–32.

ten or more years."[21] In comparison, less than 19% of federal powder cocaine defendants sentenced in 1994 were eligible for quantity-based sentences of less than five years imprisonment, and over 45% were subject to sentences of ten or more years.[22] Judge Tacha concluded from these statistics that crack traffickers who occupy roles similar to their equally culpable powder cocaine counterparts distribute smaller amounts of crack. She speculated that under a 1:1 penalty scheme, crack traffickers would be eligible for lesser sentences than similarly situated powder cocaine defendants.

The fault that Judge Tacha found in the majority's approach was their decision to focus only on the pharmacological similarity between crack and powder. She argued that more attention should be paid to the societal harms caused by crack. While she found it regrettable that a "sentencing policy based on thoughtful, appropriate, and race-neutral factors may result in differing impacts on defendants according to race, socioeconomic group, and geographic area," she concluded that these disparities "cannot divert attention from our objective judgments about the underlying criminal activity and the attendant societal interests."[23] Thus, Judge Tacha concluded that a differential quantity ratio was warranted and necessary.

Commissioner Michael Goldsmith, Professor of Law at Brigham Young University School of Law, also writing in dissent, expressed a slightly different view as to why the proposed 1:1 ratio and the "new enhancements do not account for all the systemic harms uniquely associated with crack cocaine."[24] In addition to the points made by Judge Tacha, he observed that crack poses special risks to minors and pregnant women, and that these risks exist even if the initial sale is to an adult male. He explained that, in crack culture, it is foreseeable that the crack will eventually reach a minor or pregnant woman, even if it was not originally sold to them.

To account for these differences between crack and powder while at the same time avoiding unduly harsh punishments for low-level dealers, Professor Goldsmith proposed a tiered system. For low-level street dealers, a 1:1 ratio would be appropriate. However, for mid-level crack dealers, a 5:1 ratio would be more appropriate because, due to the organizational and market differences in the two drugs, someone who sells one hundred grams of crack is equivalent to someone who sells five hundred grams of powder. He also noted that a 5:1 ratio is consistent with the way that the guidelines distinguish between heroin and powder cocaine.[25] Professor Goldsmith conceded that a 5:1 ratio may ultimately not be the proper ratio, and he suggested the need for further research, but he argued that a ratio higher than 1:1 is necessary to capture crack's heightened harmfulness.[26] He agreed with the majority that the 100:1

21. Under the 100:1 ratio, only 15% of federal crack defendants sentenced in 1994 were eligible for guideline sentences of less than five years imprisonment, while 59% were eligible for sentences of ten or more years. *Id.* at 2132.

22. *Id.*

23. *Id.*

24. *Id.* at 2133.

25. Ordinarily, five units of powder cocaine are punished as harshly as one unit of heroin. *See* GUIDELINES MANUAL, *supra* note 5, § 2D1.1(c).

26. Professor Goldsmith also conceded that reasonable arguments could be made for at least a ten-to-one ratio. He noted that the Drug Enforcement Administration assigns the same priority level to crack dealers who distribute 50 grams and powder dealers who distribute 1000 grams. He also cited Commission data indicating that mid-level powder dealers deal in quantities

ratio was too extreme, but felt that to change to a 1:1 ratio would be to supplant one extreme with another.

In response to the criticism that the 100:1 ratio has a disproportionate impact on African-Americans, Professor Goldsmith made two points. First, he argued that the reality of the crack trade is that it is dominated by African-American dealers who devastate many inner-city, economically disadvantaged African-American communities throughout the country. Second, he observed that the 100:1 ratio is applied equally to all persons who violate it.[27] He analogized to the federal RICO statute which was first applied predominantly to organized crime groups dominated by Sicilian-Americans. Professor Goldsmith argued that, in both these circumstances, the disproportionate impact was acceptable because there was no discriminatory purpose, and the punishment was directed at an identifiable harm. He also noted that the federal RICO statute has since been applied to other offenders across ethnic and racial lines.[28]

Ultimately, Congress agreed with Judge Tacha and Professor Goldsmith when it passed legislation rejecting Amendment Five before it could take effect on November 1, 1995.[29] In the legislation, Congress directed the Commission to make further recommendations regarding the powder/crack statutes and guidelines. The recommendations are to reflect the following considerations, among others: the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine; high-level wholesale cocaine traffickers should generally receive longer sentences than low-level retail crack traffickers; and if the government can prove that a particular powder cocaine trafficker knew that the powder would be converted to crack, he or she should be sentenced as though he or she had trafficked in crack.[30]

In this article, I will examine the proposals made by the majority, Judge Tacha, and Professor Goldsmith in an attempt to determine which, if any represents the correct result. In Part I, I will briefly summarize the history of cocaine use in the United States. In Part II, I will examine the legislative response that it has inspired. The primary focus of Part II will be on the Anti-Drug Abuse Act of 1986 which created the 100:1 ratio. In Part III, I will discuss the forms, methods of administration, and pharmacology of cocaine, especially what characteristics, if any, make crack more harmful to society than other forms of cocaine. In Part IV, I will discuss the harmful impact that crack has had on our society. In Part V, I will discuss the racially disparate sentencing

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ranging between 2000 and 3500 grams. *See U.S. Sentencing Commission, supra* note 10, at 2133.

27. This point is debatable since there is evidence that some federal law enforcement officials apply the 100:1 ratio more often against African-Americans than against whites. *See infra* Section V.A.

28. *U.S. Sentencing Commission, supra* note 10, at 2133–34.

29. The Senate voted to reject Amendment Five on September 29, 1995, followed by the House on October 18, 1995. *See* Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. No. 104–38, 109 Stat. 334 (1995).

30. *Reports and Proposals: Sentencing Commission Again Seeks Input on Sentences for Crack, Money Laundering*, 58 Crim. L. Rep. (BNA) 1319, 1320 (Jan. 10, 1996). The legislation also recommends enhanced sentences for cocaine traffickers who use dangerous weapons, involve juveniles or pregnant women in the offense, sell to a vulnerable victim, or sell within 500 feet of a school. *Id.* At the time this article was published, the Sentencing Commission had not yet sent any further recommendations to Congress.

impact that the 100:1 ratio has had on African-Americans. In Part VI, I will discuss the Commission's proposed amendments to Section 2D1.1. In Part VII, the last section, I will argue that the combination of a graduated ratio (a 1:1 ratio for low-level street dealers, and an increased 20:1 ratio for mid- and high-level dealers) and offender-specific enhancements that punish only those people who harm others with their crack dealing or use is a better solution to the problem than the one proposed by the Sentencing Commission.

I. A BRIEF HISTORY OF COCAINE

Cocaine is a natural substance that is derived from the leaves of the erythroxylon plants indigenous to the Andes Mountains of South America. Although there are seventeen species of erythroxylon plants that produce cocaine, only two—erythroxylon coco and erythroxylon novogranatese—yield sufficient levels of cocaine alkaloid to justify mass cultivation for processing into cocaine.[31] These two species, cultivated primarily in Peru, Bolivia, and Columbia, supply the world's cocaine.[32]

Coca leaves have been used by the native people of South America for more than four thousand years. Archeological evidence of coca chewing includes small ceramic containers that were used for lime in the Valdivia culture of southwestern Ecuador and that date back to about 2100 B.C. Lime is one of several alkalis that South American Indians use with the leaves in order to make chewing them more enjoyable. Alkalinity facilitates absorption of the cocaine alkaloid.[33] A ceramic figurine dated between 1600 and 1500 B.C. from this same culture clearly depicts the bulging cheeks of the coca chewer. It is the earliest surviving example of a long tradition of ceramic figures representing *coqueros* (coca users).[34]

The word "coca" derives from the Aymara[35] word that means simply "tree." Prior to the Spanish Conquest, South American Indians used various names for the several varieties of cultivated erythroxylum. The Spanish took the name "coca" from the southern reaches of the Incan Empire and brought it into use throughout their domain. The Incas regard coca as a gift from the gods intended to improve human life. Coca leaves are sacred, and the Incas have

31. The cocaine alkaloid is extracted from the coca leaves as follows. The leaves are mixed with an alkaline material (e.g. sodium bicarbonate), an organic solvent (e.g., kerosene), and water. The mixture is agitated, causing the cocaine alkaloid and organic solvent to naturally separate from the water and the leaves. The water and leaves are then removed from the mixture and discarded. Using an acid, the cocaine alkaloid and the kerosene are separated and the kerosene is drawn off the mixture. Additional sodium bicarbonate is added and a solid substance separates from the solution. This solid substance, the coca paste, is removed and allowed to dry. Coca paste is then dissolved in hydrochloric acid and water and mixed with potassium salt. The potassium salt causes undesirable substances to separate from the mixture. These substances are discarded and ammonia is added to the remaining solution, causing a solid substance—the powder cocaine—to separate from the solution. The powder cocaine is then removed and allowed to dry. *See* U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMIN., COCAINE CULTIVATION AND COCAINE PROCESSING: AN OVERVIEW (1991).

32. *See* John B. Murray, *An Overview of Cocaine Use and Abuse*, 59 PSYCHOL. REP. 243–64 (1986).

33. *See* Andrew Weil, *Letter from the Andes: The New Politics of Coca*, NEW YORKER, May 15, 1995, at 70.

34. *Id.* at 71–72.

35. The Aymara are a group of South American Indians in the Andes Mountains.

personified the spirit of the plant as "Mama Coca," a divine and beneficent aspect of nature.[36]

Millions of Indians in the Andes of Peru and Bolivia still chew coca every day. They equate dedication to coca chewing to spirituality and higher pursuits. They also employ it in their folk medicine as the *gran remedio* for ailments as diverse as toothache and altitude sickness. Quids of partially chewed leaves are used as local anesthetics for trephining operations and to relieve post-trephining distress.[37] The juice of chewed leaves is used to treat eye and throat irritations.[38] The Indians also incorporate coca leaves into their cultural, magical and spiritual practices.[39]

The potency of the coca leaves that Peruvian and Bolivian Indians chew is only one percent of the potency of the cocaine drug.[40] Studies on contemporary coca chewers suggest that this method of administration results in an average daily ingestion of anywhere from two hundred to five hundred milligrams of cocaine. The Indians place the coca leaves in their mouths and chew them until they form a quid. A quid is built up in the mouth for fifteen to twenty minutes by adding more and more dry leaves until a walnut-sized mass is formed. The quid is held in the cheek and sucked dry of the juice and flavor for about an hour and then ejected. An average of thirty to fifty dry leaves are chewed each day.[41] The leaves provide a long-lasting, low-grade feeling of euphoria that reduces appetite, increases physical stamina, and counters symptoms associated with "mountain sickness" and oxygen deprivation.[42] Indians use and exchange coca at all major functions: births, weddings, funerals, dedications of new dwellings, the making of contracts, healing ceremonies and magical rites.[43]

"Coca was introduced to Europe in reports by 16th Century explorers, 17th Century chroniclers, 18th Century naturalists and 19th Century botanists."[44] The first documented account of coca leaf use by South American Indians was made by Amerigo Vespucci during his second voyage to America in 1499. He wrote the following passage in his journal: "We found there the most bestial and ugly people we had ever seen: very ugly of face and expression, and all of them had their cheeks full of a green herb that they chewed constantly like beasts, so that they could barely speak."[45]

In 1859, the Italian neurologist, Paolo Mantegazza, wrote an essay on the hygienic and medicinal virtues of coca leaves. Mantegazza was enthusiastic about his own experiences with coca, writing that "I would prefer a life of ten

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36. Weil, *supra* note 33, at 70–72.
37. Trephination is a procedure in which the skull is perforated with a surgical instrument.
38. *See* Ronald K. Siegel, *New Patterns of Cocaine Use: Changing Doses and Routes, in* COCAINE USE IN AMERICA: EPIDEMIOLOGIC AND CLINICAL PERSPECTIVES 204, 204–05 (Nicholas J. Kozel & Edgar H. Adams eds., 1985).
39. Weil, *supra* note 33, at 70.
40. Murray, *supra* note 32, at 244.
41. *Id.*
42. *See* DAVID F. ALLEN & JAMES F. JEKEL, CRACK: THE BROKEN PROMISE 2–3 (1991). These claimed effects of coca leaves have never been tested under experimental conditions. *See* Murray, *supra* note 32, at 244.
43. Weil, *supra* note 33, at 72.
44. Siegel, *supra* note 38, at 205.
45. Weil, *supra* note 33, at 70.

years with coca to one of a hundred thousand years without it."[46] Within a year of the publication of Mantegazza's article, a German chemist isolated cocaine from coca, and identified it as the "active principle" of erythroxylum. "As a result, much scientific interest shifted from the plant to the pure alkaloid."[47]

One of the first European medical uses of cocaine was as an anesthetic in eye operations.[48] During the 19th century, cocaine was promoted as a remedy for such respiratory ailments as asthma, whooping cough, and tuberculosis. Additionally, it was publicized as an aphrodisiac[49] and an antidote for morphine addiction and alcoholism.[50] Use initially followed the same dose patterns observed in South America.[51]

By 1890, cocaine had become the primary ingredient in many elixirs, "restoratives," and coca wines that claimed to provide relief from depression and a multitude of other ailments.[52] The coca wines contained approximately thirty-five to seventy milligrams of cocaine per dosage unit.[53] The strongest contained approximately 245 to 560 milligrams of cocaine. Thus, the recommended doses of even the strongest preparation would have resulted in daily ingestion of approximately the same amount as is ingested by the coca leaf chewers of the Andes Mountains. And use of the average preparation would have resulted in the ingestion of much less cocaine than is ingested by coca leaf chewers. For instance, most coca wines available in the 1890s contained approximately ten milligrams of cocaine per fluid ounce and recommended doses were from one-half a wine glass (two ounces or twenty milligrams) to a full wine glass (four ounces or forty milligrams) per administration.[54]

At the same time that these new coca products were introduced on the market, advertisements promoted their use for a wide variety of nonmedical purposes. The following advertisement illustrates this change in usage:

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46. *Id.* at 74.
47. *Id.*
48. Murray, *supra* note 32, at 245–46. In addition to anesthetizing the eye and preventing muscle reflex, cocaine constricts the arterioles which, in turn, reduces the amount of bleeding in an otherwise blood-rich area. Cocaine also widens the air sacs in the lungs, constricts the capillaries in the nasal passages, and makes breathing significantly easier. *See* Peter I. Jatlow, *Drugs of Abuse Profile: Cocaine*, 33 CLINICAL CHEMISTRY 66B (1987).
49. Murray, *supra* note 32, at 251. Among those who publicized cocaine as an aphrodisiac was Sigmund Freud. Inspired by Mantegazza's essay, Freud began to experiment with cocaine himself. He never worked with coca, however. Instead, he took pure cocaine hydrochloride by mouth, in doses of at least a hundred milligrams, and found that it produced an exhilaration and euphoria that he liked very much. In 1884, he wrote to his fiancee, Martha Bernays, that he was interested in trying cocaine "in cases of cardiac ailments and nervous exhaustion, especially in the terrible condition that occurs in withdrawal from morphine." In a February, 1886 letter to Bernays, possibly written while under the influence of cocaine, Freud wrote that cocaine relieved his neurasthenia and gave him confidence in social situations. He also said that it made him feel he had the strength to sacrifice his life, as his ancestors had done in defending the Temple. In all, he wrote three essays on the subject. It is generally agreed that they are not among his best writings, and, at the end of his career, he ordered that they be excluded from his collected works. *See* Weil, *supra* note 33, at 74–75.
50. Weil, *supra* note 33, at 74.
51. Siegel, *supra* note 38, at 205.
52. Cocaine was also used as an ingredient in cigars, cigarettes and chewing gum.
53. "Coca-Cola" was first known as "French Wine Coca," and contained less than one-half ounce of coca leaves per gallon. It was promoted as "Brain Tonic" for exhaustion, went through several changes in its formula, and, from the 1890s to 1903 contained approximately sixty milligrams of cocaine per eight ounce serving. *See* Siegel, *supra* note 38, at 206.
54. *Id.* at 205.

> Public speakers, Singers, and Actors have found wine of coca to be a valuable tonic to the vocal cords [sic]. Athletes, Pedestrians, and Base Ball Players have found by practical experience that a steady course of coca taken both before and after any trial of strength or endurance will impart energy to every movement, and prevent fatigue. Elderly people have found it a reliable aphrodisiac superior to any other drug. (Metcalf's Wine of Coca).[55]

Cocaine was also widely available at this time and the recommended doses for cocaine products would have resulted in the daily ingestion of as much as 810 to 1620 milligrams of cocaine, or approximately three times the intake of the coca chewer. "Indeed, whereas coca products and dosages were treated as roughly equivalent to the chewing of coca leaves, cocaine was advertised as 200 times stronger than coca, one grain of cocaine being the equivalent of 200 grains of coca leaves."[56]

Little adjustment for this dosage difference was made. In fact, the convenience of cocaine prompted even the most conservative of physicians to apply its use to virtually all medical and nonmedical complaints.[57] Cocaine was even promoted as a remedy for children's diseases. The increased use of cocaine was further advanced by the increasing popularity of the highly efficient intranasal and injection methods of administration.[58] Inhalant and intranasal doses of sixty-five milligrams were commonly used; injection doses were even stronger, ranging as high as 1200 milligrams per dose. Some asthma and hay fever snuffs were pure cocaine and users were instructed to take them as needed. By 1894, cocaine was being used topically on the penis as well as rectally and vaginally. It was believed to cause sexual arousal and to improve sexual performance.[59]

The widespread availability of cocaine marked the decline of coca in medicine. But the parallel increases in cocaine dosages, methods of administration, and medical and nonmedical abuses just as quickly arrested cocaine's development as a therapeutic agent. Daily dosages of cocaine "addicts" sometimes reached over twelve grams, doses almost impossible to achieve with coca products and ones that would not be seen again until the discovery of smoking cocaine freebase more than seventy-five years later.[60] The first

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55. *Id.* at 206.

56. *Id.* Cocaine is actually only one hundred times as potent as coca leaves. *See* Murray, *supra* note 32, at 244.

57. In 1880, Dr. W. H. Bentley, in Detroit's *Therapeutic Gazette,* hailed coca as "the desideratum in health and disease." The *Gazette*'s editors, quoting other medical journals, enthusiastically endorsed this view and added "one feels like trying coca, with or without the opium-habit. A harmless remedy for the blues is imperial." *See* Gopal Das, *Cocaine Abuse in North America: A Milestone in History,* 33 J. CLINICAL PHARMACOLOGY 296, 297 (1993). William Hammond, one of America's most prominent neurologists, extolled cocaine in print and lectures. By 1887, Hammond was assuring audiences that cocaine "was no more habit-forming than coffee or tea." He also told them of the "cocaine wine" he had perfected with the help of a New York druggist: two grams of cocaine to a pint of wine. Hammond claimed that this tonic was far more effective than the popular French wine coca, probably a reference to Vin Mariani, which he complained had only half a grain of cocaine to the pint. *See* also David F. Musto, *Opium, Cocaine and Marijuana in American History,* SCI. AM., July 1991, at 44.

58. Parke–Davis and at least one other company offered consumers a handy cocaine kit. The Parke–Davis kit contained a hypodermic syringe. The company boasted that cocaine could "supply the place of food, make the coward brave, the silent eloquent and...render the sufferer insensitive to pain." Musto, *supra* note 57, at 44.

59. Siegel, *supra* note 38, at 207; Murray, *supra* note 32, at 251.

60. Siegel, *supra* note 38, at 207.

documented cocaine addict was Chicago socialite Annie C. Meyers. She became so addicted to the drug that, on one occasion, she pried loose one of her gold teeth with a pair of scissors, and, with blood streaming down her face and drenching her clothes, pawned the tooth for eighty cents in order to buy her daily dose of "Birney's Catarrh Remedy," an over-the-counter cocaine snuff. She was later treated and cured of the addiction and wrote an account of it which was published in 1902.[61]

In 1891, 200 cases of death from cocaine intoxication were reported. According to one estimate, the United States population in 1906—only half as large as today's population—consumed as much cocaine as it did in 1976.[62] As the harm caused by cocaine use became more widely known, however, the public's perception of the drug changed. In 1910, President William Howard Taft presented Congress with a report that found cocaine to be more dangerous than any other "habit-forming" drug used in the United States. Cocaine use also became associated with crime. By 1914, all forty-eight states, in an effort to control crime, had enacted legislation regulating the use and distribution of cocaine.[63] That same year, Congress passed the Harrison Narcotic Drug Act[64]

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61. *Id.* at 204. Sir Arthur Conan Doyle's second Sherlock Holmes novel, *The Sign of Four*, which was first published in 1890, contains a cautionary fictional description of cocaine abuse. He used Holmes's sidekick, Dr. Watson, to describe the detective's addiction as follows:

> Sherlock Holmes took his bottle from the corner of the mantlepiece, and his hypodermic syringe from its neat morocco case. With his long, white, nervous fingers he adjusted the delicate needle and rolled back his left shirtcuff. For some little time his eyes rested thoughtfully upon the sinewy forearm and wrist, all dotted and scarred with innumerable puncture-marks. Finally, he thrust the sharp point home, pressed down the tiny piston, and sank back into the velvet-lined armchair with a long sigh of satisfaction.
>
> Three times a day for many months I had witnessed this performance, but custom had not reconciled my mind to it. On the contrary, from day to day I had become more irritable at the sight, and my conscience swelled nightly within me at the thought that I had lacked the courage to protest. Again and again I had registered a vow that I should deliver my soul upon the subject; but there was that in the cool, nonchalant air of my companion which made him the last man with whom one would care to take anything approaching a liberty. His great powers, his masterly manner, and the experience which I had of his many extraordinary qualities, all made me diffident and backward in crossing him.
>
> Yet upon that afternoon, whether it was the Beaune which I had taken with my lunch or the additional exasperation produced by the extreme deliberation of his manner, I suddenly felt that I could hold out no longer.
>
> "Which is it today," I asked, "morphine or cocaine?"
>
> He raised his eyes languidly from the old black-letter volume which he had opened.
>
> "It is cocaine," he said, "a seven-percent solution. Would you care to try it?"

SIR ARTHUR CONAN DOYLE, THE SIGN OF FOUR, *in* SIR ARTHUR CONAN DOYLE, SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES: VOLUME I 107 (Bantam Classics ed. 1986). Watson persistently attempts to dissuade Holmes from using cocaine, and is ultimately successful, although not until much later in *The Adventure of the Missing Three-Quarter*, which is also contained in SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES: VOLUME I, but was first published in SIR ARTHUR CONAN DOYLE, THE RETURN OF SHERLOCK HOLMES, in 1903.

62. ALLEN & JEKEL, *supra* note 42, at 4.

63. Das, *supra* note 57, at 298.

64. 38 Stat. 785 (1923).

("Harrison Act" or "Act"), banning non-medical use of the drug and requiring strict accounting of medical dispensing to patients.[65]

Cocaine became scarce following the passage of the Harrison Act, and by the 1930s, it was no longer considered to be a law enforcement problem.[66] There are several plausible reasons for the decline of interest. First, the Harrison Act put restrictions on the importation, manufacture, and distribution of cocaine. Second, substitutes were found for many of the surgical and prescription uses of cocaine. Third, amphetamines appeared on the market in 1932 and provided a stimulant that was cheaper, more accessible, and longer-lasting, if less attractive to connoisseurs. Fourth, the Depression made luxuries like cocaine less available.[67]

Between 1930 and the late 1960s, recreational use of cocaine in the United States was largely out of sight and out of mind. To the extent that it was available at all, cocaine became a plaything of the more adventurous and less respectable among the wealthy. It was a familiar part of the cafe-society world that Cole Porter described in his songs. He is said to have written a version of *I Get a Kick Out of You*, his famous song of put-on weary decadence (for a musical comedy set in the 1920s), in which he included the line, "[S]ome get their kicks from cocaine." In Hollywood and around Broadway, cocaine was available if not abundant. Charlie Chaplin's *Modern Times*, released in 1936, includes a scene in a jail cell where the tramp sniffs something called "nose powder" and becomes a comic superman.[68] During the 1960s, cocaine re-emerged as a drug of abuse. In 1970, Congress classified cocaine as a Schedule II controlled substance,[69] meaning that it had a legitimate use—as a local anesthetic—but, that it also had a high potential for abuse and dependency.

Crack cocaine was first manufactured in the United States in the early 1970s by underground alchemists in the San Francisco Bay area. For most of the decade, its use was confined to a small number of sophisticated users in that area. By the end of the decade, however, crack had spread to Los Angeles. In 1978, drug researchers observed residents of the Nickerson Gardens public housing project in South Central Los Angeles smoking crack.[70] In 1979, Dr. Robert Byck of the Yale University School of Medicine, warned a congressional committee about the potential for a cocaine smoking epidemic in the United States. Dr. Byck's warning proved prescient: by the early 1980s, crack use had exploded, spreading to major cities throughout the country.[71] Drug experts agree that the crack epidemic that hit the United States during the

65. DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 54–68 (1973). An interesting historical antecedent to the disparate impact of the 100:1 ratio is the fear that cocaine stirred in whites at the turn of the century because it was believed to stimulate blacks to defiance and retribution. Many myths about the "cocainized black" sprung up. It was believed that cocaine would give blacks superhuman strength and cunning, that it would improve their pistol marksmanship, and that it would make them impervious to .32 caliber bullets. In fact, in response to this last myth, many Southern police departments switched to .38 caliber revolvers. *Id.* at 7.

66. Musto, *supra* note 57, at 45.

67. *See* LESTER GRINSPOON & JAMES B. BAKALAR, COCAINE: A DRUG AND ITS SOCIAL EVOLUTION 47 (1985).

68. *Id.*

69. *See* 21 U.S.C. § 812 (1994).

70. *See* Jesse Katz, *Tracking the Genesis of the Crack Trade*, L.A. TIMES, Oct. 20, 1996, at A1.

71. *Id.*

1980s was a broad-based phenomenon that simultaneously arose in several cities and was driven by drug dealers of different nationalities, races and ethnic groups.[72]

Recently, however, this multi-causal explanation of the crack epidemic has been called into question by prominent African-American leaders such as Representative Maxine Waters, a Democrat from California and a leading member of the Congressional Black Caucus, who claim that the Central Intelligence Agency (CIA) engaged in a nefarious plot to fund the Nicaraguan Contra war by selling massive amounts of cocaine to poor inner-city blacks in the United States. This allegation is based on a controversial San Jose Mercury News investigative report which charged that a CIA-backed Nicaraguan drug network led by Oscar Blandon Reyes and Juan Norwin Meneses Cantarero sold tons of cocaine to a South Central Los Angeles crack dealer named "Freeway" Ricky Ross. Ross, in turn, converted the cocaine to crack and funneled it to the Bloods and Crips, who sold it throughout South Central and eventually the nation. Blandon and Meneses allegedly used the proceeds from their sales to Ross to buy weapons and equipment for the Fuerza Democratica Nicaraguense (FDN), the largest of several Nicaraguan anti-communist groups commonly referred to as Contras.[73]

The CIA's alleged role as the creator of the crack epidemic has been contradicted by drug experts, however, who assert that the rise of crack was driven by a broad array of factors, including a worldwide glut of powder cocaine, shifting tastes among addicts, and the entrepreneurial drive of the inner-city drug dealers who marketed it.[74] The CIA-Contra conspiracy theory is also undermined by the fact that crack—the result of a simple process of cooking cocaine with baking soda—was invented in the early 1970s in California, long before the contras even existed. Thus, the alleged CIA-Contra conspiracy could not have "introduced" crack into America. Moreover, experts agree that it would have been impossible for any one dealer to supply the massive amount of crack that was consumed just in Los Angeles, much less the entire nation, during the 1980s. As Jonathon Caulkins, a professor of public policy at Carnegie Mellon University, observed: "If Freeway Ricky Ross had become a born-again Christian and gone to build Habitat for Humanity houses, crack would still have happened. We are talking about mid-level operators who were not causes of these events but rather participants in something that would have occurred without them."[75] Thus, it seems likely that the crack epidemic that hit the United States during the 1980s was a broad-based phenomenon caused by people of many different nationalitites, races and ethnic groups.[76]

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72. *See* Roberto Suro & Walter Pincus, *The CIA and Crack: Evidence Is Lacking of Alleged Plot; Nicaraguans Had Limited Role in Bringing Drug to U.S. Cities*, WASH. POST, Oct. 4, 1996, at A1. At the same time that the crack epidemic hit Los Angeles in the early 1980s, it also hit New York, Washington, and Miami. On the East Coast, the crack trade was run by groups of independent contractors, who were often organized along ethnic lines (Jamaicans, Dominicans, and Haitians) and who had direct links to the Columbian cartels. *See* Katz, *supra* note 70, at A1.

73. *See* Gary Webb, *"Crack" Plague's Roots Are in Nicaraguan War*, SAN JOSE MERCURY NEWS, Aug. 18, 1996, at A1.

74. *See* Katz, *supra* note 70, at A1.

75. *See* Suro & Pincus, *supra* note 72, at A1.

76. *Id.*

II. COCAINE LEGISLATION

The Harrison Narcotic Drug Act,[77] America's first comprehensive anti-drug legislation, was inspired by the advent of American Colonialism and the increasingly important role that the United States began to play in international politics at the turn of the Twentieth Century. When the United States colonized the Philippines in 1898, it inherited that country's opium problem. Civil Governor William Howard Taft proposed an opium monopoly for the Philippines through which the United States government would obtain revenue from sales to opium merchants and use the profits to pay for a public education campaign.[78] President Theodore Roosevelt vetoed this plan, however, and in 1905, Congress mandated an absolute prohibition of opium for any purpose other than medical use.[79]

In 1906, China instituted a campaign against opium use in an attempt to modernize and make the empire better able to cope with Western encroachments on its sovereignty.[80] At about the same time, China boycotted American goods to protest mistreatment of its nationals in the United States. Partly to appease the Chinese by assisting their anti-opium efforts, and partly to control rampant smuggling in the Philippines, the United States convened a meeting of regional powers.[81] In this way, the United States launched a world-wide campaign for the control of narcotics trafficking that would extend through the years from the League of Nations to the present efforts of the United Nations.

The International Opium Commission, a gathering of thirteen nations, met in Shanghai in February of 1909.[82] The Protestant Episcopal Bishop of the Philippines, Charles Henry Brent, who had been instrumental in organizing the meeting, was chosen to preside.[83] The participants adopted resolutions noting problems with opium and opiates, but they were not binding decisions. In order to gain such binding decisions, the United States began to organize another international conference, and one was convened in the Hague in 1911, with Bishop Brent again presiding.[84] The twelve participating nations adopted a convention requiring each country to enact domestic legislation controlling narcotics trade.[85] The goal was a world in which narcotics were restricted to medicinal purposes.

Dr. Hamilton Wright, who served as an opium commissioner in the State Department in Theodore Roosevelt's administration, and who later became known as the father of American anti-narcotic laws for his key role in drafting and promoting the Harrison Act, participated in the Shanghai Conference.[86] When Dr. Wright returned from Shanghai, he began to draft a comprehensive federal anti-narcotics law. His efforts were made difficult by the problem of state's rights and by a coalition of physicians and pharmacists who lobbied

77. 38 Stat. 785 (1923).
78. MUSTO, *supra* note 65, at 25–27.
79. *Id.* at 27–28.
80. *Id.* at 28–30.
81. *Id.* at 30–35.
82. *Id.* at 35–36.
83. *Id.* at 32.
84. *Id.* at 35–40, 49–50.
85. *Id.* at 51–52.
86. *Id.* at 31–37.

against the legislation.[87] Legally, the problem was how the federal government could constitutionally interfere with the local prescribing practices of physicians and pharmacists. Dr. Wright settled on Congress's power to lay and collect taxes pursuant to Article One, Section Eight of the Constitution. The result, after protracted bargaining with the pharmaceutical, import, export, and medical interests, was the Harrison Narcotic Drug Act of 1914.[88] The Act prohibited the non-medical use of cocaine, and required a strict accounting of medical dispensing to patients.[89] To accomplish this control, a small tax had to be paid at each transfer, and permits had to be obtained from the Internal Revenue Service. Only the patient paid no tax and needed no permit.[90]

Dr. Wright used blatant racial politics in seeking the passage of the Harrison Act. For instance, he warned Congress in 1910 that "the use of cocaine by the negroes of the South is one of the most elusive and troublesome questions which confront the enforcement of the law in most of the Southern states."[91] Although Dr. Wright "was reporting unsubstantiated gossip, and knowingly misrepresent[ing] the evidence before him," the report was amplified and personalized by the news media, and was circulated as well in medical records and congressional reports. It helped to create the stereotype of the black man as a drug addict.[92] The strategy worked, however. During the Act's passage, Congress quoted a 1910 report by Dr. Wright to the

87. *Id.* at 54–65.

88. The Supreme Court upheld the constitutionality of the Act in United States v. Doremus, 249 U.S. 86 (1919).

89. Under the Act, any person who produced, imported, manufactured or sold opium, coca leaves, or their derivatives was required to register with the Bureau of Internal Revenue. At the time of registration, the registrant was required to pay a tax of $1 per year. Registrants were also required to purchase stamps and affix them to a package; it was illegal to purchase or sell the drugs covered by the Act, except from the original stamped package.

Transfers had to be made pursuant to a written order form issued by the Bureau of Internal Revenue. There were certain exceptions to the order form requirement such as transfers made by a physician or dentist to a patient in the course of the physician or dentist's professional practice; or a transfer by a pharmacist to a consumer pursuant to a physician's prescription. Only persons who were in compliance with state law were allowed to register, and only those who were registered were allowed to secure order forms. Order forms were issued in triplicate to proper applicants and were stamped only with the name of the prospective purchaser.

When a purchaser decided to execute a form, he or she filled in the date of the order and the amount of cocaine (or other drug) requested and signed his or her name to the form. The purchaser retained the duplicate and delivered the original and the executed triplicate to the seller, who entered the number and size of the stamped packages furnished and the date when each item was filled. The seller was required to forward the triplicate to the Bureau of Internal Revenue at the end of the month. Both the buyer and seller were required to keep their respective copies of the form for two years, and to make them available to inspection by law enforcement officers. United States v. Doremus, 249 U.S. 86, 90–92 (1919); Minor v. United States, 396 U.S. 87, 89 n.1 (1969).

The Harrison Narcotic Drug Act was superseded by the Controlled Substances Act, (codified as amended at 21 U.S.C. §§ 801–966 (1994)), which was part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91–513, 84 Stat. 1236 (1970). *See* United States v. Moore, 423 U.S. 122, 132 (1975). The Comprehensive Drug Abuse Prevention and Control Act of 1970 is discussed more fully *infra* Section II.A.

90. Musto, *supra* note 57, at 44. Representative Francis Burton Harrison, a genteel Tammany Democrat, was responsible for steering the anti-narcotics legislation through the House. As noted, however, the moving force behind the legislation was Dr. Wright. Representative Harrison's task was simply to assure his colleagues that the various trade interests and concerned parties had achieved a generally acceptable narcotics bill. *See* MUSTO, *supra* note 65, at 54–56, 59–63.

91. *See* JOHN HELMER, DRUGS AND MINORITY OPPRESSION 47 (1975).

92. *Id.* at 51–53.

International Opium Commission which stated that cocaine was "a potent incentive in driving humbler negroes all over the country to abnormal crimes."[93]

The Harrison Act was enforced by the Bureau of Internal Revenue.[94] The Bureau prosecuted physicians, pharmacists and unregistered users.[95] It also closed clinics that used maintenance programs to treat cocaine addicts. Following passage of the Act, the cocaine supply was greatly reduced. As noted, by the 1930s, law enforcement officials no longer considered the use of cocaine a problem, although it re-emerged as a drug of abuse in the 1960s.[96]

A. The Comprehensive Drug Abuse Prevention and Control Act of 1970

In 1970, Congress moved away from determinate sentencing[97] when it passed the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("1970 Act").[98] Included in the 1970 Act was a repeal of mandatory minimum sentences for drug offenses. The authors of the 1970 Act were concerned that "increasingly longer sentences that had been legislated in the past had not shown the expected overall reduction in drug law violations."[99] There was also a concern that "severe drug laws, specifically as applied to marijuana have helped create a serious clash between segments of the youth generation and the Government" and have "contributed to the broader problem of alienation of youth from the general society."[100] Consequently, the 1970 Act revised the penalty structure of the federal drug laws. "The main thrust of the change in the penalty provisions [was] to eliminate all mandatory minimum sentences for drug law violations except for a special class of professional criminals."[101]

The legislative history of the 1970 Act demonstrates that Congress was concerned that mandatory minimum penalties hampered the "process of rehabilitation of offenders" and infringed "on the judicial function by not allowing the judge to use his discretion in individual cases."[102] Some members of Congress also argued that the mandatory minimum penalties reduced the deterrent effect of the law by reducing the consistency with which the drug laws were applied:

> The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat

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93. *Id.* at 53.
94. MUSTO, *supra* note 65, at 121.
95. *See* Direct Sales Co. v. United States, 319 U.S. 703 (1943); United States v. Behrman, 258 U.S. 280 (1922); Jin Fuey Moy v. United States, 254 U.S. 189 (1920).
96. Musto, *supra* note 57, at 45.
97. A determinate sentence is one for a fixed period as specified by statute. An indeterminate sentence is one in which the time period is partly governed by statute and partly by the behavior of the inmate. A mandatory minimum is a type of determinate sentence.
98. Pub. L. No. 91–513, 84 Stat. 1236 (1970).
99. *See* S. REP. NO. 613, 91st Cong., 1st Sess. 2 (1969).
100. *Id.*
101. *Id.*
102. *Id.*

> hardened criminals, tend to make convictions somewhat more difficult to obtain.[103]

By the late 1970s, America had forgotten its earlier bad experience with cocaine, and some medical authorities were again praising the drug. President Jimmy Carter's drug policy advisor, Dr. Peter Bourne, was forced to resign by charges that he had written illegal prescriptions and used cocaine. In 1974, he had put his support of cocaine on the record:

> Cocaine...is probably the most benign of illicit drugs currently in widespread use. At least as strong a case could be made for legalizing it as for legalizing marijuana. Short acting—about 15 minutes—not physically addicting, and acutely pleasurable, cocaine has found increasing favor at all socioeconomic levels....
>
> One must ask what possible justification there can be for the obsession which [U.S.] Drug Enforcement Administration officials have with it, and what criteria they use to determine the priority they give the interdiction of a drug if it is not the degree of harm which it causes the user?[104]

Dr. Bourne's remarks reflect the "Youth" or Baby Boom Generation's acceptance of, and willingness to experiment with, marijuana and cocaine during the 1960s and 1970s. The widespread use of these drugs was also reflected in popular culture. Films such as *Easy Rider* and *Annie Hall*, the comedy routines of Richard Pryor, George Carlin, and Cheech and Chong, and many popular songs[105] depicted a culture in which drugs played a prominent role. Indeed, the prevalence of drug use among Baby Boomers can best be gauged by the number of our current national leaders—President Clinton, Vice President Gore, Justice Clarence Thomas, Speaker of the House Newt Gingrich, and Representative Susan Molinari—who have admitted to it.[106]

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103. *See* H.R. REP. NO. 1444, 91st Cong., 2d Sess., pt. 1, at 11 (1970).

104. *See* David F. Musto, *America's First Cocaine Epidemic*, WQ, Summer 1989, at 62.

105. *See e.g.*, J.J. CALE, *Cocaine*, *on* TROUBADOUR (Mercury Records 1976); THE VELVET UNDERGROUND, *Heroin*, *on* THE VELVET UNDERGROUND & NICO (Verve Records 1967); THE VELVET UNDERGROUND, *I'm Waiting for the Man*, *on* THE VELVET UNDERGROUND & NICO (Verve Records 1967); JOHN PRINE, *Illegal Smile*, *on* JOHN PRINE (Atlantic Records 1971); IAN DURY & THE BLOCKHEADS, *Sex & Drugs & Rock & Roll*, *on* SEX & DRUGS & ROCK & ROLL (Rhino Records 1992); NEIL YOUNG, *The Needle and the Damage Done*, *on* HARVEST (Reprise Records 1972); JOHN LENNON, *Cold Turkey*, *on* SHAVED FISH (EMI Records 1975); WINGS, *Hi, Hi, Hi*, *on* WING'S GREATEST (Capitol Records 1978); ERIC CLAPTON, *Cocaine*, *on* SLOWHAND (RSO Records 1977); JEFFERSON AIRPLANE, *White Rabbit*, *on* SURREALISTIC PILLOW (RCA Records 1967); THE ROLLING STONES, *Sister Morphine*, *on* STICKY FINGERS (Rolling Stones Records 1971); THE ROLLING STONES, *Mother's Little Helper*, *on* HOT ROCKS 1964–1971 (London Records 1972); STEVE MILLER BAND, *The Joker*, *on* THE JOKER (Capitol Records 1973); BOB DYLAN, *Rainy Day Women #12 & 35*, *on* BLONDE ON BLONDE (Columbia Records 1966); BREWER & SHIPLEY, *One Toke over the Line*, *on* TARKIO ROAD (Kama Sutra Records 1970); THE BEATLES, *Come Together*, *on* ABBEY ROAD (Capitol Records 1969); THE GRATEFUL DEAD, *Casey Jones*, *on* WORKINGMAN'S DEAD (Warner Bros. Records 1970); THE JIMI HENDRIX EXPERIENCE, *All Along the Watchtower*, *on* ELECTRIC LADYLAND (Reprise Records 1968); GRAHAM PARKER, *White Honey*, *on* HOWLIN' WIND (Mercury Records 1976); JACKSON BROWNE, *Cocaine*, *on* RUNNING ON EMPTY (Asylum Records 1977).

106. *See* Anita Creamer, *"Experimenting" with the Truth*, SACRAMENTO BEE, Aug. 19, 1996, at C1.

B. The Reemergence of Determinate Sentencing

In the 1980s, however, with the advent of President Ronald Reagan's War on Drugs, Congress shifted back to its pre-1970 position and again made determinate sentencing the center of federal sentencing policy. Somewhat schizophrenically, it questioned the legitimacy of indeterminate sentences and early parole release, particularly the ability of prisons to rehabilitate offenders and of parole boards to identify offenders ready for release. At the same time, an emerging consensus concluded that criminal laws would better help control crime if sentences were more certain, less disparate, and sufficiently punitive.

Through different laws, Congress enacted determinate sentencing in several forms in the 1980s. First, Congress passed the Sentencing Reform Act of 1984.[107] The law established the United States Sentencing Commission and directed it to promulgate a system of detailed, mandatory sentencing guidelines to assure more uniform federal court sentencing decisions. In addition, the Act abolished parole for defendants sentenced under the guidelines.

At the same time, and on several occasions since, Congress enacted mandatory minimum penalties for certain drug and firearms offenses. Mandatory minimums were enacted in 1984, 1986, 1988, and to a lesser extent in 1994; and legislative proposals in 1995[108] continued to include mandatory minimum penalty provisions. Both the mandatory minimum statutes and the guidelines are mandatory determinate sentencing schemes. The statutes, however, represent a very different approach than that embodied by the sentencing guidelines. For instance, the statutes set a minimum penalty based on only a few characteristics of the offense and offender, particularly the type and amount of drug involved in the offense. Judges can sentence below this level only when the government makes a motion that the defendant has substantially assisted in the prosecutions of other offenders. The guidelines, on the other hand, take into account many more aggravating and mitigating factors. Judges can sentence outside the guideline range if there is an unusual factor present in the case that is not taken into consideration by the guidelines.[109]

C. The Anti-Drug Abuse Act of 1986

The passage of the Anti-Drug Abuse Act of 1986 ("1986 Act")[110] was significantly motivated by the death of University of Maryland basketball star, Len Bias, in June, 1986. Eric Sterling, who served as counsel to the House Judiciary Committee and played a significant staff role in the development of

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107. Pub. L. No. 98–473, 98 Stat. 1987 (1984).

108. *See, e.g.*, S. 3, 104th Cong., 1st Sess. (1995) (Violent Crime Control and Law Enforcement Improvement Act of 1995); S. 38, 104th Cong., 1st Sess. (1995) (Violent Crime Control and Law Enforcement Amendments Act of 1995); and H.R. 3, 104th Cong., 1st Sess: (1995) (Taking Back Our Streets Act of 1995).

109. Mandatory minimum penalty statutes have come under attack by academics who believe that they cause unwarranted uniformity in sentencing. *See, e.g.*, Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity Not Disparity*, 29 AM. CRIM. L. REV. 833, 870–71 (1992). They are also unpopular with many federal judges. *See Crime and Punishment: More Judges Disregard Sentencing Guidelines*, SAN DIEGO UNION–TRIB., May 10, 1993, at B6 (noting that Judges Jack Weinstein and Whitman Knapp of the United States District Court for the Eastern District of New York elected to take senior status to avoid presiding over drug cases governed by mandatory minimum penalty statutes).

110. Pub. L. No. 99–570, 100 Stat. 3207 (1986).

many provisions of the 1986 Act, summarized how the 1986 Act was enacted as follows:

> The Controlled Substances Act sentencing provisions were initiated in the [House] Subcommittee on Crime in early August 1986 in a climate in the Congress that some have characterized as frenzied. Speaker O'Neill returned from Boston after the July 4th district work period where he had been bombarded with constituent horror and outrage about the cocaine overdose death of NCAA basketball star Len Bias after signing with the championship Boston Celtics. The Speaker announced that the House Democrats would develop an omnibus anti-drug bill, easing the reelection concerns of many Democratic members of the House, by ostensibly preempting the crime and drug issue from the Republicans who had used it very effectively in the 1984 election season. The Speaker set a deadline for the conclusion of all Committee work on this bill as the start of the August recess—five weeks away. The development of this omnibus bill was extraordinary. Typically members introduce bills which are referred to a subcommittee, and hearings are held on the bills. Comment is invited from the Administration, the Judicial Conference, and organizations that have expertise on the issue. A markup is held on a bill, and amendments are offered to it. For this omnibus bill much of this procedure was dispensed with. The careful deliberative practices of the Congress were set aside for the drug bill.[111]

Ironically, because the circumstances surrounding Bias's death were distorted by the media, the legislators who enacted the 1986 Act, as well as the American public, misunderstood the role that crack played in his death. Bias died of cocaine intoxication the day after he was the second player drafted in the National Basketball Association's 1986 college draft. At the time of his death, it was not known, outside a small group of people who had been with him, what method of cocaine ingestion he had used. Papers across the country nevertheless ran stories that quoted Maryland's Assistant Medical Examiner, Dr. Dennis Smyth, that Bias had died of "free-basing" cocaine.[112] There were several other medical analyses of the probable method of cocaine ingestion. For instance, Dr. Yale Caplan, a toxicologist in the Maryland Medical Examiner's Office said that a test of cocaine found in a vial at the scene "probably was not crack."[113] Similarly, Maryland's Chief Medical Examiner, Dr. John Smialek, stated that evidence of cocaine residue in Bias's nasal passages suggested that Bias probably snorted cocaine. However, Dr. Smyth's statement received most of the coverage.[114]

A year later, at the trial of Brian Tribble, who was accused of selling the cocaine to Bias, Terry Long, another University of Maryland basketball player who participated in the cocaine party that led to Bias's death, testified that he, Bias, Tribble and another player snorted cocaine over a four-hour period. Long's testimony received only limited coverage.[115]

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111. *See Hearings Before the United States Sentencing Comm'n on Proposed Guideline Amendments* (Mar. 22, 1993) (testimony of Eric E. Sterling, President of the Criminal Justice Policy Foundation).

112. *See* Craig Reinarman & Harry G. Levine, *The Crack Attack: Politics and Media in America's Latest Drug Scare*, *in* IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS 115, 117 (Joel Best ed., 1989); U.S. SENTENCING COMM'N, *supra* note 4, at 122.

113. U.S. SENTENCING COMM'N, *supra* note 4, at 122 n.45.

114. *Id.*

115. *Id.* at 123.

The 1986 Act created the federal criminal law distinction between powder cocaine and crack cocaine. Interestingly, there was no attempt to distinguish between powder and the other forms of cocaine (or, more accurately, methods of administering cocaine) such as intravenous injection or the smoking of coca paste. The way that the 1986 Act distinguished between crack and powder was, of course, the 100:1 quantity ratio. In addition, the 1986 Act created the basic framework of mandatory minimum penalties that currently apply to federal drug trafficking offenses.

The 1986 Act established two tiers of mandatory prison terms for first-time drug traffickers: a five-year and a ten-year minimum sentence. Under the statute, these prison terms are triggered exclusively by the quantity and type of drug involved in the offense. For example, the ten-year penalty is triggered if the offense involved at least one kilogram of heroin, five kilograms of powder cocaine, or fifty grams of cocaine base.[116]

Congress quickly enacted the 1986 Act into law, fueled by a bi-partisan feeling among the members of the House and Senate that the nation was under siege from crack.[117] Senator Paula Hawkins, a Republican from Florida, speaking in favor of the 1986 Act, reflected the sentiment for urgent legislation:

> Drugs pose a clear and present danger to America's national security. If for no other reason we should be addressing this on an emergency basis....
>
> ...This is a bill which has far-reaching impact on the future of civilization as we know it as Americans and as we mature into the next century.[118]

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116. Under the Act's approach, higher mandatory minimum penalties can apply if the offender has previously been convicted of a drug trafficking offense. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (1994).

117. The desire to move the bill through Congress quickly and bypass the committee process was not monolithic. At least a few Senators were troubled by the absence of careful consideration of the bill. *See, e.g.*, 132 CONG. REC. 26,441 (1986) (remarks of Sen. Evans) (describing the legislative process behind the 1986 Act as "the sanctimonious election stampede of the House of Representatives, a stampede that trampled on the Constitution. In fact, at times the action over there resembled a congressional lynch mob more than it did careful legislation."). Senator Mathias similarly remarked:

> [I]t is the precipitous use of legislative power that poses the greatest threat to our individual liberties and social institutions.
>
> Very candidly, none of us has had an opportunity to study this enormous package. It did not emerge from the crucible of the committee process, tempered by the heat of debate. The committees are important because, like them or not, they do provide a means by which legislation can be carefully considered, can be put through a filter, can be exposed to public view and public discussion by calling witnesses before the committee. That has not been the origin of this bill. Many of the provisions of the bill have never been subjected to committee review.
>
> ....
>
> If we are contemplating changes to important individual freedoms, if we are about to alter major social commitments, then those modifications simply must be discussed fully.

132 CONG. REC. 26,462 (1986).

118. 132 CONG. REC. 26,436 (1986). Senator Lawton Chiles stated that "The whole Nation now knows about crack cocaine. They know it can be bought for the price of a cassette tape, and make people into slaves. It can turn promising young people into robbers and thieves, stealing anything they can to get the money to feed their habit." 132 CONG. REC. 26,447 (1986). Senator Charles Grassley stated that "the tragic death of basketball star Len Bias and

As a consequence of the 1986 Act's expedited schedule, there was no committee report to document Congress's intent in enacting the Act, or to analyze the legislation. The only record of congressional intent is contained in the statements made on the floors of the House and Senate in favor of the Act.

Most importantly for the purpose of developing a logical and fair policy regarding crack cocaine, the legislative history contains no discussion of the 100:1 crack/powder cocaine ratio. Congress did, however, consider a number of different crack/powder ratios before deciding on 100:1, as evidenced by the ratios contained in the other bills that were put forward during this period, but never passed into law. For instance, the original version of the House bill that was ultimately enacted, House Report 5484, contained a quantity ratio of 50:1.[119] House Report 5394, known as the Narcotics Penalties and Enforcement Act of 1986, also contained a 50:1 ratio.[120] A number of other bills introduced during this period contained ratios of 20:1.[121] One of the bills containing a 20:1 ratio, the Drug Free Federal Workplace Act of 1986, was introduced on behalf of the Reagan Administration by Majority Leader Robert Dole. Ultimately, House Report 5484, as amended by Senate bill 2878 (the Anti-Drug Abuse Act of 1986) was passed by Congress and signed into law on October 27, 1986. The Senate bill contained the 100:1 powder/crack quantity ratio.[122]

What little legislative history there is suggests that legislators believed that crack is more addictive than powder cocaine,[123] that it causes crime (psychopharmacological, economic-compulsive and systemic),[124] that it has perilous physiological effects such as psychosis and death, that young people are particularly prone to becoming addicted to it ("[s]tudents will be faced with the temptations of crack and other drugs during their school years")[125] and that crack's low cost per dose and ease of manufacture would lead to even more widespread use of it. Acting upon these beliefs, Congress decided to punish crack more severely than powder. The decision to distinguish crack from powder coincided with the decision to punish "serious" and "major" traffickers more severely than others. The result was the five- and ten-year mandatory minimum penalty provisions that currently apply to federal drug trafficking offenses.

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subsequent reports that his death was caused by the ingestion of cocaine helped to focus national attention on the problem of substance abuse in America." 132 CONG. REC. 27,134 (1986).

119. H.R. 5484, 99th Cong., 2d Sess. (1986).

120. H.R. 5394, 99th Cong., 2d Sess. (1986).

121. *See, e.g.*, S. 2787, 99th Cong., 2d Sess. (1986) (Mandatory Crack and Other Drug Penalties Act); S. 2849, 99th Cong., 2d Sess. (1986) (Drug Free Federal Workplace Act of 1986); S. 2850, 99th Cong., 2d Sess. (1986) (Drug Enforcement Act of 1986).

122. S. 2878, 99th Cong., 2d Sess. (1986).

123. *See* 132 CONG. REC. H6729 (daily ed. Sept. 11, 1986) (statement of Rep. LaFalce regarding H.R. 5484) ("Crack is [thought] to be even more highly addictive than other forms of cocaine or heroin.").

124. Although there are differences of opinion on this topic, some experts claim that the correlation between crack and violence is attenuated at best. *See, e.g., Hearing Before United States Sentencing Comm'n on Crack Cocaine* 52 (Nov. 9, 1993) (testimony of Dr. Steven Belenko, Senior Research Fellow, New York City Criminal Justice Agency) ("[I]s there any evidence that the emergence of crack had any kind of gross effect on violent crime rates in the cities in which it became a problem? The answer to that is there is no clear evidence of that."). *But see* Chin & Fagan, *infra* note 220, at 25; Goldstein, *infra* note 220, at 662–63; Inciardi, *infra* note 220, at 104.

125. 132 CONG. REC. 26,447 (1986) (statement of Sen. Chiles).

"Serious" and "major" drug traffickers were identified according to the amount of drugs with which they were apprehended. Senator Robert Byrd, the Minority Leader, explained the mandatory minimum penalties as follows:

> For the kingpins—the masterminds who are really running these operations—and they can be identified by the amount of drugs with which they are involved—we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years.... Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail—a minimum of five years for the first offense.[126]

One of the major goals of the bill was "to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources."[127] In a report issued by the House Judiciary Subcommittee on Crime following its consideration of an earlier version of the bill, H.R. 5394, the Subcommittee stated that the five- and ten-year mandatory minimums would create the proper incentives for the Department of Justice to direct its "most intense focus" on "major traffickers" and "serious traffickers." The Subcommittee defined "major traffickers" as "the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities."[128] "Serious traffickers" were defined as "the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials...and doing so in substantial street quantities."[129]

The Subcommittee formulated these definitions based upon interviews "with a number of DEA agents and prosecutors about the distribution patterns of these various drugs...which if possessed by an individual would likely be indicative of operating at such a high level."[130] The Subcommittee also set the quantity levels that trigger the mandatory minimums based upon their interviews with DEA agents and prosecutors. For "major traffickers," the level was five kilograms of powder or 100 grams of crack. For "serious traffickers," the level was 1000 grams of powder or twenty grams of crack. Thus, the powder/crack ratio for H.R. 5394 was 50:1.[131]

The 1986 Act advanced quickly through the legislative process in the late summer and early fall of that year. Few hearings were held in the House on the enhanced penalties for crack offenders, and the Senate conducted only a single hearing on the 100:1 ratio which lasted less than four hours.[132] The Senate went

126. 132 CONG. REC. 14,300 (1986) (statement of Sen. Byrd).
127. H.R. REP. NO. 9-845, 99th Cong., 2d Sess., pt. 1, at 11 (1986).
128. *Id.* at 11-12.
129. *Id.* at 12.
130. *Id.*
131. *Id.* at 16-18.
132. Some commentators have argued that Congress failure to follow the usual procedure of hearings on the 1986 Act amounted to an abandonment of due process which renders the 1986 Act constitutionally unsound. *See* Laura A. Wytsma, Comment, *Punishment for "Just Us"—A Constitutional Analysis of the Crack Cocaine Sentencing Statutes*, 3 GEO. MASON INDEP. L. REV. 473, 506-08 (1995). Others have argued that since the statutes incorporating the 100:1 ratio have a disparate impact on African-Americans, they should be subjected to a less deferential version of the rational basis test in order to strike them down as violative of the Equal Protection Clause. *See* Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder*

beyond H.R. 5394, and increased the powder/crack ratio to 100:1. Many Senators felt that the increase was justified by the severe harm that a small amount of crack could cause. For instance, Senator Lawton Chiles, one of the leading proponents of severe crack penalties, explained that:

> This legislation will provide enhanced penalties for drug offenses. It will decrease the amount necessary for the stiffest penalties to apply. Those who possess 5 or more grams [of] cocaine freebase will be treated as serious offenders. Those apprehended with 50 or more grams of cocaine freebase will be treated as major offenders. Such treatment is absolutely essential because of the especially lethal characteristics of this form of cocaine. Five grams can produce 100 hits of crack. Those who possess such an amount should have the book thrown at them. The damage 100 hits can inflict upon users more than warrants this treatment.[133]

Senator Chiles was also concerned with crack dealers' exploitation of children to sell and distribute the drug: "The legislation will also create an offense for employing, hiring or using children to distribute drugs."[134] At the same time, the Act's general mandatory minimum penalty scheme continued to be explained by a number of congressional leaders, such as Senator Byrd, in terms of a correlation between quantities of each of the major street drugs and the relative culpability of the typical trafficker involved with those quantities in drug trafficking organizations.[135] Despite these explanations, however, perhaps the most significant aspect of the Senate's decision to increase the 50:1 ratio contained in House Report 5394 to 100:1, was that it was not based on information received from DEA agents and prosecutors. Although the 50:1 ratio was a liberal estimate of the different quantities typically dealt by major crack and powder dealers, it did have some basis in market reality. The 100:1 ratio has no such basis.

Read as a whole, the abbreviated legislative history of the 1986 Act does not provide a single, consistently cited rationale for the crack-powder penalty

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Cocaine, 25 U. TOL. L. REV. 215 (1994). These arguments, as well as challenges based on the Eighth Amendment's Cruel and Unusual Punishment Clause, have been rejected by every federal appellate court that has entertained them. *See, e.g.*, United States v. Singleterry, 29 F.3d 733, 740–41 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 647 (1994) (equal protection and discriminatory classification); United States v. Moore, 54 F.3d 92, 98–99 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 793 (1995) (equal protection and discriminatory purpose); United States v. Frazier, 981 F.2d 92, 95 (3d Cir. 1992), *cert. denied*, 507 U.S. 1010 (1993) (equal protection, cruel and unusual punishment); United States v. Thomas, 900 F.2d 37, 39–40 (4th Cir. 1990) (equal protection); United States v. Watson, 953 F.2d 895, 898 (5th Cir. 1992), *cert. denied*, 504 U.S. 928 (1992) (due process, equal protection); United States v. Williams, 962 F.2d 1218, 1227–28 (6th Cir. 1992), *cert. denied*, 506 U.S. 892 (1992) (equal protection); United States v. Lawrence, 951 F.2d 751, 755 (7th Cir. 1991) (equal protection); United States v. Simmons, 964 F.2d 763, 767 (8th Cir. 1992), *cert. denied*, 506 U.S. 1011 (1992) (due process, equal protection, cruel and unusual punishment); United States v. Harding, 971 F.2d 410, 412–14 (9th Cir. 1992), *cert. denied*, 506 U.S. 1070 (1993) (equal protection); United States v. Turner, 928 F.2d 956, 960 (10th Cir. 1991), *cert. denied*, 502 U.S. 881 (1991) (due process); United States v. King, 972 F.2d 1259, 1260 (11th Cir. 1992) (equal protection); United States v. Cyrus, 890 F.2d 1245, 1248 (D.C. Cir. 1989) (equal protection, cruel and unusual punishment). The statutes and guidelines incorporating the 100:1 ratio have also withstood challenges that they are unconstitutionally vague. *See* United States v. Jones, 979 F.2d 317, 319–20 (3d Cir. 1992); United States v. Brown, 859 F.2d 974, 975–76 (D.C. Cir. 1988).

133. 132 CONG. REC. 26,447 (1986) (statement of Sen. Chiles).

134. *Id.*

135. *See* 132 CONG. REC. S14,301 (daily ed. Sept. 30, 1986).

structure. In fact, there is evidence that Congress was simply pandering to the anti-crime attitude of the nation. Eric Sterling, a former staff member of the House Judiciary Committee, described the passage of the legislation as "this frenzied panic atmosphere—I'll see your five years and I'll raise you five years. It was the crassest political poker game."[136]

Although nobody has ever suggested that Congress had a consciously discriminatory intent in passing the 1986 Act, at least one commentator has argued that the 1986 Act evidences an unconscious intent to discriminate against African-Americans. In *United States v. Clary*,[137] Judge Clyde Cahill found that, "while intentional discrimination is unlikely today, unconscious feelings of difference and superiority still live on even in well-intentioned minds."[138] He further found that "[w]hile it may not have been intentional, it was foreseeable that the harsh penalties imposed upon blacks would be clearly disproportional to the far more lenient sentences given whites for use of the same drug—cocaine."[139] Judge Cahill posited that unconscious racism can be traced to a latent feeling of superiority in the psyches of white Americans, a feeling that was formed by centuries of exposure to various myths and fallacies that portrayed African-Americans as inferior.[140]

Judge Cahill observed that between 1985 and 1986, more than 400 news stories about crack were published or aired. He found many of the stories to be racist because they ignored the statistical data indicating that many whites also used crack. "These stereotypical images undoubtedly served as the touchstone that influenced racial perceptions held by legislators and the public as related to the 'crack epidemic.'"[141] He further found that the media had created a stereotype of the crack dealer as a young black male who was unemployed, belonged to a gang, and toted a gun. This again ignored the reality that whites also use crack:

> The fear of increased crime as a result of crack cocaine fed white society's fear of the black male as a crack user and as a source of social disruption. The prospect of black crack migrating to the white suburbs led the legislators to reflexively punish crack violators more harshly than their white, suburban, powder cocaine dealing counterparts.[142]

Judge Cahill cited speeches made on the floor of the Senate during debate on the bill to support his assertion that legislators used the racist media stories as a basis for the 1986 Act. For instance, some legislators labeled crack dealers as black gang members.[143] Others used language which Judge Cahill found to be

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136. Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More than Kingpins*, WASH. POST, Nov. 4, 1990, at C2. In United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992), Judge Gerald Heaney, in a concurring opinion, stated that "[a]lthough the 1986 Congressional hearing with respect to crack cocaine cited by our court in *Buckner* was filled with general statements about the dangers of crack and the economics of crack distribution, Congress had no hard evidence before it to support the contention that crack is 100 times more potent or dangerous than powder cocaine."

137. United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

138. *Id.* at 779.

139. *Id.* at 785.

140. *Id.* at 779.

141. *Id.* at 784.

142. *Id.*

143. *See, e.g.*, 132 CONG. REC. S2495 (daily ed. Mar. 12, 1986) ("big city ghettos are infested with crack houses" and "are centers of the new cocaine trade" in crack); 132 CONG.

overtly or subtly racist,[144] and which aggravated white fears that the crack problem would spread out of the ghettos.[145] Although Judge Cahill made a compelling argument that certain legislators had engaged in unwarranted racial stereotyping, the Eighth Circuit ultimately rejected his novel theory that unconscious racism could be used to overturn a statute on equal protection grounds.

D. The Anti-Drug Abuse Act of 1988

Congress further emphasized its concern about drugs generally, and crack cocaine specifically, in the Anti-Drug Abuse Amendments Act of 1988.[146] The most significant change of the 1988 Act was the application of the same mandatory minimum penalties to drug trafficking conspiracies and attempts that previously were applicable only to substantive, completed drug trafficking offenses. Furthermore, with respect to crack, the 1988 Act amended 21 U.S.C. Section 844 to make crack cocaine the only drug with a mandatory minimum penalty for a first offense of simple possession. The Act made possession of more than five grams of crack punishable by at least five years in prison. The same five year mandatory minimum penalty also applies to possession of more than three grams of crack if the defendant has a prior conviction for crack possession, and to possession of more than one gram of crack if the defendant has two or more prior crack possession convictions. By contrast, simple possession of any quantity of any other drug by a first-time offender—including powder cocaine—is a misdemeanor punishable by a maximum of one year of incarceration.

III. THE PHARMACOLOGY OF COCAINE

Cocaine is the strongest central nervous system stimulant of natural origin.[147] All forms of cocaine are derived from the coca leaf. Chewing the coca leaf was the earliest form of cocaine use. As discussed in Part I, South American Indians chew the leaf with a lime-based, alkaline mixture known as *tocra* or *llipta* which facilitates the release of cocaine from the organic material of the leaf and aids the body in digesting it. The same amount of coca leaves chewed with alkali results in substantially higher concentrations of cocaine in the blood than when the leaves are chewed alone.[148] It takes longer to reach peak plasma concentrations by chewing coca leaves than in other methods of administration. Chewing coca provides a subtle but long-lasting effect including

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REC. S4670 (daily ed. Apr. 22, 1986) ("Most of the dealers, as with past drug trends, are black or Hispanic...whites rarely sell the cocaine rocks."); 132 CONG. REC. S7123–25 (daily ed. June 9, 1986) (dealers "organize small cells of pushers, couriers and lookouts from the ghetto's legion of unemployed teenagers." *Id.* at S7123.).

144. *See e.g.*, 132 CONG. REC. S4672 (daily ed. April 22, 1986) ("For the growing numbers of the white middle class who have become hooked on cocaine rock, buying the drug can be like stepping into a foreign culture."). It should be noted that this statement contradicts Judge Cahill's assertion that the media and Congress ignored the statistical data indicating that many whites also use crack.

145. *See e.g.*, 132 CONG. REC. S7123–25 (daily ed. June 9, 1986) ("There are ominous signs that crack and rock dealers are expanding well beyond the inner city." *Id.* at S7124.).

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

147. U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMIN., DRUGS OF ABUSE (1989).

148. Jatlow, *supra* note 48, at 67B.

mood elevation, mild stimulation, increased physical stamina and reduced appetite.[149]

A. Coca Paste

When coca leaves are ground up and treated with sulfuric acid, and a solvent like kerosene or gasoline, they form coca paste. Coca paste is an intermediary product in the manufacture of cocaine hydrochloride and contains 40–80% cocaine sulfate, as well as other coca alkaloids and contaminants from the refining process such as kerosene and sulfuric acid.

Coca paste is inexpensive and is widely smoked in South America in tobacco or marijuana cigarettes which are called "basuco" in Columbia and Peru, and "pitillo" in Bolivia. Smoking coca paste is an inefficient way to deliver cocaine to the brain, however, because the high temperature of the burning cigarette destroys much of the cocaine. South American users overcome this problem by packing the cigarette with large amounts of coca paste. The user can achieve high plasma concentrations of cocaine within minutes by smoking coca paste.[150] Smoking coca paste produces an intense euphoria, but is also highly damaging. It can cause paranoid delusions, hallucinations, overriding anxiety and depression.[151] Moreover, if coca paste is used long enough, it can lead to cardiovascular problems, malnutrition, muscle spasms and convulsions.[152]

B. Cocaine Hydrochloride (Powder)

When coca paste is treated with hydrochloric acid and a solvent like ether or acetone, it forms cocaine hydrochloride, or powder.[153] With this form of cocaine, manufacturers can achieve ninety-five percent purity, but dilutants are invariably added before the street sale to the consumer in order to create more product. Cocaine hydrochloride is generally sniffed; however, since it is soluble in water, it can also be injected.[154] Peak plasma concentrations are not reached for thirty to sixty minutes through snorting cocaine.[155] It produces a feeling of elation which lasts anywhere from ten to thirty minutes, and which rises and subsides gradually.[156] Continued use of cocaine powder causes irritation of the nasal membranes which can lead to ulceration, bleeding, nasal sores and chronic sinus congestion.[157] In the most serious cases, continued and habitual snorting of cocaine powder can cause perforation of the nasal septum.[158]

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149. David F. Allen, *Modes of Use, Precursors, and Indicators of Cocaine Abuse, in* THE COCAINE CRISIS 15, 15 (David F. Allen ed., 1985).
150. Jatlow, *supra* note 48, at 67B.
151. *See* Allen, *supra* note 149, at 15–16.
152. *Id.*
153. Chemically, cocaine is benzoylmethylecognine ($C_{17}H_{21}NO_4$). Das, *supra* note 57, at 299.
154. Cocaine hydrochloride can be absorbed through any mucous membrane, including the eyelid, mouth, anus, or vagina. Cocaine suppositories used in the vagina or anus may prove fatal due to the vast absorption of cocaine into the blood in a short time. Allen, *supra* note 149, at 16.
155. Jatlow, *supra* note 48, at 67B.
156. Allen, *supra* note 149, at 16.
157. *Id.*
158. *Id.*

Injected cocaine has a very high dependence potential due to the direct entry into the bloodstream and rapid absorption into the brain. Peak plasma concentrations are almost instantaneous.[159] The complications that can arise from taking cocaine intravenously include phlebitis, hepatitis, AIDS, and the other complications related to freebase.[160]

C. Freebase Cocaine

Smoking cocaine powder is an inefficient method of administering cocaine to the brain because some of the active material is lost in the process. The cocaine alkaloid, or freebase, is, however, suitable for smoking.[161] It is a colorless, odorless, crystalline substance that is insoluble in water, but soluble in alcohol, acetone, and ether.[162] Unlike cocaine powder which decomposes on heating, the alkaloid is transformed into a stable vapor at high temperatures.[163] Freebase is created by treating the hydrochloride with an alkali like ammonia, baking soda or sodium hydroxide. Sometimes the cocaine is extracted with a volatile solvent, at other times the mixture is merely heated and smoked. This procedure, which can be performed largely by the user,[164] created a paraphernalia industry which included the sale of chemicals, glassware and pipes. As with the injection of cocaine, peak plasma concentrations are almost instantaneous.[165]

D. Cocaine Base or Crack

The name "crack" is derived from the popping sound that occurs during heating.[166] The synonym "rock" refers to crack's appearance.[167] Crack takes the freebase method one step further and supplies the consumer with a ready-to-smoke product. Crack is the most efficient way of delivering cocaine to the brain in a very short time. The high addiction potential of this method creates an instant demand for the drug.

Crack is manufactured by dissolving the white cocaine hydrochloride powder in warm water and adding an alkali, such as sodium bicarbonate (baking soda), and then heating and drying it. This leads to the precipitation of small yellow-white cocaine crystals (crack). The adulterants that had been in the cocaine hydrochloride remain; in addition, the baking soda, now table salt, is also present. The crack is then placed in a plastic water pipe, heated until the cocaine vaporizes, and inhaled.[168]

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159. Jatlow, *supra* note 48, at 68B.
160. *Id.*
161. Das, *supra* note 57, at 299.
162. *Id.*
163. *Id.*
164. *See, e.g.*, Allen, *supra* note 149, at 25.
165. Jatlow, *supra* note 48, at 67B.
166. MATTHEW J. ELLENHORN & DONALD G. BARCELOUX, MEDICAL TOXICOLOGY: DIAGNOSIS AND TREATMENT OF HUMAN POISONING 646 (1988).
167. *Id.*
168. Although people commonly speak of "smoking" freebase, this is an inaccurate description of the procedure since nothing is combusted. The vapor of freebase is inhaled after it is heated, converting it from a solid to a liquid to a gas. Sidney Cohen, *The Implications of Crack*, *in* THE COCAINE CRISIS 27, 28 (David F. Allen ed., 1985).

E. Absorption and Distribution Within the Body

While cocaine in any form—leaf, paste, powder, freebase or crack—produces the same type of physiological and psychotropic effects, the onset, intensity and duration of the effects are directly related to the method of use.[169] The method of use directly affects the rate at which the drug will be absorbed into the bloodstream and then transported to the central nervous system and brain. Absorption of the drug into the bloodstream is regulated by two primary factors: the amount of blood flowing to the site of ultimate consumption (e.g., the stomach or lungs), and the surface area over which the drug is absorbed. Snorting powder, for example, limits the surface area to the nasal mucosa in the nasal cavity. In contrast, inhaling crack expands the surface area because the drug is absorbed by the air sacs in the lungs which have a surface area approximately the size of a football field.

The impact of cocaine is additionally governed by the proportion of the drug distributed to various parts of the body. The most important factor is the proportion of the drug reaching the central nervous system, particularly the brain, which is the primary site of action for drugs that are abused. For instance, when a drug is injected intravenously, 100% of it is distributed to the body. Other methods of use result in smaller proportions being distributed to the central nervous system both because a smaller fraction of the drug is absorbed into the bloodstream, and because the body has natural safeguards such as metabolism that cleanse the blood of toxic substances.[170]

F. Effects of Cocaine

1. Physiological Effects of Cocaine

Cocaine, like other central nervous system stimulants such as amphetamines, caffeine, and nicotine, produces alertness and heightens energy.[171] Cocaine acts on the central nervous system by inhibiting the reuptake of the neurotransmitter norepinephrine. The augmentation of norepinephrine results in increased motor activity, producing slight tremors and convulsions in the user's extremities.[172] In the cardiovascular system, the augmentation of norepinephrine results in increased heart rate, elevated blood pressure, and other symptoms similar to hypertension. The rate of increase in these physiological responses varies by route of cocaine administration, with the most efficient absorption routes (inhalation of crack vapors and injection of powder cocaine) producing the most rapid increases.[173]

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169. *See* Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 JAMA 1580, 1582 (1996); Richard W. Foltin & Marian W. Fischman, *Smoked and Intravenous Cocaine in Humans: Acute Tolerance, Cardiovascular and Subjective Effects*, 257 J. PHARMACOLOGY & EXPERIMENTAL THERAPEUTICS 247, 247 (1991); J. Javaid et al., *Cocaine Plasma Concentrations: Relation to Physiological and Subjective Effects in Humans*, 202 SCI. 227, 227 (1978).

170. *See* Foltin & Fischman, *supra* note 169, at 247; Javaid et al., *supra* note 169, at 227.

171. Frank H. Gawin & Everett H. Ellinwood, Jr., *Cocaine and Other Stimulants: Actions, Abuse and Treatment*, 318 NEW ENG. J. MED. 1173, 1174 (1988).

172. U.S. SENTENCING COMM'N, *supra* note 4, at 22–23; *see also* Victor F. C. Raczkowski et al., *Cocaine Acts in the Central Nervous System to Inhibit Sympathetic Neural Activity*, 257 J. PHARMACOLOGY & EXPERIMENTAL THERAPEUTICS 511 (1991).

173. U.S. SENTENCING COMM'N, *supra* note 4, at 23.

Cocaine's vasoconstrictive properties reduce the size of the blood vessels, causing the air sacs in the lungs to dilate and the capillaries in the nasal passages to constrict. Because cocaine permits less body heat to be lost, cocaine users generally experience an increase in body temperature. In cases involving cocaine overdoses, body temperatures as high as 114 degrees fahrenheit have been reported.[174]

2. Psychotropic Effects of Cocaine

Cocaine also inhibits the re-uptake of dopamine, a neurotransmitter that controls the pleasure centers in the central nervous system. This causes a sense of euphoria, decreased anxiety and social inhibitions, and heightened sexuality.[175] Feelings of pleasure and well-being normally occur when certain external stimuli cause the release of dopamine by stimulating the sending nerve.[176] The dopamine crosses the microscopic space between nerve cells, and touches the receiving nerve ending, stimulating it to fire.[177] Then, ordinarily the dopamine in the space between the nerves is reabsorbed by a kind of microscopic "re-uptake pump" in the sending nerve.[178] Thus, the stimulation of the receiving nerve is brief, and the supply of dopamine is conserved.[179] Cocaine blocks the re-uptake of dopamine, causing it to remain in the synapse, continuing to stimulate the receiving nerve which soon becomes over-stimulated.[180]

The constant stimulation eventually depletes the sender cells of dopamine because dopamine synthesis cannot keep pace with the dopamine release.[181] The production of dopamine is eventually exhausted and the nerves become under-stimulated.[182] This causes the negative late effects of crack use—depression, lack of energy, inability to experience pleasure, and a general feeling of dysphoria—to begin to appear.[183] These and other mechanisms provide the physiologic reasons for the initial euphoria and the subsequent dysphoria which crack users experience.[184]

The psychotropic feelings described as the "high" are correlated to the rate of increased concentration of cocaine in the blood, particularly blood flowing to the brain. The faster the cocaine reaches the brain, the greater the intensity of the psychotropic effects.[185] However, these intense psychotropic effects also dissipate more quickly. The methods of cocaine use with the more immediate and intense psychotropic responses—specifically, injection of powder cocaine and inhalation of crack vapors—maintain the intensity for shorter periods of time than slower methods of administration.[186] For instance, when a user inhales crack fumes, it takes only eight seconds to reach his

174. *Id.*
175. *Id.*
176. ALLEN & JEKEL, *supra* note 42, at 21.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*.
182. *Id.*
183. *Id.*
184. *Id.*
185. *See* Hatsukami & Fischman, *supra* note 169, at 1582.
186. *Id.*

brain.[187] The duration of the effect is thirty minutes, but the maximum physiological effect lasts for only two minutes, and the maximum psychotropic effect for only one minute. By comparison, when a user snorts powder cocaine, the cocaine enters his bloodstream and brain in three to five minutes, the maximum physiological effect occurs within forty minutes, the maximum psychotropic effect occurs within twenty minutes and the duration of the effect is sixty minutes.[188] Even injecting cocaine does not produce the desired effects as quickly as smoking crack. When a user injects cocaine, it enters his bloodstream immediately, of course, but it does not reach his brain until one minute later. The maximum psychotropic and physiological effects do not occur for four minutes and ten minutes respectively. Chewing coca leaves is the slowest route of administration. It takes thirty minutes to reach the bloodstream and brain, and sixty minutes to reach the maximum physiological and psychotropic effects.[189]

3. Addiction Issues

Drug addiction can be both physiological and psychological. Cocaine users often experience anxiety and depression when use of the drug is withdrawn. Although these symptoms may affect the body's functioning, they are primarily manifestations of psychological dependence.[190] Psychological dependence is defined as a compulsion for repeated use of a drug for its euphoric effects despite any adverse effects that may occur.[191]

Because higher doses of cocaine intensify the euphoric feeling, some users will gradually increase the frequency of use and the quantity of the dose. The pursuit of euphoria becomes so great that users may often ignore all signs of physical and psychological risk. With continued use, the elation and self-confidence associated with the euphoria diminish, and depression and irritability set in. Often, in an attempt to ward off depression and the "crash" from the high, cocaine users further intensify their pattern of use, resulting in cocaine binges lasting for several hours or even days.[192]

The psychological craving of cocaine is the most important contributor to its abuse potential.[193] The level and severity of addiction are affected by the method of use and drug tolerance. As noted, those methods of use such as injection of cocaine powder and inhalation of crack vapors that result in the most rapid increases in blood concentration and that deliver the cocaine most

187. Allen, *supra* note 149, at 17.

188. *See* Craig Van Dyke et al., *Oral Cocaine: Plasma Concentrations and Central Effects*, 200 SCI. 211 (1978).

189. *See* Paul Wilkinson et al., *Intranasal and Oral Cocaine Kinetics*, 27 CLINICAL PHARMACOLOGY & THERAPEUTICS 386, 391 (1980).

190. Frank H. Gawin, *Cocaine Abuse and Addiction*, 29 J. FAMILY PRACTICE 193, 194 (1989).

191. U.S. SENTENCING COMM'N, *supra* note 4, at 25.

192. Allen, *supra* note 149, at 17. One researcher reports seeing cocaine addicts in the Bahamas who freebased for five days straight with little food, sleep, or water. As noted, this is caused by a depletion of dopamine which, in turn, raises one's pleasure threshold for the simple joys of living such as eating, reading or walking. The depletion of dopamine also causes the receptors on nerve cells to become supersensitive, producing a biologically based craving for cocaine similar to hunger or thirst. *Id.*

193. U.S. SENTENCING COMM'N, *supra* note 4, at 25.

rapidly to the brain provide the maximum levels of psychotropic effects and therefore are the most addictive.[194]

When crack is inhaled, 80% pure cocaine vapor reaches the brain in eight seconds causing a rush or high with intense euphoria, pounding heart and warm flush.[195] The high, sometimes described as "orgasmic," "Christmas," or "joy," lasts for about two minutes, and is followed by a glow that lasts for ten to twenty minutes.[196] This strong reinforcing memory of the first high causes the user to seek it again.[197] Due to the depletion of dopamine from the first intense high, however, the subsequent highs are less intense and of shorter duration and associated with an increasing sense of unhappiness (in medical terms, dysphoria).[198] The dysphoria resulting from frequent use causes wild mood swings.[199] This state in turn reinforces the desire to use crack again to escape the unhappiness.[200] As use continues, a well-defined cocaine withdrawal depression develops.[201] As a result, the crack addict is forced back to the drug to relieve his or her depression.[202]

Crack's reinforcing effect is stronger than that for sniffing cocaine powder or chewing coca leaves simply because of the quickness and strength of its effect. Some experts estimate that a user has a fifty times greater risk of addiction when inhaling crack vapors than when snorting cocaine powder.[203] Moreover, crack users themselves admit that it is more addictive than powder cocaine. For instance, in her testimony before Congress, Judge Tacha related the following stories of two crack offenders:

> Recently, a Judge colleague of mine sent me transcripts of two sentencing hearings involving crack cocaine offenders. In both cases, despite histories of powder cocaine use, the college-educated defendants were productive members of society. All of that changed, however, when the defendants began using crack. As one defendant reiterated to the Judge, he and many of his friends had snorted powder cocaine infrequently over several years without the drug significantly affecting their lives. In contrast, reviewing his own experience as well as the experiences of the numerous individuals the defendant knew who had tried smoking crack, the defendant was aware of only one individual who had *not* become addicted to crack after smoking the drug and whose life had *not* been devastated by its use.[204]

Intravenous cocaine injection or the smoking of coca paste may have a comparable reinforcing effect because they also reach the brain quickly. These methods of administration are not, however, in wide use in the United States.

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194. Hatsukami & Fischman, *supra* note 169, at 1582–83.
195. Allen, *supra* note 149, at 17.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *See "Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 99th Cong., 2d Sess. 88 (1986) (testimony of Robert Byck, M.D., Professor of Psychiatry and Pharmacology, Yale University School of Medicine) [hereinafter *"Crack" Cocaine Hearing*].
204. *Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. 6 (1995) (testimony of the Honorable Deanell Reece Tacha, United States Sentencing Commission) (emphasis in original).

Since crack is more addictive than inhaling powder cocaine (the other popular method of use in the United States), it is also more likely to lead to the harmful physical and psychological effects associated with all forms of cocaine use.[205]

IV. CRACK

Crack revolutionized the cocaine trade by providing the consumer with a small, affordable amount of the drug—one vial sells for between ten and twenty dollars—that produces a high that is quicker and more intense than the other forms. The affordability of crack opened up new markets of users, such as juveniles and the poor. For the dealer, crack is a more profitable way to deal cocaine. Whereas a gram of powder has a street value of approximately seventy-five dollars, the same amount yields fifteen vials of crack at ten to twenty dollars per vial thus yielding the dealer at least twice as much money. The manufacture of crack is also a small scale, efficient procedure in which only a kilo or so at a time is converted from hydrochloride to the base, and then broken down into chunks suitable ultimately for the consumer.[206] Dr. Robert Byck, an expert on crack, described the crack market as follows:

> [W]hat we have here is the fast food solution. It is not that McDonald's hamburgers are necessarily better,...it is the fact that they are already prepared, they are ready to go, and they come in a little package. Here suddenly we have cocaine available in a little package, in unit dosage, available at a price that kids can pay initially.[207]

A. The Crack Milieu

Crack has harmful societal effects that are absent from the other forms of cocaine administration—for instance, the "crack house." Crack houses are of two types—fortified and open. Fortified crack houses are characterized by limited buyer-seller interaction, bricked or boarded windows, rear or alley entryways, and slots through which the transaction occurs.[208] They involve a risk of predatory violence among the parties because their familiarity with each other is limited and the conditions favor robbery. Consequently, firearms are commonly present. At one crack house in Trenton, New Jersey, for instance,

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205. Not all medical experts agree that crack is more addictive or more dangerous than powder. For instance, Dr. George Schwartz, an expert in the field of emergency medicine and drug treatment, testified in U.S. v. Maske, 840 F. Supp. 151 (D.D.C. 1993), that "there is no rational basis for distinguishing between powder cocaine and crack cocaine in terms of the addictive potential of these drugs." *Id.* at 155. Dr. Schwartz further testified that he considered powder to be much more dangerous than crack. *Id.* To support his conclusion, he testified that three times as many deaths are reported from the intranasal use of cocaine powder than from the smoking of cocaine base or the injection of cocaine powder. *Id.* at 154. Moreover, he considered significant the 40% incidence of AIDS found in individuals who inject powder cocaine. *Id.* at 155. While Dr. Schwartz conceded that crack may be more psychologically addictive than powder, he asserted that there is no objective scientific evidence to support the conclusion that crack is more physically addictive than powder. *Id.*

206. Cohen, *supra* note 168, at 28.

207. *"Crack" Cocaine Hearing*, *supra* note 203, at 20 (testimony of Robert Byck, M.D., Professor of Psychiatry and Pharmacology, Yale University School of Medicine).

208. Tom Mieczkowski, *The Operational Styles of Crack Houses in Detroit*, *in* DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES 60, 71 (Mario De La Rosa et al. eds., 1990).

there was no furniture, but it was stocked with a sawed-off shotgun, a .38 caliber handgun, nine millimeter handguns, and a machine gun.[209]

Open crack houses permit more interaction between the buyer and seller. The more interactive houses have a shooting or smoking gallery and even rudimentary child care facilities. Even in open crack houses, however, where the buyers and sellers know each other, bodyguards or enforcers patrol the house with shotguns or knives.[210] Some houses provide other goods in addition to crack such as drug paraphernalia, liquor, and other drugs. A relatively new type of open crack house is the "freak house" which first developed in New York City. A freak house is typically a dwelling in which a male crack user permits several homeless, female crack users to reside in exchange for providing sex to the house's male customers. The customers, who may not even be crack users, generally purchase crack cocaine in street-corner markets and exchange it for sex ("freaking"). The proprietor of the house receives sex and crack from the women in his employ, and crack or cash from the customers.[211]

Another problem associated with crack is gang violence. The most notorious gangs currently distributing crack (as well as powder) cocaine are the Jamaican posses, the Crips and the Bloods, Haitian gangs, and Dominican gangs. These gangs are large,[212] well-financed, well-organized and well-connected in their communities. They use violence to enforce gang discipline and to consolidate their market share. Although these gangs initially distributed crack only in large urban areas such as Los Angeles, New York and Miami, they have now established operations nationwide in numerous small and mid-sized cities and towns.[213] The combination of gangs fighting over economic turf, aided by very dangerous weapons, and, in many cases fueled by the violence-stimulation of crack itself, can lead to extreme violence and killing.[214]

Complicating the problem of gang violence is the tendency of crack distribution gangs to recruit children to distribute the crack.[215] The DEA identifies crack cocaine distributors as responsible in large part for the increase

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209. *Hearing Before United States Sentencing Comm'n on Crack Cocaine, supra* note 124, at 19 (testimony of Kevin M. Donnelly, Special Agent, Drug Enforcement Administration).

210. Mieczkowski, *supra* note 208, at 84.

211. Ansley Hamid, *The Developmental Cycle of a Drug Epidemic: The Cocaine Smoking Epidemic of 1981–1991*, 24 J. PSYCHOACTIVE DRUGS 340, 344 (1992).

212. Jamaican posses had 11,000 members in the United States in 1988. *See* U.S. DEP'T OF TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, CARIBBEAN BASED ORGANIZED CRIME 1 (1993).

213. U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMIN., DEA DRUG SITUATION REPORT: CRACK COCAINE 1, 4 (1993) [hereinafter DEA DRUG SITUATION REPORT].

214. Some medical researchers claim that crack has greater violence-stimulating potential than any other abused drug with the possible exception of amphetamines and phencyclidine (PCP). *See* ALLEN & JEKEL, *supra* note 42, at 31 (citing Theo C. Manschrek et al., *Characteristics of Freebase Cocaine Psychosis*, 61 YALE J. BIOLOGY & MED. 115–22 (1988)). This is not, however, a uniformly held view. *See* Jeffrey Fagan, *Intoxication and Aggression*, 13 DRUGS AND CRIME 241, 257 (Michael Tonry & James Q. Wilson eds., 1990) (concluding that, to date, there has been no systematic research linking crack use with psychopharmacologically driven violence).

215. *See Hearing Before United States Sentencing Comm'n on Crack Cocaine, supra* note 124, at 10, 14 (testimony of Jeff L. Tymony, Executive Director, Halfway House for Adults, Wichita, Kansas); *see also* Jeffrey Fagan & Ko-Lin Chin, *Initiation into Crack and Cocaine: A Tale of Two Epidemics*, 16 CONTEMP. DRUG PROBS. 579, 598 (1989); James A. Inciardi, *Trading Sex for Crack Among Juvenile Drug Users: A Research Note*, 16 CONTEMP. DRUG PROBS. 689, 689–90 (1989).

in juvenile involvement in drug trafficking.[216] In addition, arrest data from New York City indicate that, while both powder and crack cocaine dealers are young, crack dealers are younger. Of 339 powder distributors, 29% were 21 years old or younger, and 30% were 22–26 years old. By comparison, of 618 crack dealers, 38% were 21 years old or younger and 30% were 22–26 years old.[217] Crack dealers use juveniles in visible roles—as lookouts, steerers and runners—in the belief that juveniles are more likely to escape detection and prosecution.[218]

B. Crack and Crime: Causality

The views of social scientists regarding the relationship between crack and violence are mixed at best. On the one hand, several studies have found a connection between crack and systemic violence.[219] For instance, in 1988, approximately 60% of drug-related homicides in New York City were related to crack.[220] Researchers have also found that many crack users finance their habit through crime.[221] For instance, one study found that 48% of male crack users and 62% of female crack users committed, on average, one petty property crime per week to support their habit. In addition, 69% of female users were trading sex for money or drugs.[222]

Other social scientists argue, however, that there is no empirical data to support a direct causal relationship between crack and other crimes. They attribute the crime associated with crack to the interaction of the following forces: the immaturity and volatility of the crack market, the ages and types of people attracted to crack distribution, the social and economic disorganization of the nation's inner cities that began in the 1980s, the proliferation of powerful guns, and the spread of cheaper cocaine during the same time period.[223] They also contend that from a historical perspective, the violence associated with

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216. DEA DRUG SITUATION REPORT, *supra* note 213, at 13.

217. *Id.*

218. *Hearing Before United States Sentencing Comm'n on Crack Cocaine*, *supra* note 124, at 136–37 (testimony of Dr. Robert Byck, Professor of Psychiatrics and Pharmocology, Yale University); DEA DRUG SITUATION REPORT, *supra* note 213, at 13.

219. Systemic violence is violence that is associated with an illicit market. *See Hearing Before United States Sentencing Comm'n on Crack Cocaine*, *supra* note 124, at 67 (testimony of Dr. Paul J. Goldstein, Professor of Epidemiology, University of Illinois at Chicago).

220. *See* Paul J. Goldstein et al., *Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis*, 16 CONTEMP. DRUG PROBS. 650, 662–63 (1989); *see also* James A. Inciardi, *The Crack-Violence Connection Within a Population of Hard-Core Adolescent Offenders*, *in* DRUGS AND VIOLENCE: CAUSES, CORRELATES AND CONSEQUENCES 92, 104 (Mario De La Rosa et al. eds., 1990) (those involved in dealing crack cocaine committed significantly more robberies than those who were not so involved); Ko-Lin Chin & Jeffrey Fagan, *Violence as Regulation and Social Control in the Distribution of Crack*, *in* DRUGS AND VIOLENCE: CAUSES, CORRELATES AND CONSEQUENCES 8, 25 (Mario De La Rosa et al. eds., 1990) (violence within new crack selling groups internally to maintain control and externally to maintain selling territory was more likely to characterize unstable new crack markets than more established drug markets and distribution systems).

221. *See* Tom Mieczkowski, *Crack Distribution in Detroit*, 17 CONTEMP. DRUG PROBS. 9, 23 (1990) (61% of crack cocaine dealers in Detroit cited the desire to consume crack as the principal motivation for their crack dealing).

222. James A. Inciardi & Anne E. Pottieger, *Crack-Cocaine Use and Street Crime*, 24 J. DRUG ISSUES 273, 284 (1994).

223. *See Hearing Before United States Sentencing Comm'n on Crack Cocaine*, *supra* note 124, at 59 (testimony of Dr. Steven Belenko, Deputy Director, New York Criminal Justice Agency).

crack is not unique. Systemic violence fluctuates with the phases of an illicit market economy, and is highest when the market is first emerging. For instance, there were also high rates of homicide associated with the powder cocaine market in the late 1970s and early 1980s (when Columbian and Cuban syndicates were at war for control of middle-level distribution), and with the alcohol market during Prohibition in the 1930s. The homicide rates for these drugs declined, however, when the markets matured.[224] The proponents of this view argue by implication that the violence associated with crack will likewise subside when the market matures.

C. Crack Comparatively

Crack is the most dangerous of the cocaine forms for several reasons. First, because it is the most compelling type of cocaine addiction—i.e., the very rapid onset and brief duration of an extreme euphoria keeps the consumer coming back for more—it creates a potentially endless supply of users. Second, the crack trade is difficult for law enforcement agencies to break up because the marketing strategy is low cost, shifting, high volume and operated in large part by adolescents who can easily be replaced. Third, crack preys on the young and the poor, leading them, in many cases, to commit crimes of violence to support their habit. And finally, crack leads to paranoid, disorganized thinking which is a risk to the user and those in his or her vicinity.[225]

V. THE RACIALLY DISPARATE IMPACT AND OTHER FLAWS

From 1986 through 1988, before the full implementation of the federal sentencing guidelines,[226] white, black and Hispanic offenders received similar sentences, on average, in the federal courts. The sentences of those black and white offenders who were not subject to the guidelines were roughly comparable in length: a maximum of 51 months, on average, for whites, and 55 months for blacks. Hispanics were more likely to be imprisoned, but their maximum sentences were identical to those imposed on whites.

After the implementation of the guidelines and the new mandatory minimum statutes, however, the differences in the average sentences imposed on whites, blacks and Hispanics became more pronounced. Sentences received by black and Hispanic federal offenders in guideline cases were harsher, on average, than those imposed on whites. Seventy-eight percent of all black offenders and 85% of Hispanic offenders who were convicted of federal crimes during this period and were subject to the guidelines were sentenced to incarceration, while only 72% of whites received such sentences. Blacks had the

224. *Id.* at 64–65.

225. Cohen, *supra* note 168, at 28–29.

226. Pursuant to the Sentencing Reform Act of 1984, Pub. L. No. 98–473, 98 Stat. 1987, the federal sentencing guidelines became effective for offenses committed after November 1, 1987. In January 1989, the Supreme Court upheld the constitutionality of the Sentencing Commission and the guidelines in Mistretta v. United States, 488 U.S. 361 (1989), and the full, nationwide implementation of the guidelines followed.

longest average prison sentence: 71 months as compared with 50 months for whites and 48 months for Hispanics.[227]

In a Bureau of Justice Statistics study conducted by Douglas McDonald and Kenneth Carlson, the researchers found that the disparate impact could be traced to a specific area of federal criminal law: drug offenses. Drug offenders convicted in federal courts under the guidelines are disproportionately black or Hispanic. For instance, between January 20, 1989, and June 30, 1990, only 40% of white offenders sentenced were convicted of drug offenses, while 49% of blacks and 59% of Hispanics were convicted of such offenses. During the same time period, both the rate and the average length of incarceration for federal drug offenders increased for blacks in comparison to whites: 92% of whites were incarcerated compared with 96% of blacks and 97% of Hispanics.[228] Blacks were also given the longest sentences, averaging 96 months compared with 70 months for whites and 68 months for Hispanics.[229]

The dissimilarities in average sentences given to whites, blacks, and Hispanics convicted of drug trafficking reflected two kinds of differences among offenders. The first was that the proportions of whites, blacks, and Hispanics convicted varied according to the type of drug. Because certain types of drug offenses were more severely punished than others, a predominance of black offenders convicted of those offenses translated into a longer average sentence for all blacks. Second, some of the dissimilarity in sentencing resulted from whites, blacks and Hispanics being punished differently upon conviction for trafficking in the same type of drug.

African-American drug traffickers were punished more severely partly because they were more likely to be convicted of trafficking in cocaine and, to a much lesser degree, in heroin. Both of these offenses were severely punished, compared with the other common type of drug offense—marijuana trafficking. During the January, 1989 to June, 1990 period, 71% of all black drug traffickers prosecuted in the federal courts in guideline cases were convicted of cocaine offenses, compared with only 50% of white drug offenders and 43% of Hispanic offenders. Moreover, blacks outnumbered whites and Hispanics in convictions for heroin trafficking. In contrast, only 3% of all black drug offenders were convicted of marijuana offenses, compared with 19% of all white offenders, and 39% of all Hispanics. Because the average sentences for marijuana trafficking were substantially shorter than for cocaine offenses, the average sentences given to all white and Hispanic traffickers were shorter than for black traffickers.[230]

The different sentences that blacks, whites and Hispanics received can also be explained by the type of cocaine they were convicted of trafficking. For instance, from January 20, 1989, to June 30, 1990, the proportions of whites and blacks receiving a prison sentence for trafficking in powdered cocaine were nearly identical (95% and 96%) as were the average prison terms (71 months and 73 months). What differed noticeably, however, were the proportions of

227. *See* Douglas C. McDonald & Kenneth E. Carlson, *Sentencing in the Federal Courts: Does Race Matter?*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS 1–3 (Dec. 1993).
228. *Id.* at 83.
229. *Id.*
230. *Id.* at 84–88.

whites and blacks convicted of distributing crack. Eighty-two percent of all offenders convicted of crack trafficking were black.[231] Blacks received prison sentences for crack offenses that averaged 140 months, while whites received sentences that averaged 130 months, and Hispanics received sentences that averaged 162 months.[232] By 1993, blacks accounted for 88.3% of crack convictions.[233]

Because the imprisonment rate for crack was 99%, the overall imprisonment rate for blacks convicted of trafficking in all kinds of cocaine was higher than for whites. And because the sentences for crack offenses were approximately twice as long as those given for powder cocaine, the average sentences given to all black cocaine offenders were longer than those given to whites.[234]

McDonald and Carlson concluded that the disparately harsh punishment of blacks under the guidelines was caused largely by the mandatory minimum penalties for drug offenses, and more specifically, by the 100:1 powder/crack ratio:

> The single most important reason for the longer average sentences given to blacks was their predominance in the crack trade (or, more precisely, among those brought into Federal court for trafficking in crack). Because they were disproportionately convicted of a crime that Congress had chosen to penalize especially harshly, the average sentences of all black traffickers were longer than those imposed on whites.[235]

Excluding offenders convicted of trafficking in powder or crack cocaine from the total number of offenders sentenced under the guidelines, the remaining difference in the length of sentences imposed on blacks and whites was a "residual" seven months.[236] McDonald and Carlson concluded from this that, if the law were changed so that crack and powder cocaine traffickers were sentenced identically for the same weight of cocaine, the "black\white difference in sentences for cocaine trafficking would not only evaporate but would slightly reverse."[237] They also noted that, if, as an alternative policy change, the mandatory minimum sentences for cocaine trafficking were to remain unchanged, but the guidelines were to be revised so as to require no more than the mandatory minimum specified by the law, the observed 30% longer sentence for black cocaine traffickers would be reduced to an 11% longer sentence.[238]

A. Police and Prosecutorial Discretion

Another explanation for the disparate impact has to do with police and prosecutorial discretion. According to one study which investigated the racial

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231. *Id.* at 90–93.
232. *Id.* at 93. In the same time period, the sentences given to crack offenders averaged 141 months compared to 79 months for powder cocaine offenders. While those convicted of crack offenses were overwhelmingly black, only 29% of cocaine offenders during this period were black (41% white and 30% Hispanic). *Id.* at 94–110.
233. U.S. SENTENCING COMM'N, *supra* note 4, at 161, tbl. 13.
234. McDonald & Carlson, *supra* note 227, at 93.
235. *Id.* at 110.
236. *Id.* at 2.
237. *Id.*
238. *Id.*

disparity caused by the 100:1 ratio and the mandatory minimum sentencing statutes, blacks made up 42% of all drug arrests in 1991, even though they comprised only 12% of the population. In 1992, blacks were four times as likely as whites to be arrested on drug charges, even though there were only 1.6 million black drug users and 8.7 million white drug users.[239]

Judge Clyde S. Cahill, of the United States District Court for the Eastern District of Missouri, found that prosecutorial and police discretion were directly accountable for the disparate impact in crack cocaine cases in the Eastern District of Missouri. "The law enforcement practices, charging policies, and sentencing departure decisions by prosecutors constitute major contributing factors which have escalated the disparate outcome."[240] Out of 57 crack convictions in the Eastern District of Missouri during the 1988–1992 time period, 56 of the defendants were black, and one was described as white/Hispanic. Thus, 98.2% of defendants convicted of crack cocaine charges in the Eastern District of Missouri during this period were black.[241] Judge Cahill also cited national statistics indicating that 92.6% of the defendants convicted of crack violations during 1992 were black, while only 4.7% of the defendants were white.[242]

Judge Cahill found evidence of prosecutorial discrimination in two facts. First, he cited statistics compiled by the National Institute on Drug Abuse indicating that only 26.2% (990,000) of the people who use crack are black while 64.4% (2.4 million) are white and 9.2% (348,000) are Hispanic. He contrasted this with the fact that 98.2% of the people convicted of crack offenses in the Eastern District of Missouri were black and concluded that the radical difference between the two percentages could only be explained by law enforcement officers and prosecutors targeting black crack traffickers for arrest and prosecution.[243]

Second, Judge Cahill observed that, although Congress expressed a clear intent, in passing the 1986 Act, to target "kingpins" and "high level traffickers," national and local statistical data demonstrate that prosecutors and law enforcement officials are not targeting the upper echelons of the drug trade for prosecution. As evidence of this point, Judge Cahill noted that powder cocaine is usually imported into the United States in large quantities by boats, trucks, and planes; and that drug kingpins transport cocaine in brick-like packages referred to as "kilos" that weigh 1000 grams each. Yet, he observed, fifty of the fifty-seven people convicted of crack offenses in the Eastern District of Missouri in the 1988–92 period possessed a total of less than 2000 grams, for

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239. *See* Sam V. Meddis, *Is the Drug War Racist? Disparities Suggest that the Answer is Yes*, USA TODAY, July 23, 1993, at A1.

240. *See* United States v. Clary, 846 F. Supp. 768, 787 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

241. *Clary*, 846 F. Supp., at 786. There is a slight discrepancy in the conviction numbers that Judge Cahill cites. In one part of the opinion he states that 55 of the 57 defendants were black, one was Hispanic, and one was white. *Id.* at 788. This would yield a percentage of 96.49% black defendants. In another part of the opinion, however, he states that 56 of the defendants were black, and one was white/Hispanic. *Id.* at 786 n.53. As noted, this translates to 98.2% black defendants. In any event, the difference in percentages is minuscule.

242. *Id.* at 786 (citing 1992 U.S. Sentencing Commission representative sample of all drug cases received for the fiscal year 1992; and, U.S. Sentencing Commission, Monitoring Data Files (April 1–July 31, 1992)).

243. *Id.* at 787 n.68, 790.

an average of less than forty grams each. Thus, he concluded, prosecutors and law enforcement officials were more focused on the race of particular crack offenders than the amount of crack they possessed.[244]

Judge Cahill is not alone. Other commentators have argued that blacks are being targeted by law enforcement officials and prosecutors.[245] Law enforcement officials respond, however, that "blacks are arrested more frequently because drug use often is easier to spot in the black community, with dealing on urban street corners and in open-air markets rather than behind closed doors."[246] While this may be a sufficient explanation for the racial disparity, however, it does not address the criticism that federal law enforcement officials are not living up to the statutory mandate to prosecute kingpins and other high-level dealers; to attack the crack problem at the top where it matters, not at the bottom.

Judge Gerald Heaney has observed that some law enforcement officials exacerbate the prosecutorial imbalance towards low-level dealers by engaging in sentencing entrapment: persuading suspects to buy or sell drugs in amounts large enough to trigger statutory minimum penalties even if the suspect is unable to afford or acquire the trigger quantity.[247] Similarly, agents may postpone arresting suspects until they have bought or sold aggregate drug quantities sufficient to trigger a statutory minimum penalty. Moreover, because such investigative methods are used by more experienced drug enforcement agents who are familiar with statutory and guidelines sentencing issues, similar drug offenders may receive divergent sentences merely because of differences in the levels of sophistication of the agents who arrested them.[248]

An additional source of disparity is the ability of law enforcement officials to prosecute drug offenders under either federal or state law. Both state and federal jurisdiction exist over the majority of drug arrests because

244. *Id.* at 788–90. Judge Cahill also noted that nine of the 57 crack offenders convicted in the Eastern District of Missouri were arrested by state police officers, but then prosecuted in federal court (where the penalty was more severe), even though they each had only "tiny quantities" of crack. Eight of the nine were black. Judge Cahill concluded that, "[e]ven a disinterested inquirer would wonder why the tremendous expense of federal prosecution and subsequent incarceration should be wasted on relatively minor offenders." *Id.* at 788.

245. *See* Wytsma, *supra* note 132, at 483–84 ("In the years since the enactment of the crack statutes it has become clear that minorities, more specifically young, black males, are being targeted by police officers and prosecutors. These law enforcement officers and prosecutors have used their power and discretion to exacerbate sentencing laws that were biased at their conception."); *see also* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 203 (1991) ("[L]aw enforcement personnel may use race as 'an independently significant, if not determinative, factor in deciding whom to follow, detain, search, or arrest.'" (citation omitted)); Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 234 (1983) ("Although the DEA has not committed its drug courier profile to writing, the profile clearly contains a racial component.").

246. Meddis, *supra* note 239, at A1.

247. Heaney, *supra* note 245, at 195–97; *see also* United States v. Shepherd, 857 F. Supp. 105, 106 (D.D.C. 1994) (undercover agent, who testified that it was a "policy" in his office to request the conversion of powder to crack in order to raise the defendant's sentencing exposure, refused to buy cocaine in powder form until it was converted to crack, whereupon the defendant cooked the powder in a microwave for a few minutes, thus raising his guidelines range from 60 months to 120–135 months); United States v. Walls, 841 F. Supp. 24, 26 (D.D.C. 1994) (agent testified at trial that he specifically demanded that powder cocaine be converted into crack because he knew that crack carried heavier guidelines sentence than powder).

248. Heaney, *supra* note 245, at 195–97.

they typically involve cooperation between local police agencies and federal law enforcement agencies. Since federal prosecutions are usually more likely to result in conviction, and carry a more severe punishment, drug offenders are more frequently prosecuted in federal courts than in state courts.[249]

Neither sentencing entrapment nor the tendency to favor federal over state prosecution by themselves would lead to disparate results. They are, however, coupled with the apparent reality that race is an influential factor in federal charging decisions. In a study of crack charging practices in Los Angeles, for instance, researchers Richard Berk and Alec Campbell found that, over a four-year period, blacks constituted 58% of those arrested for selling crack but 83% of those charged at the federal level. Whites represented 3% of crack arrests, but no federal indictments were returned against them.[250] Indeed, courts have actually dismissed indictments as a result of finding that prosecutors had selectively prosecuted the defendants.[251]

Since federal prosecutions and incarceration are expensive, some commentators have concluded that federal prosecutors focus on low-level offenders in order to create the appearance that the War on Drugs is succeeding. "[A]lthough it is clear that whites sell most of the nation's cocaine and account for 80% of its consumers, it is blacks and other minorities who continue to fill up America's courtrooms and jails, largely because, in a political climate that demands that something be done, they are the easiest people to arrest."[252] In any event, it is apparent that the 100:1 ratio is not achieving its stated purpose of incarcerating major drug traffickers.[253]

B. The Ineffectiveness of the 100:1 Ratio in Targeting Dangerous Offenders

The federal sentencing guidelines were created to permit more sophisticated, calibrated gradations among offenses and offenders than are possible in a broad statutory system.[254] When Congress enacted the 100:1 ratio, the sentencing guideline system was not yet in place. Both Congress in passing

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249. Wytsma, *supra* note 132, at 480; *see also* Heaney, *supra* note 245, at 197 ("Because some state laws provide drug penalties less severe than those mandated by federal statutes and the guidelines for the same underlying conduct, the choice between federal and state prosecution is a significant factor in the sentence a defendant ultimately will receive if convicted.").

250. *See* Richard Berk & Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 FED. SENT. REP., July–Aug. 1993, at 36 (study revealed that not a single federal indictment was returned against a white defendant during the four-year period between 1988 and 1992).

251. *See* United States v. Armstrong, 48 F.3d 1508, 1520 (9th Cir. 1995) (affirming district court's dismissal of five crack distribution indictments because there was a colorable basis for concluding that selective prosecution had occurred, based upon a study conducted by Federal Public Defender's Office for the Central District of California, showing that twenty-four out of twenty-four crack cases closed by the Office in 1991 involved black defendants), *rev'd*, 116 S. Ct. 1480 (1996). Although the Supreme Court reversed, finding that the study did not show the existence of the essential elements of a selective-prosecution claim, it upheld the right of defendants to make selective-prosecution defenses in cases in which they can prove that the federal prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose. *Id.* at 1487.

252. *See* Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, at A1.

253. *See* United States v. Willis, 967 F.2d 1220, 1227 (8th Cir. 1992) (Heaney, J., concurring) (finding that there is no evidence that current crack policy deters drug use or distribution since "[a]s one small time crack dealer is confined another takes his place.").

254. Schulhofer, *supra* note 109, at 851–60.

mandatory minimum penalty statutes and the Sentencing Commission in its guidelines have targeted dangerous offenders for more severe sentences. The result is a complicated system of overlapping statutes and guidelines which use different criteria to target the most dangerous offenders. The 100:1 ratio, which is contained in both the mandatory minimum statutes and the guidelines, uses only the type of cocaine involved in a particular offense to target the most dangerous offenders.

Statistics show, however, that the form of cocaine involved in an offense is not as accurate an index of a defendant's dangerousness, as reflected in such characteristics as criminal history and whether he or she possessed a weapon, as the guideline enhancements designed explicitly to capture those characteristics.[255] Thus, while more crack offenders have prior records than do other drug offenders, 44% have either minor records or none at all.[256] Moreover, while more crack offenders possess a weapon in connection with their offense than other drug offenders, 72% do not.[257] The non-crack defendants who receive enhanced sentences for dangerousness under the guidelines actually have more serious prior records or show other evidence of greater risk than do defendants punished by the 100:1 ratio.

Punishing crack defendants based solely on the drug type and amount results in a problem that is common to all mandatory minimum sentences—unwarranted uniformity.[258] Offenders who differ in terms of danger to the community, culpability, or in other ways relevant to the purposes of sentencing but not listed in the statute, are treated the same. This "tariff" approach to sentencing was rejected historically because too many important distinctions among defendants are obscured by the single, flat punishment criterion.[259]

Furthermore, if the purpose of the 100:1 ratio is to exact the harshest punishment on "serious" or "major" drug traffickers in order to dissuade them from doing business, statistics show that it is not accomplishing its purpose. Among cocaine traffickers in general, relatively few (5.5% for crack defendants and 9.2% for powder defendants) are classified as occupying high level functions within their particular drug trafficking organizations.[260] The majority (59.6%) of crack defendants are street-level, while only

255. U.S. SENTENCING COMM'N, *supra* note 4, at 166.

256. Crack defendants are, however, the most likely to score in the career offender range (6.3%). In addition, crack defendants are more likely to have a recent criminal record, with 19.2% under a pre-existing sentence at the time of their most recent federal offense. Crack defendants are also most likely (4.2% compared to 1.7% for powder cocaine defendants) to have committed the instant offense within two years of release from imprisonment for a prior offense. Finally, 14.5% of crack cocaine defendants (compared to 6.6% of powder cocaine defendants) are both under a pre-existing sentence when they commit their offense and commit the new offense within two years of release from imprisonment for a prior offense. *See* U.S. SENTENCING COMM'N, *supra* note 4, at 164–65, tbls. 14, 15.

257. The guideline enhancement for possession of a weapon under § 2D1.1(b)(1) is applied to 13.9% of crack defendants, 13.1% of methamphetamine defendants, and 8.8% of powder cocaine defendants. The charge for possession of a weapon under 18 U.S.C. § 924(c) is applied in 14.0% of crack cases, 9.9% of methamphetamine cases, and 6.3% of powder cocaine cases. *See id.* at 167, tbl. 16.

258. Schulhofer, *supra* note 109, at 851–56.

259. *See generally* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM (1991).

260. *See* U.S. SENTENCING COMM'N, *supra* note 4, at 172, tbl. 18.

approximately one-third (31.2%) of powder defendants are street-level.[261] For methamphetamine, however, 22.6% of defendants are high-level dealers, 53.2% are mid-level dealers, and only 21% are street-level dealers.[262]

The 100:1 ratio and the corresponding guideline levels for crack and powder are structured in such a way as to target low-level dealers which is inconsistent with the legislative intent of the 1986 Act. For instance, a marijuana defendant with an offense level of 14 would have been dealing drugs worth $42,000, and a powder cocaine defendant at the same level would have been dealing cocaine worth about $2675. A crack dealer, on the other hand, would have been dealing only $29 worth of crack. Moreover, at offense level 32, at which first offenders receive more than ten years incarceration, dealers of drugs other than crack would have been dealing between $500,000 and $8 million worth of drugs, while crack defendants would have been dealing roughly $5750 worth of the drug.

Another way of illustrating the problem is that five grams of crack, which triggers a five-year mandatory minimum sentence, represents only 10–50 doses with an average retail price of $225–$750 for the total five grams. In contrast, a powder cocaine defendant must traffic in 500 grams of powder, representing 2500–5000 doses with an average retail price of $32,500–$50,000, in order to receive the same five-year sentence. The 500 grams of cocaine that can send one powder defendant to prison for five years can be distributed to eighty-nine street dealers who, if they converted it to crack, could make enough crack to trigger the five year mandatory minimum for each defendant.[263] The result is that local-level crack dealers get average sentences quite similar to intrastate and interstate powder cocaine dealers; and both intra- and interstate crack dealers get average sentences that are longer than international powder cocaine dealers.[264]

The most ironic effect of the 100:1 ratio involves those cases in which a retail crack dealer receives a longer sentence than the wholesale powder distributor who supplied him the powder cocaine from which the crack was produced. A recent case is illustrative. Two defendants purchased approximately 255 grams of powder cocaine from their supplier, returned home, and cooked the powder, producing 88 grams of crack cocaine. Expecting the normal yield of approximately 200 grams of crack, the defendants were unhappy and called their supplier to complain. The supplier agreed to replace the 255 grams of powder at no additional cost. The defendants returned to the supplier with the 88 grams of crack in their possession and were arrested before they could complete the transaction.

At sentencing, the supplier, who had a criminal history category of I, had a guideline range of 33 to 41 months. The two defendants, also first-time offenders, each had a guideline range of 121 to 151 months. Moreover, the two defendants were subject to the statutory minimum of ten years while the supplier was not.[265] The results in this case are not atypical of the inversion of

261. *Id.*
262. *Id.*
263. *Id.* at 175.
264. *Id.* at 174–75.
265. *Id.* at 174.

penalties between high-level and low-level cocaine dealers that are caused by the 100:1 ratio.

VI. THE PROPOSED AMENDMENTS

The Sentencing Commission's most significant proposed amendment was "Amendment Five" which would have changed the structure of the Drug Quantity Table contained in Section 2D1.1(c) of the guidelines. The Drug Quantity Table is divided into fourteen base offense levels from 38 (highest) to 12 (lowest). The proscribed drugs are heroin, cocaine, crack, PCP, methamphetamine, LSD, marijuana, and hashish, among others. Each base offense level corresponds to a certain amount of each proscribed drug. For instance, base offense level 38 is triggered by offenses involving thirty kilograms of heroin, thirty kilograms of methamphetamine,[266] 150 kilograms of cocaine, and 1.5 kilograms of crack. At each level, the amount of crack necessary to trigger the statute is one hundred times less than the corresponding amount of powder cocaine. Hence, the 100:1 ratio.

Amendment Five would have simply deleted crack from the Drug Quantity Table, thereby treating crack and powder equally under the guidelines. The Commission clarified this point by stating, at the very end of the proposed amended Drug Quantity Table, that "'[c]ocaine,' for the purposes of this guideline, includes cocaine hydrochloride, cocaine base, and crack cocaine."[267]

Amendment Five also contained a proposed amendment to Section 2D1.1(b)(1). Section 2D1.1(b)(1) provides for a two-level enhancement if the defendant possessed a dangerous weapon. The Sentencing Commission's proposed amendment would have increased the base offense level by six levels if the defendant discharged a firearm; by four levels if the defendant brandished or otherwise used a dangerous weapon (including a firearm); and by three levels if the defendant possessed a dangerous weapon (including a firearm). In addition, the proposed amendment would have added a new application note listing bodily injury to any victim as grounds for an upward departure. The Commission justified the proposed change from a 100:1 to a 1:1 ratio by arguing that many of the harms associated with crack offenses are already captured by other guideline sentence enhancements. For example, the guidelines ensure lengthier imprisonment for organizers, leaders and managers of drug distribution offenses (3B1.1), for sale of controlled substances to juveniles or pregnant women (2D1.2), for sale of controlled substances in protected locations (2D1.2), for use of juveniles in controlled substance offenses (2D1.2), and for repeat offenders (Chapter 4). Thus, to the extent that these other guideline provisions take into account the increased harms associated with crack offenses, the Commission thought that punishing crack more severely than powder was akin to double-counting.[268]

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266. The Guidelines distinguish between methamphetamine and methamphetamine (actual). Methamphetamine (actual) refers to the weight of the methamphetamine itself contained in the mixture or substance. For example, a mixture weighing ten grams containing methamphetamine at 50% purity contains five grams of methamphetamine (actual).

267. *See* 60 Fed. Reg., 25,074, 25,075 (1995).

268. *Id.* at 25,076.

Recognizing that the changes proposed in Amendment Five would fall short of their purpose if the statutes governing such offenses remained unaltered, the Commission also sent a piece of legislation to Congress, "The Cocaine Adjustment Act of 1995," that would have eliminated the references to cocaine base in Sections 841 and 960 of Title 21 of the United States Code. If such changes had been made, the ten and twenty year mandatory minimums contained in these statutes would have been triggered when the quantity amounts for cocaine (crack or powder) were met. The proposed legislation also would have changed Section 844(a) by eliminating the sentence providing special treatment for crack possession.[269]

VII. THE CORRECT RATIO

In February 1995, the United States Sentencing Commission sent a voluminous report, "Cocaine and Federal Sentencing Policy," to Congress. The report recommended that Congress abolish the 100:1 crack/powder ratio, finding that its disparate impact on African-Americans was unjustifiable. The report and recommendation sparked an emotional and partisan debate in Congress about how best to punish and deter those who traffick in powder and in crack cocaine. The debate culminated on October 18, 1995, when the House of Representatives voted 332 to 83 to reject the Commission's recommendation to abolish the 100:1 ratio (the Senate had earlier voted to reject the recommendation on September 29, 1995). Congress' rejection of the Sentencing Commission's recommendation touched off riots at federal prisons in Alabama, Illinois, Pennsylvania, and Tennessee. The rioting began on October 19th in a cafeteria at the Talladega federal prison in Alabama. In subsequent days, inmates at federal institutions in the four states, many of whom were serving time for crack offenses, set fire to mattresses, broke windows, threw chairs and hurled baseball bats in protest of Congress' refusal to abolish the 100:1 ratio.[270]

One could argue that the intensive debate and study of the issue, occasioned by the Sentencing Commission's report, took place eight years too late; that it should have occurred before Congress enacted the 100:1 ratio in the first place. The reason it did not, however, is that, when the legislation was enacted in 1986, most members of Congress felt that the country was under seige by a crack epidemic. They responded by bypassing the committee process—the part of the legislative process devoted to studying the viability and potential effects of legislation—and enacting the 1986 Act at an almost unprecedented speed. As a result, Congress gave no consideration to what ratio would properly account for the characteristics that make crack more dangerous than powder. Indeed, all available evidence indicates that the 100:1 ratio was chosen randomly. Thus, it should not have been surprising when the 100:1 ratio came under fire for lacking a rational basis, and for having an unjust, disparate impact on African-Americans.

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269. 57 Crim. L. Rep. (BNA) 2127, 2128 (May 31, 1995).

270. *See* David Johnston, *Federal Prisons Lock Thousands in Cells After Violence in 4 States*, N.Y. TIMES, Oct. 22, 1995, at 1:1. According to Juanita Hodges, president of Seekers of Justice, Equality and Truth, a prisoner advocate group, the inmates "were watching [the Congressional vote] on C-Span.... All during the Congressional debate, I was receiving telephone calls from brothers in prison who were watching developments. The violence was because of Congress's vote." *See* Ronald Smothers, *Wave of Prison Uprisings Provokes Debate on Crack*, N.Y. TIMES, Oct. 24, 1995, at A18.

A. Resistance to the 100:1 Ratio in the African-American Community

In the eight years between the passage of the 100:1 ratio and the Sentencing Commission's report that called for its abolition, it became apparent that, even given crack's greater potential for harm, the 100:1 ratio was imposing unduly harsh penalties on minority crack users. Indeed, Congress ordered the Sentencing Commission to study the issue partly in response to the increasingly vocal outrage expressed by African-American leaders regarding the harsh penalties that the 100:1 ratio imposed on their community. For instance, referring to the 100:1 ratio during a speech at the October 16, 1995 "Million Man March" in Washington, D.C., the Reverend Jesse Jackson said, "It's racist, it's ungodly, it must change."[271] This feeling was substantiated by Justice Department statistics showing that, in 1993, nearly 90% of the people convicted of crack offenses in the United States were African-American. Complicating the issue were studies indicating that certain law enforcement officers and prosecutors contributed to the disparate impact by targeting African-Americans for arrest and prosecution in crack cases.[272]

While opinion in the African-American community seems to be overwhelmingly in favor of abolishing the 100:1 ratio on the basis that it has a disparate impact, it is not uniformly so. Some African-American commentators, whom Professor Paul Butler has labelled "law enforcement enthusiasts,"[273] have taken a different view, choosing to focus on how crack itself damages the African-American community rather than how federal sentencing policy punishes crack offenders. They believe that the harm that crack does to the law abiding members of the black community, who make up the vast majority, is so extreme that crack offenders deserve the stiff sentences they receive, regardless of whether white powder cocaine offenders receive equally harsh sentences.

One of the leading proponents of this view is Professor Randall Kennedy of Harvard Law School. In a recent article, Professor Kennedy argued that the Minnesota Supreme Court's decision in *State v. Russell*,[274] in which the court invalidated a statute that punished possession of three grams of crack with twenty years incarceration, but an equal amount of powder cocaine with only five years incarceration, applied the wrong constitutional standard for determining what counts as impermissible state action.[275] Professor Kennedy noted that, although the court purported to apply a rational basis test, in reality it was concerned that the statute's penological burden fell almost exclusively on African-Americans and thus applied a strict scrutiny standard "with such intense hostility that [the statute's] invalidation [was] virtually preordained."[276]

Professor Kennedy also took issue with the court's observation that the statute imposed a substantially disproportionate burden on African-Americans,

271. *See* Francis X. Clines, *After March, House Votes on Emotional Racial Issue*, N.Y. TIMES, Oct. 19, 1995, at B12.

272. *See* Berk & Campbell, *supra* note 250.

273. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 697 (1995).

274. 477 N.W.2d 886 (Minn. 1992).

275. *See* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994).

276. *Id.* at 1265 (citation omitted).

finding it simplistic: "Assuming that one believes in criminalizing the distribution of crack cocaine, punishing this conduct is a public good. It is a 'burden' on those who are convicted of engaging in this conduct. But it is presumably a benefit for the great mass of law-abiding people."[277] He also cautioned against ascribing only one set of concerns to the African-American community:

> Finally, to return to the point of departure—the intersection of state crime control policy and racial politics—it is worth noting that, to an increasing extent, across the political spectrum and within black communities, priority of sympathetic identification is flowing to victims as opposed to perpetrators of crime. Sometimes people with these sentiments become inhibited when they confront the paradox that increasing the extent and severity of state crime control policy to protect law-abiding blacks will result in higher rates of incarceration and heavier punishments for black perpetrators, as most of those who commit crimes against blacks are themselves black. Perhaps, however, they will come to accept that [crack/powder] disparities like those in *Russell* may be the mark, not of a white-dominated state apparatus 'discriminating' against blacks, but instead, of a state apparatus responding sensibly to the desires of law-abiding people—including the great mass of black communities—for protection against criminals preying upon them.[278]

Other African-American legal scholars have referred to this school of thought as the "politics of distinction." Professor Regina Austin describes it as follows:

> According to the politics of distinction, little enough attention is being paid to the law-abiding people who are the lawbreakers' victims. Drive-by shootings and random street crime have replaced lynchings as a source of intimidation, *and the 'culture of terror' practiced by armed crack dealers and warring adolescents has turned them into the urban equivalents of the Ku Klux Klan.* Cutting the lawbreakers loose, so to speak, by dismissing them as aberrations and excluding them from the orbit of our concern to concentrate on the innocent is a wise use of political resources.[279]

The politics of distinction have also found voice outside the academy. For instance, Bill Johnson, an editorial writer for the Detroit News, took issue with Jesse Jackson's opposition to the 100:1 ratio. After noting that Jackson had urged rioting inmates at federal prisons to show restraint despite their anger over the "racist sentencing structure," Johnson responded as follows:

> [T]hat admonition raises questions about what constituency Jackson represents...black communities ought to be applauding Congress for not lowering penalties for crack cocaine possession.... Crack, more than any other illicit drug, is associated with violent crime. Many young victims of crime are black men caught up in the epidemic of crack cocaine use. Since 1985, there has been an upsurge in the number of crack-addicted babies. The pervasiveness of the drug scourge in the black community doesn't lend itself to the concern that the drug of choice for whites doesn't carry as severe a sentence as the drug of choice for blacks.[280]

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277. *Id.* at 1266–67 (citation omitted).
278. *Id.* at 1278 (citation omitted).
279. *See* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772–73 (1992) (citation omitted) (emphasis added).
280. *See* Bill Johnson, *Reducing Crack Sentences Hurts Blacks*, DETROIT NEWS, Oct. 27, 1995, at A8.

This school of thought has also found its way into popular culture. For instance, in the 1986 film, *New Jack City*, a biblical morality tale by the African-American filmmaker Mario Van Peebles, a wicked, amoral kingpin crack dealer, Nino Brown, preys upon and destroys the Harlem community in which he lives with impunity from the secular justice system, until one of his victims takes matters into his own hands and kills him. The film is a dramatic portrayal of all the personal and social harms caused by crack as the Sentencing Commission's report documents.

As Brown ruthlessly rises to the top of a crack distribution empire, the "CMB," he leaves in his wake a neighborhood damaged by gang-related turf wars, and depleted by the loss of addicted young men and women who have traded their potential, and their bodies for crack. In one of the last scenes in the film, an undercover cop, Scottie Appleton, played by the popular rap artist, Ice T, has finally apprehended Nino Brown, and he desperately wants to kill him as revenge for Brown's murder of Appleton's mother many years earlier. A crowd of people from the neighborhood, whose anger and resentment towards Brown have built up over the years, urge Appleton to kill him. Appleton is persuaded, however, by his partner, Paretti, not to resort to vigilante justice. Paretti assures Appleton that Brown will be convicted and imprisoned.

In the middle of Brown's trial, however, he pleads guilty and, in exchange for cooperating with the government, receives a sentence of three-to-twelve years with eligibility for parole after a year. In the last scene, as Brown is leaving the courtroom, taunting Appleton that he will be back on the streets in a year, a Prophet-like character, known simply as the Old Man, who had earlier accused Brown of committing genocide against his own people, shoots and kills him in the atrium of the courthouse. The film is, of course, popular entertainment and does not represent a policy statement, but I believe it represents a general feeling in many African-American communities that crack is destroying them.[281] When coupled with the outrage that many African-American leaders have expressed at the irrationality and inequities of the 100:1 ratio, however, it adds up to a somewhat ambivalent attitude towards the issue: crack cannot be tolerated, but then again neither can the effects of the 100:1 ratio.

White commentators have also argued that the 100:1 ratio protects the black community. Most notably, during the recent House debate regarding the Sentencing Commission's recommendation, Representative E. Clay Shaw, a Republican from Florida and one of the sponsors of the 1986 Act, argued in favor of rejecting the recommendation. His argument was that African-Americans living in crack-blighted neighborhoods want to be protected from crack dealers:

> [I]n Dade County, in Broward County, and Palm Beach County that I represent, and as a matter of fact right here in this Nation's Capital in the minority areas, they are saying come in and arrest the drug traffickers, get them out of our neighborhood. Put them in jail and throw the key away.
>
> That is the voice of America. That is the voice of the minorities in the areas that are responsible who want to get their areas up out of poverty, get out of the gutter, get the problems out of their

281. The fact that Mario Van Peebles portrayed crack as extremely harmful to the African-American community in *New Jack City* does not mean that he supports the 100:1 ratio. To my knowledge, Mr. Van Peebles has not taken part in the recent debate regarding the issue.

> neighborhoods and get the crimes out of the streets so again they can walk their streets and sit on their front porch and they can enjoy life.[282]

Unfortunately, given the racial angle of the crack/powder debate, viewpoints such as those expressed by Representative Shaw and Professor Goldsmith, although sincere, can be criticized as paternalistic. Such a criticism was put most succinctly by Representative Maxine Waters, who responded to Representative Shaw's argument as follows:

> I do not want [Representative Shaw] to ever believe that he cares more about my community than I do. I do not want the gentleman to think that somehow his policies and his beliefs are right for my community. I would like the gentleman to ask me sometime, and ask us sometimes, those who work in those communities.
>
> Mr. Speaker, I tell the gentleman, no black leader has said to him: Lock up our kids and have this disparity in law. Nobody said that to the gentleman[283]
>
> ....
>
> [The 100:1 ratio] is racist, because their little white sons are not getting caught up in the system. They are not targeted. Our children are.[284]

B. Resistance to the 100:1 Ratio by Federal Judges, Prosecutors, and Juries

It is not just African-American citizens and legislators who feel that the 100:1 ratio is unfair. Many federal judges, whose role it is to implement it, have expressed dismay at its results. Indeed, this discontent reaches to the very top of the American judiciary. Justice Anthony Kennedy, who was appointed by President Ronald Reagan, has criticized the 100:1 ratio as unfair. Testifying at a House Appropriations Subcommittee hearing on the Supreme Court budget, Justice Kennedy stated that "I think I am in agreement with most judges in the federal system that mandatory minimums are an imprudent, unwise and often unjust mechanism for sentencing.... I simply do not see how Congress can be satisfied with the results of mandatory minimums for possession of crack cocaine."[285]

Because many judges believe the 100:1 ratio is unjust, they have looked for ways of avoiding its application. One such method is through the exercise of their discretion to accept or reject plea agreements between defendants and the government.[286] For instance, in one case, a street-level crack dealer and a drug kingpin were both convicted of crack trafficking, however, as a result of the

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282. *See* 141 CONG. REC. H10,262 (daily ed. Oct. 18, 1995) (remarks of Rep. Shaw). Representative Shaw's remarks were echoed by Professor Michael Goldsmith, one of the three Sentencing Commissioners who was opposed to abolishing the 100:1 ratio. In explaining why he thought some heightened ratio was necessary, Professor Goldsmith wrote that "the crack trade...has been dominated by African-American retailers, *who in turn, have devastated many inner-city, economically disadvantaged African-American communities throughout the country.*" *See View of Commissioner Goldsmith Dissenting, in Part, from Amendment Five and Related Legislative Recommendation*, 57 Crim. L. Rep. (BNA) 2127, 2133 (May 31, 1995) (emphasis in original).

283. *See* 141 CONG. REC. H10,262 (daily ed. Oct. 18, 1995) (statement of Rep. Waters).

284. *Id.* at H10,277.

285. *See Justice Kennedy Calls Mandatory Federal Sentences Unwise, Often Unfair*, WASH. POST, Mar. 10, 1994, at A15.

286. *See* FED. R. CRIM. P. 11.

kingpin's cooperation in the prosecution of other crack traffickers, the government recommended that he serve only a fourteen-year sentence, while recommending a thirty-year sentence for the street dealer. Judge James Carrigan of the United States District Court for the District of Colorado, rejected the Government's recommendation based upon the unjustified disparity in the sentences.[287]

Other judges, their hands tied by the guidelines or precedent, have not been able to rectify the perceived injustice, but have nonetheless voiced their opposition to the 100:1 ratio. For instance, in *United States v. Willis*,[288] the defendant was sentenced to 188 months for possession with intent to distribute 200 grams of crack cocaine. He challenged the 100:1 ratio on Equal Protection grounds, arguing that it had a racially discriminatory impact on African-Americans. The Eighth Circuit rejected this argument, finding that "Congress had a rational basis, in terms of protecting society, for imposing more severe penalties for crimes involving crack cocaine 'because of crack's potency, its highly addictive nature, its affordability, and its increasing prevalence.'"[289] Judge Gerald Heaney "concur[red] in the court's opinion, but only because I am bound by our prior decisions that hold there is no merit in [defendant's] equal protection argument."[290] Judge Heaney also observed that,

> If there were any evidence that our current policies with respect to crack were deterring drug use or distribution the extreme sentence might be justified. Unfortunately, there is none. As one small time crack dealer is confined another takes his place. Until our society begins to provide effective drug treatment and education programs, and until young black men have equal opportunities for a decent education and jobs, a bad situation will only get worse. All of us and our children will suffer.[291]

Similarly, in *United States v. Patillo*,[292] Judge J. Spencer Letts, of the United States District Court for the Central District of California, was forced to impose a ten-year mandatory minimum sentence on a twenty-seven year old African-American man who was a college graduate, had a stable employment history, and had never previously been involved in drug trafficking. The defendant, who was "subject to extraordinary financial pressures, due to an accumulation of debt for student loans, credit cards, phone bills and rent" had accepted a neighbor's offer of $500 to mail a Federal Express package from Los Angeles to Dallas.[293] The package contained 681 grams of crack cocaine.

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287. *See* Kevin Simpson, *Inmates' Sudden Rioting Echoes Federal Judge*, DENVER POST, Oct. 24, 1995, at B1.

288. 967 F.2d 1220, 1226–27 (8th Cir. 1991).

289. *Id.* at 1225 (quoting United States v. Buckner, 894 F.2d 975, 978 (8th Cir. 1990)).

290. *Id.* at 1226.

291. *Id.* at 1227. The district court judge who sentenced Willis was also distressed by the result in the case, as evidenced by the following statement:

> I'm going to give you the least I can possibly give you, and I will go one step further, and the one step isn't going to be worth a whit until maybe sometime in the future. But the one step is I'm going to beg the Congress to reconsider what they've done here. This is not right. You've done wrong, you've done a wrong thing, but if there's any good in you, it's going to take a long time for you to be able to show it, and I wish it could be less time.

Id. at 1226.

292. 817 F. Supp. 839 (C.D. Cal. 1993).

293. *Id.* at 840.

The defendant admitted to knowing that the package contained illegal drugs, but claimed not to know that the drugs were crack.[294]

Judge Letts noted at the outset that "this sentencing appeared to place me in the position of making the most difficult choice I have yet faced, between my judicial oath of office, which requires me to uphold the law as I understand it, and my conscience, which requires me to avoid intentional injustice."[295] He also noted that he had "postponed sentencing several times in the hope of finding some reasoned basis for holding that precedent does not bind the court."[296] When he ultimately determined that he was bound by precedent, however, Judge Letts nevertheless registered his objection to the sentence:

> I, however, will no longer apply this law without protest, and with no hope for change.... I have no great difficulty imposing lengthy prison sentences upon proven high-volume drug merchants, and others proven to be high in the chain of drug distribution...however, one of the basic precepts of criminal justice has been that the punishment fit the crime. This is the principle which, as a matter of law, I must violate in this case.... I, for one, do not understand how it came to be that the courts of this nation, which stood for centuries as the defenders of the rights of minorities against abuse at the hands of the majority, have so far abdicated their function that this defendant must serve a ten year sentence...treating crack one hundred times more severely than cocaine, seems arbitrary at best, and disproportionately affects black defendants.[297]

One federal judge simply resigned from the bench rather than have to apply the 100:1 ratio any longer. Judge J. Lawrence Irving of the United States District Court for the Southern District of California, who was nominated to the bench by President Reagan, resigned because "he could no longer impose the rules in good conscience, particularly in cases involving youthful, first-time drug offenders who were being sentenced to lengthy terms without the possibility of parole."[298] Similarly, as many as fifty senior federal judges, whose seniority allows them to choose which cases they will hear, have refused

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294. *Id.*
295. *Id.*
296. *Id.* at 841.
297. *Id.* at 841–43, 843 n.6; *see also* United States v. Gaviria, 804 F. Supp. 476, 480 (E.D.N.Y. 1992) (Weinstein, J.) (defendant, a battered and abused Columbian woman whose husband compelled her through physical abuse to be a drug courier, pled guilty to possession with intent to distribute 67.7 grams of crack cocaine which resulted in a guidelines range of 70–87 months; Judge Jack Weinstein departed downward to sentence her to a term of 60 months, noting his frustration that "the court has no power to consider the injustice of minimum terms in individual cases."); United States v. Majied, No. 8:CR91–00038(02), 1993 WL 315987, at *4–5 (D. Neb. July 29, 1993) (Strom, J.) (in sentencing defendant convicted of crack distribution, court departed downward because "members of the African-American race are being treated unfairly in receiving substantially longer sentences than Caucasian males who traditionally deal in powder cocaine, and this disparity simply is not justified by the evidence."), *rev'd*, United States v. Maxwell, 25 F.3d 1389, 1400 (8th Cir. 1994) ("while a racially disparate impact may be a serious matter, it is not a matter for the courts, and therefore, not a basis upon which a court may rely to impose a sentence outside of the applicable Guidelines range").
298. *See* Alan Abrahamson, *Irving Heard Flurry of Sentence Appeals as He Left Bench; Justice: Irony Is Evident as a Federal Judge Who Quit in Protest of New Sentencing Rules Was Besieged by Criminals Seeking Leniency*, L.A. TIMES, Jan. 7, 1991, at B1.

to preside over drug cases because they feel that the punishments specified by the guidelines are too draconian.[299]

Distaste at applying the unduly harsh sentences required by the 100:1 ratio has spread from judges to prosecutors and jurors as well. For instance, in Miami some federal prosecutors have chosen not to charge certain crack suspects because they believe the punishment that they will face is too severe.[300] Indeed, Attorney General Janet Reno, the nation's chief law enforcement officer, has gone on record as saying that the 100:1 ratio is unfair and should be abolished.[301] Moreover, the 100:1 ratio is causing juries to nullify verdicts. Anecdotal evidence from districts with predominantly African-American juries indicates that some of them acquit African-American crack defendants whether or not they believe them to be guilty if they conclude that the law is unfair.[302] Indeed, rookie prosecutors in the District of Columbia are informed that they will lose many of their cases even though they have persuaded the jury of the defendant's guilt beyond a reasonable doubt because some black jurors refuse to convict black defendants whom they know are guilty in protest of what they feel is a racist system.[303]

The most famous example of a jury nullifying a verdict in a crack case was the prosecution of District of Columbia Mayor Marion Barry in June, 1990. Barry was captured on videotape smoking crack cocaine by an FBI sting operation, and charged with one count of conspiracy to possess cocaine, ten counts of possession of cocaine, and three counts of perjury for allegedly lying to the grand jury that had investigated him. Barry's defense, which was publicly supported by Minister Louis Farrakhan, the leader of the Nation of Islam, was that he was the victim of a racist prosecution. Although a jury containing ten African-Americans convicted Barry of one count of perjury, it acquitted him of all the other charges, including the ten counts of cocaine possession.[304] Given that the government introduced into evidence a videotape of Barry smoking

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299. *See Crime and Punishment: More Judges Disregard Sentencing Guidelines*, *supra* note 109, at B6. Judges Jack Weinstein and Whitman Knapp of the United States District Court for the Eastern District of New York elected to take senior status in order to avoid drug cases for the same reason. *Id.* In giving his reasons for taking senior status, Judge Weinstein cited "[his] sense of depression about much of the cruelty [he has] been party to in connection with the war on drugs." *See* Bill Rankin, *Prison Sentences Set in Stone: A Deterrent or an Injustice?*, ATLANTA J.–CONST., Oct. 17, 1993, at A1.

300. *See* Charisse Jones, *Crack and Punishment: Is Race the Issue?*, N.Y. TIMES, Oct. 28, 1995, at A1.

301. "And equally clearly, I don't think the 100-to-1 ratio is fair...[the sentencing guidelines must] make sure the person who distributed the powder that became the crack gets the more appropriately stiff sentence than the person who distributes the crack." Vanessa Gallman, *Reno Says Tougher Crack Sentences Are Unfair*, PHILA. INQUIRER, Oct. 27, 1995, at A1. Attorney General Reno's statement casts a cynical light on the Clinton Administration's cocaine sentencing policy. Soon after she made the statement, President Clinton signed into law Senate Bill 1254 which rejected the Sentencing Commission's recommendation to abolish the 100:1 ratio. Some in the media speculated that the President signed the bill for fear of appearing soft on crime as the 1996 election approached. *See Crack-Based Racial Bias*, SACRAMENTO BEE, Oct. 28, 1995, at B6 ("Afraid of looking soft on crime in an election year, President Clinton decided to follow the lead of Congress and sign into law a bill that maintains unjustly severe penalties for people convicted for possession of small amounts of crack cocaine.").

302. *See* Jeffrey Abramson, *Making the Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at A15.

303. Butler, *supra* note 273, at 678.

304. *See* United States v. Barry, No. 90–0068, 1990 WL 174907 (D.D.C. Oct. 26, 1990), *aff'd*, 938 F.2d 1327 (D.C. Cir. 1991).

crack, the only possible inference to be drawn from the verdict is that the jury simply ignored the evidence and nullified the law.

One African-American law professor has proposed a formal system of jury nullification for African-Americans who sit on juries in cases in which an African-American is accused of a "victimless" crime such as a drug offense. Professor Paul Butler argues that, since the American criminal justice system is inherently racist, African-Americans must analyze the costs and benefits to the African-American community of sending an African-American defendant to jail for a victimless crime.[305] He concludes that the outcome of such an analysis is that the cost of sending African-Americans to jail for drug offenses is too high:

> My argument here is that the consequences are too severe: African-Americans cannot afford to lock up other African-Americans simply on account of anger. There is too little bang for the buck. Black people have a community that needs building, and children who need rescuing, and as long as a person will not hurt anyone, the community needs him there to help. Assuming that he actually will help is a gamble, but not a reckless one, for the 'just' African-American community will not leave the lawbreaker be: It will, for example, encourage his education and provide his health care (including narcotics dependency treatment) and, if necessary, sue him for child support. In other words, the proposal demands of African-Americans responsible self-help outside of the criminal courtroom as well as inside it. When the community is richer, perhaps then it can afford anger.[306]

As an example of an "easy case" under his proposal, Professor Butler discusses a black defendant who has been charged with a crack offense: "The crack cocaine case is simple: Because the crime is victimless, the proposal presumes nullification. According to racial critiques, acquittal is just, due in part to the longer sentences given for crack offenses than for powder cocaine offenses."[307]

If the African-American community embraces Professor Butler's jury nullification proposal, there would be no point in lowering the 100:1 ratio to one that is more rational and just because African-American juries would still free black defendants who were convicted under a 20:1 ratio, or even a 1:1 ratio, since the premise underlying the proposal is that the entire American criminal justice system is racist, and thus not worthy of allegiance. As a matter of responsible policy-making, however, it would be wiser to assume that the majority of African-Americans will sympathize with the politics of distinction, as expressed by Professors Kennedy and Austin. If this is the case, then it is imperative to set the crack/powder ratio at a level which rationally reflects the real distinctions between the two forms of the drug, and which the vast majority of law-abiding African-American citizens will feel adequately protects them at the same time as meting out a just punishment to the lawbreakers.

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305. Butler, *supra* note 273, at 698.
306. *Id.* at 716–18 (citation omitted).
307. *Id.* at 718 (citing GUIDELINES MANUAL, *supra* note 5, § 2D1.1(c) (citation omitted)).

C. Systemic Overload and the Change in Inmate Attitude

Another, more practical reason, to lower the 100:1 ratio is the increased strain it is putting on the federal prison system as a result of the rising number of inmates who have been incarcerated for longer periods of time. The composition and conduct of the federal prison population began to change after the 1986 Act took effect. As a result, in the past decade, the average length of time served in federal prison has increased more than fifty percent for drug crimes and violent offenses, and overcrowding has become a concern. The federal prison system was designed to house only 72,289 inmates, but currently houses approximately 90,304.[308] Judge Richard Conaboy, Chairman of the Sentencing Commission, has summed up the problem as follows:

> [I]n the course of our dialogue with [prison officials], we learned that a lot of their prison inmates are serving time under drug sentences, and that many of the families of these young black men in particular are concerned and hopeful that there will be some change made in [the 100:1 ratio]. And if the change was not made it might lead to problems.[309]

Judge Conaboy's comment touches on a related problem: the change in the character and attitude of the inmates who have recently entered the federal prison system. As a result of the 1986 Act, federal prisons are housing more gang-affiliated inmates who appear to have little regard for their fellow inmates or corrections officers. This is reflected by a rise in the number of violent incidents in prisons. For instance, in 1990, there were 187 inmate assaults on prison staff members, compared to 1192 in 1994. Similarly, there were 460 inmate assaults of other inmates in 1990, compared to 1112 in 1994. "With the mandatory sentencing guidelines and the elimination of parole, we get 25-year-olds who are looking at 40-year sentences," explained Jim Hough, a corrections officer at the federal facility in Greenville, Illinois, one of the four prisons that experienced rioting after the Congressional vote rejecting the Sentencing Commission's recommendation. "The people obviously become a management problem. Why should they behave in prison when there is no incentive for them to?"[310]

D. The Correct Ratio is 20:1

At bottom, the debate revolves around a basic question regarding federal cocaine sentencing policy: what ratio will properly take into account the characteristics that make crack more dangerous than powder, but not unfairly punish the African-Americans who bear the brunt of crack sentencings? Everyone agrees that 100:1 is too high. Even Representative Bill McCollum, the sponsor of the House bill that rejected the Sentencing Commission's recommendation to eliminate the 100:1 ratio, believes that it is too high. During the debate on the bill, Representative McCollum stated that the "Sentencing Commission ultimately should come back both for trafficking and possession with something that closes that gap, but that does not go to the 1:1 ratio, that

308. *See* Mary Pat Flaherty & Pierre Thomas, *Crack Sentences Angered Inmates, Officials Warned; Prison Bureau Raised Possibility of Riots*, WASH. POST, Oct. 27, 1995, at A1.

309. *See* Jones, *supra* note 300, at A1.

310. Gary Marx, *Violence a Fact of Federal Prison Life; Congress' Crackdown on Crime Puts Younger Inmates Behind Bars*, CHI. TRIB., Oct. 24, 1995, at N1.

does not completely eliminate it."[311] The need to adjust the ratio downward is also apparent from the reluctance of many federal judges and prosecutors to apply it. At the other end of the debate, however, critics of the 100:1 ratio argue that "cocaine is cocaine;" that there is no real difference between crack and powder, and that the ratio should be 1:1.[312]

Those who argue that "cocaine is cocaine" ignore a large body of evidence indicating that there are real and significant differences between crack and powder cocaine. For instance, medical researchers have found that crack is more addictive than powder, most likely because it reaches the brain in eight seconds rather than the thirty minutes required for inhaled powder cocaine.[313] In response, critics point out that injected powder cocaine (in its liquid form) is just as dangerous as crack because it reaches the brain just as quickly. This is irrelevant, however, since only a small percentage of powder cocaine users actually inject it. As Judge Tacha has noted, a drug that can be smoked will always be more popular than a drug that must be injected through a vein with a hypodermic needle.[314]

Another significant difference is crack's increased marketability. Because it is so easily manufactured and has such a low cost-per-dose, crack is available to a larger market than powder.[315] Crack's cheapness makes it particularly appealing to the young and the poor. For instance, 12- to 17-year-olds choose crack over powder cocaine more than any other age group.[316] Moreover, crack generates several attendant social ills. For instance, crack trafficking generates gang violence as rival gangs fight for turf. Another more recent problem is "freaking" or the trading of sex for crack that takes place in crack houses known as "freak" houses.

The four-member Sentencing Commission majority took the most curious position of any party to the debate. Unlike the legislators who ignored the evidence of crack's increased harmfulness in arguing that "cocaine is cocaine," the majority conceded that crack presented a significantly greater danger than powder. Indeed, it would have been impossible for them not to,

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311. 141 CONG. REC. H10,274 (daily ed. Oct. 18, 1995) (statement of Rep. McCollum). Congressman McCollum's statement was formally incorporated into the legislation rejecting the Commission's recommendation. The legislation provides in part as follows:

> [The Commission shall] submit to Congress recommendations (and an explanation therefore), regarding changes to the statutes and sentencing guidelines governing sentences for unlawful manufacturing, importing, exporting, and trafficking of cocaine, and like offenses, including unlawful possession, possession with intent to commit any of the forgoing offenses and attempt and conspiracy to commit any of the forgoing offenses. The recommendations shall reflect the following considerations—
>
> (A) the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine.

Pub. L. No. 104–38, § 2a(1)(A), 109 Stat. 334 (1995).

312. "Crack cocaine and powder cocaine are both cocaine. Crack cocaine happens to be used by poor people who are predominantly black people because it is cheap. Powder cocaine happens to be used by white people who happen to be richer, and as a consequence, you get this disparity in the application of the law." *See* 141 CONG. REC. H10,266 (daily ed. Oct. 18, 1995) (statement of Rep. Watt).

313. Allen, *supra* note 149, at 17; Hatsukami & Fischman, *supra* note 169, at 1582–83.

314. *U.S. Sentencing Commission*, *supra* note 10, at 2131.

315. *See* U.S. SENTENCING COMM'N, *supra* note 4, at 85–87.

316. *Id.* at 187.

given the voluminous report that the Commission compiled which documented this conclusion. The majority contended, however, that crack offenses should not be punished more severely than powder offenses because the disparate impact on African-Americans is unacceptable. They argued that a 1:1 ratio coupled with enhancements that target specific harms (e.g., selling crack to a pregnant woman or a minor) would adequately punish crack's greater harmfulness without having a disparate impact on African-Americans. This would only be true, however, if crack defendants continue, among other things, to have more serious criminal histories, use weapons to a greater extent than powder defendants, and accept responsibility to a lesser extent than powder defendants. It is not sound policy to rely on the fortuity of the presence of these factors to ensure that crack defendants are sufficiently punished.

A more important flaw in the majority's argument, however, is the fact that their proposed enhancements cannot account for all the systemic harms uniquely associated with crack. For instance, an enhancement for crack's increased addictiveness would be inefficient because addictiveness is a quality that endangers every user; thus, every defendant convicted of a crack offense would receive the enhancement. The more appropriate way of accounting for crack's increased addictiveness would be to include it in crack's base offense level which would require a ratio higher than 1:1. Similarly, crack poses special risks to minors and to pregnant women. These risks are not completely accounted for by an enhancement for selling to a minor or pregnant woman because, due to the way that the crack market works, eventual usage by a minor or a pregnant woman is foreseeable, even if the initial sale is not to one of these vulnerable victims.

The organizational and market differences that distinguish crack from powder cocaine are also incapable of being accounted for by an enhancement. It takes a much smaller amount of crack than powder to get "high." Also, a "hit" of crack is much cheaper than a hit of powder cocaine. The result is that comparable levels of the two drugs do not correlate with culpability. For example, given the way that crack is marketed, a person convicted of selling 100 grams can be characterized as a mid-level dealer, that is, someone who sells to street dealers who generally have between five and fifty grams on hand. Mid-level powder cocaine dealers, on the other hand, generally distribute quantities ranging from 1000 to 3500 grams.[317] Thus, from the perspective of market considerations alone, without taking into account any of the other factors such as crack's increased addictiveness, it would be inappropriate to punish someone who was convicted of selling 100 grams of powder as harshly as someone who was convicted of selling 100 grams of crack.[318]

In light of these considerations, it is clear that although a 100:1 ratio is too high, a 1:1 ratio is too low. A 1:1 ratio plus enhancements will not properly account for crack's increased addictiveness, ease of marketability, or the real

317. *See* U.S. SENTENCING COMM'N, COMPARISON OF DRUG QUANTITY LEVELS FOR MID-LEVEL CRACK AND COCAINE DEALERS (working document in response to Commissioner's request) (Mar. 1995).

318. Moreover, under a 1:1 ratio, a mid-level crack dealer who is convicted of distributing 100 grams of crack would face a guideline sentence of 18 to 24 months incarceration. This would be inappropriately low for someone responsible for up to 1000 crack transactions. *See Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, *supra* note 204, at 6 (testimony of the Honorable Deanell Reece Tacha, United States Sentencing Commission).

differences in the way that crack and powder are sold and used. Moreover, a 1:1 ratio would effectively encourage distributors to take the final, admittedly simple, step of converting powder cocaine to crack and thus make it more readily available in the marketplace. Some other method of accounting for these factors in determining punishment must therefore be adopted. The most justifiable and flexible way of approaching the problem would be a graduated ratio: a 1:1 ratio for low-level street dealers, and an increased 20:1 ratio for mid- and high-level dealers. A low-level dealer would be defined as someone who was arrested with 100 grams or less of crack or powder. Such offenders would receive exactly the same sentence for the same quantities. A mid-level dealer, on the other hand, would be defined as anyone who was arrested with more than 100 grams of crack or 2000 or more grams of powder. These offenders would receive the same sentence for different quantities. Thus, for mid-level dealers, there would be a 20:1 ratio.

Professor Goldsmith, in dissenting from the Sentencing Commission majority's proposal to replace the 100:1 ratio with a 1:1 ratio, put forth a 5:1 ratio as "a good starting point for analysis."[319] I contend, however, that 5:1 is too low for the following reasons. First, as Professor Goldsmith noted, one of the main reasons for setting the ratio higher than 1:1 is to account for the important organizational and market factors that distinguish crack from powder. Sentencing Commission and DEA data demonstrate that mid-level powder cocaine distributors generally deal in quantities ranging from 1000 to 3500 grams whereas mid-level crack dealers generally deal in quantities ranging from 50 to 100 grams.[320] Thus, the lowest possible ratio that would adequately account for the market differences would be 10:1. In setting forth 5:1 as a possible ratio, Professor Goldsmith also noted that it would be consistent with the manner in which the law distinguishes between powder cocaine and heroin.[321] Presumably, heroin is treated more severely than powder cocaine because, like crack, it is more potent. This does not appear to be a valid basis for setting a 5:1 differential between powder cocaine and crack cocaine, however, because heroin must be injected, is more expensive than crack, and is therefore not as accessible to children and the poor. Moreover, Professor Goldsmith cited no evidence that demonstrates that the differences between powder cocaine and heroin mirror the differences between powder cocaine and crack cocaine.

Another reason that a 5:1 ratio, and even a 10:1 ratio, is too low is that neither would account for crack's increased addictiveness. As noted, some medical researchers have estimated that crack is fifty times more addictive than powder.[322] Thus, increasing the 10:1 market differential ratio to 20:1 to account for crack's increased addictiveness would be to err on the side of caution in accounting for crack's enhanced addictive power. All things considered, 20:1 is a conservative estimate of what the ratio between crack and

319. *U.S. Sentencing Commission, supra* note 10, at 2133.

320. *See id.* at 2133 n.13 (citing U.S. SENTENCING COMM'N, IMPLEMENTATION OF CRACK REPORT RECOMMENDATIONS 2 (Amendment Packet, Mar. 24, 1995); and U.S. SENTENCING COMM'N, COMPARISON OF DRUG QUANTITY LEVELS FOR MID-LEVEL CRACK AND COCAINE DEALERS (working document in response to Commissioner's request (March 1995)).

321. *See U.S. Sentencing Commission, supra* note 10, at 2133.

322. *See "Crack" Cocaine Hearing, supra* note 203, at 88 (testimony of Robert Byck, M.D., Professor of Psychiatry and Pharmacology, Yale University School of Medicine).

powder should be.[323] Indeed, a ratio as high as 40:1 or even 70:1 would not be unreasonable from a purely logical standpoint since there is data to suggest that mid-level crack dealers sometimes possess as little as 50 grams while mid-level powder dealers can have as much as 2000–3500 grams on hand.[324] Given the racial divisiveness that the 100:1 ratio has engendered, however, it would be wise from a policy standpoint to set the new ratio as low as possible without giving short shrift to the real differences between crack and powder.

A tiered or graduated approach such as the one I propose would correct the problem of retail, low-level crack dealers receiving harsher sentences than the mid- or high-level powder cocaine dealers who supply them. At the same time, however, by maintaining a differential, it would also address crack's increased addictiveness and marketability. It must, of course, be accompanied by offender-specific enhancements that would punish certain harms associated with crack that do not necessarily apply to each trafficker (e.g., use of a juvenile in the offense; operation of a crack house; sale to someone the dealer knows is an unusually vulnerable victim). In addition, in order to achieve its aim, such an amendment must also be accompanied by a parallel amendment of Sections 841 and 960 of Title 21 of the United States Code. Furthermore, Section 844(a) must also be amended to eliminate the special treatment of crack possession.

Some critics will no doubt argue that any ratio higher than 1:1 will have an unfair, disparate impact that is racially discriminatory. In response, I would note that there are other examples in the guidelines in which two forms of the same drug are punished differently because one form is particularly dangerous. For instance, Section 2D1.1(c) assigns the base offense levels for methamphetamine and "Ice" at a 10:1 ratio, even though "Ice" is simply another, more dangerous form of methamphetamine. Both methamphetamine and "Ice" are used overwhelmingly by whites: 84.2% of the people convicted of methamphetamine use in 1992–93 were white. It is therefore apparent that Congress is capable of having a racially neutral motive for punishing two forms of the same drug differently.[325]

The process of study and debate regarding the proper crack/powder ratio that was begun on February 28, 1995, when the Sentencing Commission transmitted its report, *Cocaine and Federal Sentencing Policy*, to Congress will hopefully have as its result the replacement of a ratio that was seemingly picked out of thin air with a ratio that rationally reflects the real differences between crack and powder. This legislative action would only be a first step, however, because even a tiered-ratio approach such as the one I propose would result in

323. Ironically, 20:1 was the ratio originally proposed by Senator Robert Dole in 1986. *See supra* note 121 and accompanying text.

324. An apparently obvious basis for setting a differential ratio between crack and powder is the scientific data indicating that one gram of cocaine powder yields .89 grams of crack. One could argue that the .89 conversion ratio is the correct one because it reflects the inherent quantitative difference between the two forms of cocaine. Upon closer examination, however, the conversion ratio is a faulty way of differentiating between crack and powder because it does not reflect crack's increased addictiveness or its enhanced marketability, the two characteristics that make crack more dangerous than powder.

325. It is also interesting to note that "Ice" bears a 50:1 ratio to powder cocaine. Thus, white "Ice" traffickers are being punished significantly more harshly than white powder cocaine traffickers. This is again evidence that Congress is capable of legislating harsher punishments for drugs that it considers to be particularly dangerous regardless of the race of the drug's users.

an unwarranted disparate impact on African-Americans unless the guidelines and statutes are applied in a racially neutral manner.

The responsibility to apply any new law in a racially neutral manner lies with both the executive and judicial branches of government. Law enforcement officials must apply the law neutrally. Perhaps more importantly, however, given the reality of racial bias, federal district court judges must take a vigilant role in reviewing the government's cocaine prosecutions when there is evidence of a disparate impact. It is only through such a concerted effort of all three branches of government that federal cocaine sentencing policy can be set on a more just course.