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Criticism of Crack Cocaine Sentences Is Not What It Is Cracked Up to Be: A Case of First Impression within the Ongoing Crack vs. Cocaine Debate

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Criticism of Crack Cocaine Sentences Is Not What It Is Cracked Up To Be: A Case of First Impression Within the Ongoing Crack vs. Cocaine Debate

United States v. Jackson[1]

I. INTRODUCTION

In *United States v. Jackson*,[2] the United States Court of Appeals for the Eighth Circuit held that the sentencing provisions of 21 U.S.C. § 841[3] are unambiguous, and declined to apply the rule of lenity to reduce the defendant's sentence.[4] Although the narrow issue of the alleged ambiguity of the sentencing provisions was an issue of first impression,[5] the Eighth Circuit and other federal courts have passed on the constitutionality of Section 841 and the concomitant provisions of the U.S. Sentencing Guidelines[6] many times.[7]

Courts have found the sentencing provisions constitutionally infirm in only a handful of cases,[8] yet the voluminous political criticism of the provisions continues.[9] The criticism is, in general terms, that the distinction made between powder cocaine and crack cocaine therein has an unfair impact on black Americans.[10] However, there is reason to doubt the foundations upon which critics of the provisions base their attacks.[11] Indeed, there even may be evidence to suggest that the sentencing provisions in fact are beneficial to black communities hardest hit by the crack epidemic.[12]

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1. 64 F.3d 1213 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 966 (1996).
2. *Id.*
3. *See infra* notes 37, 38 and 40 for the pertinent text of 21 U.S.C. § 841 (1988).
4. *Jackson*, 64 F.3d at 1220.
5. *Id.* at 1219.
6. *See infra* note 42 and accompanying text for the pertinent provision of the Sentencing Guidelines.
7. *See infra* notes 53-124 and accompanying text.
8. *See infra* notes 59-68, 76-84 and accompanying text.
9. *See infra* notes 43-49 and accompanying text.
10. *See infra* notes 43-45 and accompanying text.
11. *See infra* notes 130-51 and accompanying text.
12. *See infra* notes 174-76 and accompanying text.

II. FACTS AND HOLDING

On April 1, 1994, a package was sent from Las Vegas, Nevada to Des Moines, Iowa, deliverable to a "Steve White."[13] Because the package was improperly addressed,[14] United Parcel Service (UPS) staff opened the package in search of a proper address, but instead found that it contained a duct-taped ball of what appeared to be crack cocaine.[15] UPS officials contacted the police, who determined that the substance contained in the package was indeed crack cocaine.[16]

The police obtained a search warrant for 2717 Kingman, apartment number 3, the intended destination of the package.[17] Law enforcement officials posing as UPS workers then delivered the package.[18] Upon receipt of the package, Michael Stokes identified himself as Steve White, and signed for the package in that name.[19] The residence was kept under surveillance, and about two hours later the police entered the apartment pursuant to the search warrant they had obtained.[20] The police found both Stokes and Allen Scott Jackson present in the apartment.[21] Jackson was standing and facing the counter on which the package that had contained crack cocaine subsequently was found.[22] When the police entered the apartment, Jackson ran toward the area of a back door and kitchen closet, in which a duct-taped ball of crack cocaine was recovered.[23]

In a subsequent statement, Stokes said that the package had been delivered to his apartment at Jackson's request, and that he, Stokes, did not unwrap the package when it arrived, but contacted Jackson, who came to the apartment and opened the package himself.[24]

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13. United States v. Jackson, 64 F.3d 1213, 1215 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 966 (1996).

14. Although the package label indicated that the addressee lived at 2117 Kingman, the shipping order listed 2717 Kingman, No. 3, as the correct address. United Parcel Service (UPS) attempted to deliver to 2117 Kingman, but found that address did not exist. *Id.* at 1215.

15. *Jackson*, 64 F.3d at 1215.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Jackson*, 64 F.3d at 1215.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

Jackson and Stokes were charged with one count of conspiring to distribute 163.17 grams of crack cocaine in violation of 21 U.S.C. § 846,[25] and with one count of possession with intent to distribute 163.17 grams of crack cocaine in violation of 21 U.S.C. § 841(a) (1)[26] and 18 U.S.C. § 2.[27] At the conclusion of trial, the jury acquitted Stokes, but found Jackson guilty on both counts.[28]

Jackson appealed his conviction and sentence for conspiracy to distribute and possession with intent to distribute crack cocaine to the United States Court of Appeals for the Eighth Circuit.[29] Among other claims of error,[30] Jackson argued that Section 841, which imposes harsher sentences for "cocaine base" than for "cocaine,"[31] is ambiguous in its use of those terms, and that the rule of lenity should apply in his favor.[32]

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25. 21 U.S.C § 846 (1994) reads:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

26. 21 U.S.C. § 841(a) (1994) reads in pertinent part:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

See also infra notes 38-41 and accompanying text for further discussion of the text of Section 841.

27. United States v. Jackson, 64 F.3d 1213, 1215 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 966 (1996). 18 U.S.C. § 2 (1994) provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by another would be an offense against the United States, is punishable as a principal.

28. *Jackson*, 64 F.3d at 1216.

29. *Id.* at 1215.

30. In addition to his attack on 21 U.S.C. § 841, Jackson argued that: (1) the evidence for conviction was insufficient as a matter of law; (2) the district court erred in not severing his trial from that of co-defendant Michael Stokes; (3) Stokes's counsel improperly commented on Jackson's failure to testify; and (4) the District Court erred in applying the Sentencing Guidelines. *Jackson*, 64 F.3d at 1215.

31. For a discussion of the pertinent text of Section 841, see *infra* notes 40-41 and accompanying text.

32. *Jackson*, 64 F.3d at 1215. The rule of lenity requires imposition of a lesser penalty when ambiguity exists concerning the reach of a criminal statute or the penalties involved. *Id.*

The Eighth Circuit[33] found that "practical, real-world differences" between crack cocaine and other forms of cocaine existed,[34] and that Jackson had not claimed that he was unaware of the differences, or unable to distinguish between crack and other forms of cocaine.[35] Thus, as a matter of first impression, the Eighth Circuit held that Section 841 is unambiguous, rejected Jackson's request for application of the rule of lenity, and affirmed the sentence imposed by the district court.[36]

III. LEGAL BACKGROUND

In 1986, Congress passed the Anti-Drug Abuse Act,[37] which contained harsh mandatory sentences for the manufacture, distribution, and dispensation of narcotics.[38] The sentencing provisions of the Act distinguish between "cocaine base" (often referred to as "crack"[39]) and "cocaine."[40] Congress in

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33. The Honorable Pasco M. Bowman writing for a unanimous three-judge panel.

34. The court listed the following pertinent differences between the two forms of cocaine: (1) cost; (2) method of production; (3) availability to the urban poor; (4) the relatively rapid high (and consequent rapid addiction) associated with crack cocaine; and (5) the harmful effects of "second hand" crack cocaine smoke on non-users, particularly children. *Jackson*, 64 F.3d at 1219-20.

35. *Jackson*, 64 F.3d at 1220.

36. *Id.*

37. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at various sections of 18 U.S.C. and 21 U.S.C. (1994)).

38. 21 U.S.C. § 841(a) (1994) reads, in pertinent part: [I]t shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . . .

39. There is some debate as to whether the term "cocaine base" unambiguously refers to "crack" cocaine. *See infra* notes 82-104, 114-24, 142-51, and accompanying text.

40. 21 U.S.C. § 841(b) (1994) reads, in pertinent part:

> [A]ny person who violates subsection (a) of this section shall be sentenced as follows: (1) (A) In the case of a violation of subsection (a) of this section involving— . . . (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of— . . . (II) cocaine . . .; (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years . . . (B) In the case of a violation of subsection (a) of this section involving— . . . (ii) 500 grams or more of a mixture or substance containing a detectable amount of— . . . (II) cocaine . . . ; (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years . . . .

effect established a 100 to 1 cocaine to crack ratio. That is, an offense involving fifty grams of crack, as opposed to 5000 grams (5 kilograms) of cocaine, is assigned a minimum sentence of ten years; an offense involving five grams of crack, as opposed to 500 grams of cocaine, is assigned a five-year minimum sentence.[41] This 100 to 1 ratio is duplicated in the United States Sentencing Guidelines promulgated by the U.S. Sentencing Commission in 1987.[42]

The distinction made between crack and powder cocaine in the mandatory sentencing provisions of the Anti-Drug Abuse Act and the Sentencing Guidelines has been heavily criticized in the decade since its promulgation. Generally, the criticism is that the more severe penalties for crack have a discriminatory effect on black Americans.[43] That is, because crack offenders receive higher sentences than do powder cocaine offenders, and because the vast majority of crack offenders are black,[44] black defendants go to prison for longer durations than the predominantly white powder cocaine defendants for offenses

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41. 21 U.S.C. § 841 (b) (1994).

42. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (1987).

43. *See, e.g.*, Arthur L. Berney, *Cocaine Prohibition: Drug-Induced Madness in the Western Hemisphere*, 15 B.C. THIRD WORLD L.J. 19, 76 n.114 (1995).

44. There is disagreement as to the reasons why the vast majority of defendants in crack-related crimes are black. Some argue that blacks simply use crack more than whites. *See, e.g.*, Berney, *supra* note 43, at 76 n.114. Berney states "African Americans tend to use crack more often, while powdered cocaine is used mainly by whites." *Id.* (citing NATIONAL INSTITUTE ON DRUG ABUSE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1992, at 32-33, 38-39 (1993), showing that 11.8% of whites report using cocaine compared to 8.6% of blacks, while 1.2% of whites report using crack compared with 2.5% of blacks). *See also* Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179, 189-90 (1996). Days argues, "[M]inorities are more likely to use and sell crack cocaine, while non-minorities are more likely to sell powder cocaine . . . ." *Id.*

Others argue that blacks do not sell or use crack more than whites, but are simply targeted for federal prosecution under the crack statute. *See, e.g.*, Nkechi Taifa, *Crack vs. Cocaine: Disparity in Punishment*, NBA NAT'L. B.A. MAG., Aug 1995, at 30. Taifa states, "In 1993, nearly 90% of those sentenced federally for crack offenses were Black, while only 4.1% were White, despite the fact that the greatest number of documented crack users are Caucasian." *Id.*

involving the same drug quantities.[45] Critics charge that there is no scientific justification for the distinction in penalties between crack and powder cocaine.[46] They contend the 100 to 1 cocaine to crack ratio is the product of the "crack scare"[47] or "frenzy"[48] in which Congress found itself in the 1980s.[49]

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45. UNITED STATES SENTENCING COMMISSION HEARING ON PROPOSED GUIDELINE AMENDMENTS, March 14, 1995 (statements of Angela J. Davis, of the National Rainbow Coalition, and Nkechi Taifa, of the American Civil Liberties Union); U.S. SENTENCING COMMISSION, ANNUAL REPORT 152 (1993) (stating that from October 1992 through September 1993, 88% of federal crack defendants were black while 4% were white). *See also* Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 777 n.134 (1996); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995).

See also United States v. Clary, 846 F. Supp. 768, 786 (E.D. Mo.) ("98.2 percent of defendants convicted of crack cocaine charges in the Eastern District of Missouri between the years 1988 and 1992 were black."), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 513 S. Ct. 1182 (1995); United States v. Simmons, 964 F.2d 763, 767 (8th Cir.) (noting that 97% of defendants prosecuted for crack offenses in the Western District of Missouri from 1988 to 1989 were black), *cert. denied*, 506 U.S. 1011 (1992); Minnesota v. Russell, 477 N.W.2d 886, 887 n.1 (Minn. 1991) (finding that in 1988, 96.6% of all defendants charged with possession of crack cocaine in Minnesota were black, while 79.6% of all persons charged with possession of powder cocaine were white).

46. *Clary*, 846 F. Supp. at 793. *See* Freeman, *supra* note 45, at 777 n.134; Sklansky, *supra* note 45, at 1290 ("Crack and powder cocaine are both forms of the same psychoactive alkaloid derived from the leaves of the coca plant.").

However, even critics of the crack statute concede that there are pertinent differences between crack and powder cocaine. *See, e.g.*, Sklansky, *supra* note 45, at 1290-91. Sklansky concedes that:

> Crack has two properties . . . that make it considerably more dangerous than powder cocaine. First, because it is hard and waxy rather than powdery, it is easier to package and market in small, inexpensive quantities. Second, and more important, crack is easily smoked; powder cocaine is not, and instead is generally sniffed . . . . [W]hen cocaine is smoked rather than sniffed, it enters the bloodstream more quickly, provides a briefer, more intense high—and is far more addictive.

Id.

47. Sklansky, *supra* note 45, at 1292-93. Sklansky charges that the "crack scare" leading to the enactment of the Anti-Drug Abuse Act is merely the most recent episode in American history associating an illicit drug with a minority group. Furthermore, Sklansky notes that equal protection challenges to the mandatory sentences for crack trafficking have failed miserably in the federal courts. *Id.* at 1298. He criticizes established equal protection analysis and its requirement of discriminatory purpose as "blind." *Id.* at 1312-13. Under traditional equal protection analysis, even if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional only if that impact can be traced to a discriminatory purpose. *See* United States v. Lattimore, 974 F.2d 971, 975 (8th Cir.), *cert. denied*, 507 U.S. 1020 (1992) (citing Personnel Adm'r

In light of such criticism, Congress charged the United States Sentencing Commission with the task of reviewing the mandatory sentencing provisions.[50] Subsequently, the Commission recommended that Congress reduce the penalties for crimes involving crack so as to be commensurate with the powder cocaine

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v. Feeney, 442 U.S. 256, 272 (1979)).

To remedy the conspicuous lack of success of equal protection challenges to the mandatory sentencing provisions, Sklansky proposes a new equal protection analysis. Sklansky, *supra* note 45, at 1313-19. Sklansky's tailor-made equal protection analysis would take into account the disproportionate impact of the mandatory sentencing ratio, rather than limiting itself to scrutiny of the provisions' purpose. *Id.* Furthermore, this more invasive standard of judicial scrutiny would require Congress to provide a neutral explanation not only for its distinction between crack and cocaine, but also for the particular sentencing ratio it chose. *Id.* at 1319.

48. *See Clary*, 846 F. Supp. at 784 (attributing 100:1 cocaine to crack ratio to a "frenzied" Congress moved by unconscious racial animus). *See also* Jason A. Gillmer, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 553 (1995).

See also Nkechi Taifa, *Beyond Institutionalized Racism: The Genocidal Impact of Executive, Legislative & Judicial Decision-Making in the Crack Cocaine Fiasco*, NBA NAT'L. B.A. MAG., Oct. 1996 at 13. Taifa refers to the mandatory sentence for "crack" as "bizarre legislation," and charges that the United States has moved "beyond institutional racism in its administration of justice, to systemic genocide as well." *Id.* at 14.

49. *See "Crack" Cocaine: Hearing Before Permanent Subcommittee on Investigations of [the] Senate Committee on Government Affairs*, 99th Cong., 2d Sess. 1 (1986). *See also* Gillmer, *supra* note 48, at 510.

50. The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2097, § 280006 provides in pertinent part:

> Not later than December 31, 1994, 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.

level.[51] Nonetheless, Congress overwhelmingly rejected any adjustment of the cocaine to crack sentencing ratio.[52]

Political criticism of the sentencing ratio has found its way into the federal courts in the form of various constitutional challenges to the mandatory crack sentences raised by defendants sentenced under the provisions of the Sentencing Guidelines and the Anti-Drug Abuse Act. In the Eighth Circuit alone, defendants have challenged the mandatory sentences on theories of selective prosecution,[53] equal protection[54] and due process.[55] Defendants also have

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51. United States Sentencing Commission, *Amendments to Sentencing Guidelines*, 60 Fed. Reg. 25074-25076, Amend. No. 5 (1995) ("The Commission is recommending separately that Congress eliminate the differential treatment of crack and powder cocaine in the mandatory minimum penalties found in current statutes.").

In its report, the Sentencing Commission noted that "important distinctions between the two may warrant higher penalties for crack than powder [cocaine]." However, it continued that "the Sentencing Commission cannot support the current penalty scheme. The factors that suggest a difference between the two forms of cocaine do not approach the level of a 100-to-1 quantity ratio." U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy*, 104th Cong., 2d Sess., at xiv (1995).

See also Taifa, *supra* note 48, at 14. Taifa states:

> The bipartisan Commission unanimously agreed that the sentences for crack cocaine were too great and must be changed and that the sentences for simple possession of crack must be equal to simple possession of any other drug, including powder cocaine. The Commission's majority agreed that the penalties for distribution of crack cocaine must be equivalent to other forms of cocaine as well.

52. *See* 141 CONG. REC. H10,255-84 (daily ed. Oct. 18, 1995); 141 CONG. REC. S14,779-82 (daily ed. Sept. 29, 1995).

53. *See, e.g.*, United States v. Brown, 9 F.3d 1374 (8th Cir. 1993) (rejecting challenge of selective prosecution under Section 841), *cert. denied*, 511 U.S. 1043 (1994).

54. United States v. Herron, 97 F.3d 234, 239 (8th Cir. 1996) (100:1 sentencing ratio did not violate equal protection), *cert. denied*, 117 S. Ct. 998 (1997); United States v. Smith, 82 F.3d 241, 244 (8th Cir.) (holding defendant's equal protection rights not violated by calculation of sentence based on definition of contraband as crack cocaine rather than as powder cocaine), *cert. denied*, 117 S. Ct. 154 (1996); United States v. White, 81 F.3d 80, 84 (8th Cir. 1996) (holding any distinct penalties for cocaine base and powder cocaine did not violate equal protection); United States v. Clary, 34 F.3d 709 (8th Cir. 1994) (statute and Sentencing Guidelines did not violate equal protection), *cert. denied*, 513 U.S. 1182 (1995); United States v. Maxwell, 25 F.3d 1389, 1400 (8th Cir.) (holding that enforcement of statutes providing for 100 to 1 ratio between sentences for cocaine base and cocaine powder did not deny equal protection to African Americans), *cert. denied*, 513 U.S. 1031 (1994); United States v. Simms, 18 F.3d 588, 594 (8th Cir. 1994) (rejecting equal protection challenge to 100 to 1 disparity in Sentencing Guidelines between sentences relating to cocaine base and powder cocaine); United States v. Parris, 17 F.3d 227, 230 (8th Cir.) (holding that sentencing provisions of narcotics statute, by

claimed that the sentencing provisions are void for vagueness.[56] or that they constitute cruel and unusual punishment and disproportionate sentencing under the Eighth Amendment.[57] Finally, some defendants have requested downward

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imposing heavier penalties for crack cocaine than for powder cocaine, did not violate equal protection by disproportionately punishing black defendants), *cert. denied*, 511 U.S. 1077 (1994); United States v. Womack, 985 F.2d 395, 400 (8th Cir. 1992) (rejecting equal protection challenge), *cert. denied sub nom.* Carraway v. United States, 510 U.S. 902 (1993); United States v. Williams, 982 F.2d 1209, 1213 (8th Cir. 1992) (holding Sentencing Guidelines' use of 100 to 1 ratio for powder cocaine to crack cocaine did not violate equal protection); United States v. Lattimore, 974 F.2d 971, 974-76 (8th Cir. 1992) (rejecting equal protection challenge), *cert. denied*, 507 U.S. 1020 (1993); United States v. Willis, 967 F.2d 1220, 1225 (8th Cir. 1992) (rejecting equal protection claim); United States v. Simmons, 964 F.2d 763, 767 (8th Cir.) (rejecting equal protection challenge to Sentencing Guidelines Section 2D1.1(c)), *cert. denied*, 506 U.S. 1011 (1992); United States v. Hechavarria, 960 F.2d 736, 738 (8th Cir. 1992) (same); United States v. Johnson, 944 F.2d 396, 404 n.7 (8th Cir.) (same), *cert. denied*, 502 U.S. 1008 (1991); United States v. House, 939 F.2d 659, 664 (8th Cir. 1991) (holding 21 U.S.C. § 841(b)(1)(A)(iii)does not violate equal protection); United States v. Winfrey, 900 F.2d 1225, 1226-27 (8th Cir. 1990) (rejecting equal protection challenge); United States v. Buckner, 894 F.2d 975, 978-80 (8th Cir. 1990) (same).

55. United States v. Smith, 82 F.3d 241, 244 (8th Cir.) (holding defendant's due process rights not violated by sentence based on definition of contraband as crack cocaine rather than powder cocaine), *cert. denied*, 117 S. Ct. 154 (1996); United States v. Simms, 18 F.3d 588, 594 (8th Cir. 1994) (rejecting due process challenge to 100 to 1 disparity in Sentencing Guidelines between sentences for cocaine base and powder cocaine); United States v. Parris, 17 F.3d 227, 230 (8th Cir.) (holding sentencing provisions, by imposing heavier penalties for crack cocaine, did not violate due process by disproportionatelypunishing black defendants), *cert. denied*, 511 U.S. 1077 (1994); United States v. Williams, 982 F.2d 1209, 1213 (8th Cir. 1992) (holding Sentencing Guidelines' use of 100 to 1 ratio for powder cocaine to crack cocaine did not violate due process); United States v. Lattimore, 974 F.2d 971, 974-76 (8th Cir. 1992) (rejecting due process challenge), *cert. denied*, 507 U.S. 1020 (1993); United States v. Simmons, 964 F.2d 763, 767 (8th Cir.) (rejecting due process challenge to Sentencing Guidelines § 2D1.1(c)), *cert. denied*, 506 U.S. 1011 (1992); United States v. Johnson, 944 F.2d 396, 404 n.7 (8th Cir.) (rejecting due process challenge), *cert. denied*, 502 U.S. 1008 (1991); United States v. Winfrey, 900 F.2d 1225, 1226-27 (8th Cir. 1990) (same); United States v. Reed, 897 F.2d 351, 352-53 (8th Cir. 1990) (per curiam) (same); United States v. Buckner, 894 F.2d 975, 980 (8th Cir. 1990) (higher cocaine base penalties under Section 841 do not violate due process).

56. *See, e.g.*, United States v. House, 939 F.2d 659, 664 (8th Cir. 1991) (21 U.S.C. § 841(b)(1)(A)(iii) is not unconstitutionally vague).

57. United States v. Simmons, 964 F.2d 763, 767 (8th Cir.) (rejecting Eighth Amendment challenges to Sentencing Guidelines Section 2D1.1(c)), *cert. denied*, 506 U.S. 1011 (1992); United States v. Johnson, 944 F.2d 396, 404 n.7 (8th Cir.) (same), *cert. denied*, 502 U.S. 1008 (1991); United States v. House, 939 F.2d 659, 664 (8th Cir.

departures from the Sentencing Guidelines claiming that the disparity in sentences for crack and powder cocaine was not adequately taken into consideration by the Sentencing Commission.[58]

Despite the numerous constitutional challenges to the Anti-Drug Abuse Act and the Sentencing Guidelines, courts have found the mandatory sentencing provisions to be contrary to the Constitution in only a handful of cases. For example, in *United States v. Clary*,[59] the U.S. District Court for the Eastern District of Missouri[60] held the 100 to 1 ratio of powder cocaine to cocaine base deprived blacks of their Fifth Amendment equal protection rights, both generally and as applied.[61] The court based its holding, in part, upon its finding that there is no material difference between the chemical properties of crack and powder cocaine.[62] According to the court, the baseless distinction between crack and cocaine has a disparate impact on blacks.[63] The court also found that Congress

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1991) (holding 21 U.S.C. § 841(b)(1)(A)(iii) does not constitute cruel and unusual punishment); United States v. Buckner, 894 F.2d 975, 980 (8th Cir. 1990) (holding higher cocaine base penalties under Section 841 do not constitute cruel and unusual punishment).

58. U.S. Sentencing Guidelines Section 5K2.0 allows the sentencing court to depart downward from the applicable guideline if the court finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ." U.S. SENTENCING GUIDELINES MANUAL, § 5K2.0 (1995).

See, e.g., United States v. Herron, 97 F.3d 234, 239 (8th Cir. 1996) (defendants not entitled to downward departure from Sentencing Guidelines due to 100:1 sentencing ratio), *cert. denied*, 117 S. Ct. 998 (1997); United States v. Lewis, 90 F.3d 302, 305 (8th Cir. 1996) (holding district court did not have authority to make downward departure based on disparate impact suffered by African-American defendants as result of Sentencing Guidelines' 100 to 1 ratio between crack and powder cocaine), *cert. denied sub nom.* Davis v. United States, 117 S. Ct. 713 (1997); United States v. Higgs, 72 F.3d 69 (8th Cir. 1995) (holding any racially disparate impact of 100 to 1 ratio between penalties for crack and powder cocaine could not be basis for imposing sentence outside guidelines range); United States v. Shipley, 62 F.3d 1422, No. 95-1036, 1995 WL 442209 (8th Cir. 1995) (unpublished opinion) (defendant not entitled to downward departure for sentencing manipulation or sentencing entrapment).

59. 846 F. Supp. 768 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 513 U.S. 1182 (1995).

60. The Honorable Clyde S. Cahill.

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

62. Without citation to support, judicial or otherwise, the court found that "COCAINE IS COCAINE," in that crack and powder cocaine are "equal in their harm to society and destruction of individual lives and the punishment should be the same for both." *Id.* at 793.

63. *Id.* at 796-97. From a sample of 57 convictions, the court found that 98.2 percent of defendants convicted of crack cocaine charges in the Eastern District of

enacted the sentencing provisions in an arbitrary and irrational manner,[64] and that the actions of Congress and federal prosecutors were motivated by "unconscious racism."[65] Thus, the court concluded that Congress did not have a reasonable basis to make the harsh distinction between penalties for powder and crack cocaine.[66] Accordingly, the ten-year minimum sentence mandated by the crack

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Missouri between 1988 and 1992 were black. *Id.* at 786. Nationally, 92.6 percent of the defendants convicted during 1992 of federal crack violations were black. *Id.*

Furthermore, the court found that, according to *USA Today*, blacks accounted for 42 percent of all drug arrests in 1991, although they compose only twelve percent of the population. *Id. See* Sam Vincent Maddis, *Is the Drug War Racist? "Disparities Suggest the Answer is Yes,"* USA TODAY, July 23, 1993 at 1.

The court attributed these statistical disparities to the fact that "racial animus was a motivating factor in enacting the crack statute." *Clary*, 846 F. Supp. at 787.

64. *Clary*, 846 F. Supp. at 796. For Congressional debate regarding the sentencing of crack cocaine offenders, *see* 132 CONG. REC. 22,670, 26,434, 27,166, 27,193 (1986) (remarks of Rep. Roybal, Sen. Dole, Sen. Mathias, Sen. Weicker, and Sen. Byrd).

65. *Clary*, 846 F. Supp. at 797. The court embarked upon a lengthy commentary on the history of racism in American criminal punishment dating back to the seventeenth century. *Id.* at 774-79. From this historical analysis, the court concluded, "the root of racism has been implanted in our collective unconscious . . . ." *Id.* at 778.

Then the court began a psychoanalytic assessment of white Americans, finding that "unconscious feelings of difference and superiority still live on even in well-intentioned minds." *Id.* at 779-81. The court found that this "unconscious racism is patently evident in the crack cocaine statutes." *Id.* at 779.

The court further noted that, under traditional equal protection analysis, even if a neutral law has a disproportionately adverse impact upon a racial minority, it violates the Equal Protection Clause only if that impact can be traced to a discriminatory purpose. *Id.* at 782. *See* United States v. Lattimore, 974 F.2d 971, 975 (8th Cir. 1992), *cert. denied*, 507 U.S. 1020 (1993). The court concluded that, because the present equal protection analysis focuses on "purposeful" discrimination, it is an inadequate response to the more subtle unconscious racism upon which the court found the crack statute to be based. *Clary*, 846 F. Supp. at 781. Therefore, equal protection analysis must consider the unconscious predispositions of legislators, even those whose naivete honestly leads them to believe that racism does not influence their decisions. *Id.* at 782. Accordingly, the court examined the legislative history of the mandatory sentencing provisions and found that "media reports associating blacks with the horrors of crack cocaine caused the Congress to react irrationally and arbitrarily." *Id.* at 784.

Finally, the court found that the federal prosecutorial process, like Congress and society at large, was tainted by unconscious racism. *Id.* at 787-91. "[T]he logical inference to be drawn is that the prosecutors in the federal courts are selectively prosecuting black defendants who were involved with crack . . . ." *Id.* at 790.

66. *Clary*, 846 F. Supp. at 792.

statute was not applicable.[67] Instead, the court imposed the sentence which would have applied had the offense involved powder cocaine.[68]

The sentence imposed by the district court was later reversed and remanded for re-sentencing by the Eighth Circuit Court of Appeals.[69] The court of appeals, consistent with overwhelming precedent,[70] held that the 100 to 1 ratio of powder cocaine to crack cocaine did not deprive blacks of equal protection.[71] The court of appeals found that Congress clearly had rational motives for creating the distinction between crack and powder cocaine[72] and rejected the argument that crack cocaine sentences disparately impact blacks.[73] Furthermore, the court questioned the district court's reliance on "unconscious racism" and media-created stereotypes, and its conclusion that these motivated Congress in passing the mandatory sentencing provisions.[74] The Eighth Circuit found that the district court's findings simply did not support the conclusion that the statute was passed because of, and not just in spite of, the adverse effect upon blacks.[75]

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67. *Id.* at 797.

68. *Id. See* U.S. SENTENCING GUIDELINES, § 2D1.1 (1995), *supra* note 42. Had the crack been powder cocaine, the Guidelines would have required a punishment range of 21 to 27 months, with the possibility of probation. *See* U.S. SENTENCING GUIDELINES, § 2D1.1 (1995), *supra* note 42. Nonetheless, aggravating circumstances in this case prompted the court to depart upwards from the Guidelines and impose a prison sentence of four years followed by three years of supervised release. *Clary*, 846 F. Supp. at 797.

69. United States v. Clary, 34 F.3d 709 (8th Cir.), *rev'g* 846 F. Supp. 768 (E.D. Mo. 1994), *cert. denied*, 513 U.S. 1182 (1995).

70. *See supra* note 54.

71. *Clary*, 34 F.3d at 712.

72. *Id.* (citing United States v. Lattimore, 974 F.2d 971, 974-75 (8th Cir. 1992), *cert. denied*, 507 U.S. 1020 (1993)). Among the rational motives for the distinction between crack and cocaine were: the potency of crack, the ease with which crack dealers can carry and conceal it, the highly addictive nature of crack, and the violence which often accompanies trade in crack. *Clary*, 34 F.3d at 712.

73. *Clary*, 34 F.3d at 712.

74. *Id.* at 713. The court stated:

> It is too long a leap from newspaper and magazine articles [entered into the Congressional Record] to an inference that Congress enacted the crack statute because of its adverse effect on African American males, instead of the stated purpose of responding to the serious impact of a rapidly-developing and particularly-dangerous form of drug use.... [T]he evidence of the haste with which Congress acted and the action it took is as easily explained by the seriousness of the perceived problem as by racial animus.

Id.

75. *Id.* at 712-14. Under traditional equal protection analysis, even if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional only if that impact can be traced to a "discriminatory purpose." *See Lattimore*, 974 F.2d at 975 (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979)). The phrase

In *Minnesota v. Russell*,[76] the Supreme Court of Minnesota held that the state statutory distinction between crack and powder cocaine sentences[77] violated equal protection under the Minnesota Constitution. The court made clear that it was applying its own rational basis test and that it was not bound by the less rigorous federal court interpretation of the federal Equal Protection Clause.[78] Under this Minnesota test, the court found no reasonable connection between the actual effect of the challenged classification and the statutory goals.[79] The court found that without more factual support for the legislature's distinction between crack and cocaine, the distinction appeared to be arbitrary.[80]

Finally, in *United States v. Davis*,[81] the United States District Court for the Northern District of Georgia held that the 100 to 1 cocaine to crack ratio was based on a scientifically meaningless distinction.[82] The court found that the terms "cocaine" and "cocaine base," used by Congress to distinguish substances for which there were differing penalties, actually described the same substance—cocaine.[83] Thus, the distinction between crack and cocaine was ambiguous, and the rule of lenity was applied to abrogate the increased sentencing provisions for crack cocaine.[84]

As in *Davis*, other challenges to the 100 to 1 cocaine to crack ratio have charged that the distinction is ambiguous and that therefore, the rule of lenity should be applied to reduce the sentence of a defendant sentenced under the crack provisions. These have not met with the same success as did the ambiguity defense in *Davis*. For example, in *United States v. Fisher*,[85] the Fourth Circuit rejected the defendant's theory that the sentencing provisions are ambiguous, holding that the lesser sentences apply to forms of cocaine other than crack and the enhanced sentences apply to crack.[86]

"discriminatory purpose" implies that, in order for a law to violate equal protection, Congress must have selected a particular course of action because of, not merely in spite of, its adverse effects upon an identifiable group. *Id.*

76. 477 N.W.2d 886 (Minn. 1991).

77. Minn. Stat. § 152.023, Subd. 2 (1989), states that a person is guilty of a third degree offense if he possesses three or more grams of cocaine base. However, under the same statute, a person must possess ten or more grams of cocaine powder to be guilty of the same offense. *Id.*

78. *Russell*, 477 N.W.2d at 888-89.

79. *Id.* at 889-90.

80. *Id.* at 890-91.

81. 864 F. Supp. 1303 (N.D. Ga. 1994).

82. *Davis*, 864 F. Supp. at 1305-06.

83. *Id.* at 1306.

84. *Id.* at 1306, 1309.

85. 58 F.3d 96 (4th Cir.), *cert. denied*, 116 S. Ct. 329 (1995).

86. *Id.* at 99.

The Seventh Circuit, in *United States v. Blanding*,[87] held that the enhanced penalties for cocaine base unambiguously referred to crack cocaine.[88] Despite extensive scientific evidence that cocaine and cocaine base are actually the same substance, the court found that Congress clearly intended the terms to have different meanings.[89]

In *United States v. Edwards*,[90] the District of Columbia Circuit held that the purported pharmacological indistinguishability of cocaine and crack did not warrant application of the rule of lenity.[91] The court found no ambiguity in the terms "cocaine base" and "cocaine" and thus followed the other circuits that have rejected the rule of lenity theory as a challenge to the sentencing provisions.[92]

The United States Court of Appeals for the Ninth Circuit, in *United States v. Berger*,[93] held that the provisions creating a disparity in the sentences for cocaine and crack drew a sufficient legal distinction between "cocaine" and "cocaine base."[94] The court thus rejected *Davis* and refused to apply the rule of lenity.[95]

The United States District Court for the Northern District of New York, in *United States v. Buchanan*,[96] also declined to follow *Davis*.[97] The court held that the ratio between cocaine and crack in the Sentencing Guidelines was not ambiguous; thus the court would not apply the rule of lenity to impose the lesser sentence for cocaine rather than the enhanced penalty for crack.[98]

Finally, the Eighth Circuit, prior to *United States v. Jackson*,[99] had the opportunity to address an ambiguity challenge to the sentencing provisions in *United States v. Thompson*.[100] The defendant, citing *Davis*, argued that because there is no scientific difference between cocaine and crack, the district court should have applied the rule of lenity and sentenced him under the Sentencing

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87. 53 F.3d 773 (7th Cir. 1995).

88. *Id.* at 776.

89. *Id.*

90. 98 F.3d 1364 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 1437 (1997).

91. *Id.* at 1369.

92. *Id.* (citing United States v. Jackson, 64 F.3d 1213, 1219-20 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 966 (1996)).

93. 103 F.3d 67 (9th Cir.), *cert. denied*, 117 S. Ct. 1456 (1997).

94. *Id.* at 70-71 (following United States v. Jackson, 84 F.3d 1154, 1160-61 (9th Cir.), *cert. denied*, 117 S. Ct. 445 (1996) (citing United States v. Jackson, 64 F.3d 1213, 1219-20 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 966 (1996)).

95. *Berger*, 103 F.3d at 71.

96. 909 F. Supp. 99 (N.D.N.Y. 1995).

97. *Id.* at 101.

98. *Id.* (citing *Jackson*, 64 F.3d at 1220).

99. 64 F.3d 1213 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 966 (1996).

100. 51 F.3d 122, 127 (8th Cir. 1995).

Guideline and statutory sections applicable to cocaine, rather than crack.[101] However, because the defendant had failed to establish an evidentiary basis to consider this issue, the Eighth Circuit declined to do so.[102]

Again, in *United States v. Shipley*,[103] the defendant adopted the reasoning of *Davis*, but, like the defendant in *Thompson*, failed to create a sufficient record to warrant consideration of the issue on appeal before the Eighth Circuit.[104]

Thus, prior to *United States v. Jackson*, the Eighth Circuit, though given the opportunity, twice declined to consider the ambiguity and rule of lenity challenge to the mandatory sentencing provisions of the Anti-Drug Abuse Act and the Sentencing Guidelines.

IV. INSTANT DECISION

In *United States v. Jackson*,[105] the Eighth Circuit Court of Appeals, refusing to rely on *United States v. Davis*[106] and finding "practical, real-world differences" between crack and powder cocaine, found the defendant's argument for application of the rule of lenity[107] without merit.[108]

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101. *Id.* at 127.

102. *Id.*

103. 62 F.3d 1422, 1995 WL 442209, No.95-1036 (8th Cir. 1995) (unpublished opinion).

104. *Id.* at *2.

105. 64 F.3d 1213 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 966 (1996).

106. 864 F. Supp. 1303 (N.D. Ga. 1994).

107. In addition, the defendant argued that:

(1) The evidence was insufficient as a matter of law to convict him of conspiring to distribute crack cocaine. *Jackson*, 64 F.3d at 1216. The Eighth Circuit concluded that the evidence was sufficient to support the finding of the jury that beyond a reasonable doubt Jackson was a participant in a conspiracy to distribute crack. *Id.* at 1217.

(2) The district court erred in not severing his trial from that of Michael Stokes to avoid prejudice and insure that Jackson received a fair trial pursuant to the Fifth and Sixth Amendments. *Id.* The Eighth Circuit held that Jackson had failed to show that he suffered any prejudice from the district court's denial of his severance motion, and that therefore the district court did not abuse its discretion in refusing to sever the trials of Jackson and Stokes. *Id.* at 1217-18.

(3) A remark made by Stokes' counsel was an improper comment on Jackson's failure to testify. *Id.* at 1218. However, Jackson failed to object to the comments at trial, and the Eighth Circuit thus reviewed the issue under the plain error standard. *Id.* The court held that, viewing Stokes' counsel's comments in light of all the circumstances, the comments were not improper and did not amount to plain error. *Id.* at 1219.

(4) The district court erred in its application of criminal history points from the Sentencing Guidelines. *Id.* at 1220. Because the sentence imposed by the district court did not exceed the mandatory minimum sentence, the criminal history category assigned

Initially, Jackson claimed that the district court erred in determining that Section 841 was not void for vagueness.[109] Jackson claimed that the sentencing provisions were inapplicable because they provided two statutory penalties for cocaine.[110] Following *United States v. House*,[111] the Eighth Circuit held that the term "cocaine base" is not so vague that it fails to sufficiently notify people that their conduct is criminal.[112] Accordingly, the court rejected Jackson's vagueness argument.[113]

Closely related to Jackson's void for vagueness theory was his claim that the crack statute was ambiguous in distinguishing between "cocaine base" and "cocaine" for sentencing purposes.[114] Thus, according to Jackson, the rule of lenity should apply, requiring imposition of a lesser penalty.[115] Although this was an issue of first impression in the Eighth Circuit, the court had noted this theory twice previously and declined to decide the issue.[116]

Jackson's argument closely tracked that raised by the defendant in *United States v. Davis*,[117] but the Eighth Circuit declined to follow *Davis*.[118] At his sentencing hearing, Jackson had offered transcripts of expert testimony admitted

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to Jackson was of no consequence, and the court therefore did not consider the merits of Jackson's claim. *Id.*

108. *Jackson*, 64 F.3d at 1219-20.

109. *Id.* at 1219.

110. *Id.*

111. 939 F.2d 659, 664 (8th Cir. 1991) (holding that Section 841 survives a constitutional attack premised on the void for vagueness doctrine).

112. *Jackson*, 64 F.3d at 1219.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See* United States v. Thompson, 51 F.3d 122, 127 (8th Cir. 1995) (declining to consider issues raised in United States v. Davis, 864 F. Supp. 1303, 1306 (N.D. Ga. 1994), where there was no evidentiary basis to consider the issues addressed therein). *See supra* notes 91-94 and accompanying text.

See also United States v. Shipley, 62 F.3d 1422, No. 95-1036, 1995 WL 442209 (8th Cir. 1995) (unpublished opinion) (declining to consider possible ambiguity of section 841 and the applicability of the rule of lenity where there is no evidentiary basis to consider these issues). *Supra* notes 100-06 and accompanying text.

117. 864 F. Supp. at 1305-09. *See supra* notes 81-84 and accompanying text.

Although Jackson's theory closely resembled large portions of the *Davis* opinion, Jackson's counsel failed to acknowledge the source of the language and arguments in Jackson's brief. The Court expressed disapproval of such a brief-writing style, but separated the conduct of Jackson's counsel from the merits of the case. *Jackson*, 64 F.3d at 1219 n.2.

118. *Jackson*, 64 F.3d at 1219.

by the *Davis* court to support his argument that crack and powder cocaine are the same substance.[119] The Eighth Circuit found this testimony equivocal at best.[120]

Given the "practical, real-world differences" between crack and powder cocaine,[121] the court accorded no significance to Jackson's argument that the transformation of cocaine into crack does not change the molecular structure of the substance.[122] The court held that Congress had defined the substance, and its intention to impose punishment befitting the crime, with appropriate clarity.[123] Therefore, the Eighth Circuit Court of Appeals agreed with the district court in finding that Section 841 is not ambiguous and that the rule of lenity was not applicable.[124]

V. COMMENT

The 100 to 1 cocaine to crack ratio in the mandatory sentencing provisions of the Anti-Drug Abuse Act and the U.S. Sentencing Guidelines has met a wave of criticism in the last decade.[125] The argument is that because, statistically, minorities are more likely to be crack cocaine defendants than non-minorities,[126] minorities are unfairly punished for equivalent offenses involving the same

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119. *Id.* at 1216.

120. *Id.* When asked whether "the use of crack cocaine . . . [was] more dangerous to the individual than the use of cocaine hydrochloride [powder] or cocaine base," Dr. Warren James Woodford simply replied, "Yes." *Id.* He further stated that cocaine base was distinguishable from powder cocaine in "molecular weight and structure, melting point, solubility, and common method of ingestion." *Id.*

Dr. Clinton D. Kilts testified to the distinct pharmacology of cocaine free base, which is characterized by a low boiling point and rapid effect on users. *Id.*

Dr. John Marshall Holbrook noted that cocaine base is the only form of cocaine which is truly smokable. *Id.*

Peter Pool, a DEA forensic chemist, stated that cocaine base differs from other forms of cocaine in that it has a "different melting point, is soluble in different solvents, absorbs infrared light at a different frequency, and has a separate chemical abstract service registry number . . . ." *Id.* Pool also noted that cocaine base vaporizes at a lower temperature than powder cocaine, and thus is more readily smokable. *Id.*

Finally, Dr. Michael J. Moskal, a pediatrician, testified as to the effects of the inhalation of "second hand" crack smoke by young children. *Id.*

121. *See supra* note 120.

122. United States v. Jackson, 64 F.3d at 1213, 1220 (1995), *cert. denied*, 116 S. Ct. 966 (1996).

123. *Id.* (quoting United States v. Blanding, 53 F.3d 773, 776 (7th Cir. 1995)); *See supra* notes 87-89 and accompanying text.

124. *Jackson*, 64 F.3d at 1220.

125. *See supra* notes 43-49 and accompanying text.

126. *See supra* note 43.

amounts of (but different forms of) cocaine.[127] Much of this criticism is a knee-jerk reaction based on erroneous assumptions[128] and, at best, inconclusive evidence.[129]

The statistical evidence purported to suggest that blacks are unfairly and disproportionately affected by the crack statute is scarce and inconclusive.[130] The studies of drug use often cited by critics of the sentencing provisions are problematic in that they sample different populations, use different methodologies, and fail to control for many variables.[131] Concededly, the vast majority of defendants convicted and sentenced for crack-related offenses are indeed black,[132] but the reasons for this apparent discrepancy are not clear.[133] Critics of the sentencing provisions claim that blacks simply are targeted for federal prosecution under the crack statute even though they do not sell or use crack to the extent that other segments of the population do.[134] However, there is good reason to question the statistical support for this contention.[135]

Furthermore, there are data suggesting that members of a particular race, for socio-economic reasons, may dominate traffic in a particular drug.[136] For example, of all defendants sentenced in the federal courts in 1994, seventy-three percent of methamphetamine defendants were white, ninety-three percent of LSD defendants were white, and forty-four percent of marijuana defendants were white, while only four percent were black.[137] Thus, the discrepancies in the racial make-up of crack cocaine offenders versus powder cocaine offenders may be due to the simple fact that, statistically, blacks use and sell crack more than do whites, while whites sell and use powder cocaine more than do blacks. Though the statistical evidence supporting this alternative explanation may not

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127. *See supra* notes 43-45 and accompanying text. *See also* Days, *supra* note 44, at 189-90.

128. *See infra* notes 174-81.

129. *See infra* notes 130-37.

130. *See* Days, *supra* note 44, at 187-90.

131. *See* Days, *supra* note 44, at 187. The incomplete and inaccurate body of research on this subject is only exacerbated by federal courts willing to cite *USA Today* as an authoritative source of factual information in direct contradiction with the findings of Congress. *See* United States v. Clary, 846 F. Supp. 768, 787 n.66 (E.D. Mo), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

132. *See supra* note 45.

133. *See supra* note 44.

134. *See* Taifa, *supra* note 44, at 30.

135. *See* Days, *supra* note 44, at 187-90.

136. *See* Days, *supra* note 44, at 187 (citing U.S. SENTENCING COMMISSION, ANNUAL REPORT 107 (1994)).

137. Days, *supra* note 44, at 187 (citing U.S. SENTENCING COMMISSION, ANNUAL REPORT 107 (1994)).

be conclusive, neither is the evidence offered by the critics of the sentencing provisions.

The conclusion that racial animus and selective prosecution may not be the reasons for the disproportionate number of blacks sentenced under the crack statute does not answer all the critics of the sentencing provisions. Many critics claim that regardless of the reasons for crack defendants most often being black, Congress made the sentencing provisions for crack unduly harsh precisely *because* crack defendants are most often black.[138] However, this argument proves too much. In addition to the elevated crack cocaine penalties, Congress has established even harsher penalties for other illicit drugs which are most often associated with non-blacks. For example, the penalties for LSD are five times more harsh than the penalties for crack cocaine,[139] and the vast majority of defendants in LSD-related crimes are white.[140] Thus, there is an apparent disparity between mandatory sentences for the overwhelming majority of LSD-related defendants, who are white, and the sentences for the majority of crack defendants, who are black. Of course, this disparity is hardly part of a genocidal plot;[141] rather it is easily attributable to Congress' conclusion that a particular drug exhibits distinguishing characteristics which are pertinent to the determination of sentences for offenses involving that drug.

Still, some critics argue that the disparity between sentences for drugs that differ from one another is irrelevant to the disparity between crack and cocaine sentences because crack and cocaine chemically are the *same* drug.[142] But this reliance on the fact that cocaine and crack are *chemically* the same is a hypertechnical argument that ignores the "practical, real-world differences"[143] distinguishing crack from cocaine.[144] As the Eighth Circuit found in *United*

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138. *See* Taifa, *supra* note 48, at 14; Gillmer, *supra* note 48, at 550. *See also* United States v. Clary, 846 F. Supp. 768, 783-84, 787 (E.D. Mo), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

139. 21 U.S.C. § 841(b)(1)(A)(v) (1994) reads, in pertinent part: "In the case of a violation . . . of this section involving—10 grams or more of . . . lysergic acid diethylamide (LSD); . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . ." Thus, the same 10 year sentence mandated for offenses involving 50 grams of crack cocaine is required for offenses involving only 10 grams of LSD. *See supra* notes 38, 40 and accompanying text for the penalties related to crack cocaine.

140. *See supra* note 137 and accompanying text.

141. *See* Taifa, *supra* note 48, at 14.

142. *See supra* notes 46, 81-84 and accompanying text.

143. United States v. Jackson, 64 F.3d 1213, 1220 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 966 (1996).

144. *See supra* notes 46, 72, 120-24 and accompanying text for a discussion of the differences between crack and powder cocaine. *See also* United States v. Lattimore, 974

States v. Jackson, precisely these differences justify the sentencing ratio.[145] Crack is a more dangerous substance than powder cocaine in that a crack high is more intense and shorter in duration than that created by powder cocaine.[146] Due to the shorter duration of a crack high, the user is more likely to administer crack frequently.[147] Thus, crack is more psychologically addictive than cocaine powder.[148] Furthermore, crack is easily distributed in relatively small, inexpensive quantities, making it especially appealing to the poor and the young.[149] Finally, because crack is often sold in the streets, it is often accompanied by high rates of violence and the deterioration of the communities in which it is sold.[150] Certainly such practical characteristics of crack cocaine, regardless of who the distributor or user might be, merit elevated penalties relative to those imposed for powder cocaine. For this reason, the *Jackson* court correctly "accord[ed] no significance to Jackson's argument that the transformation of cocaine into crack cocaine does not change the cocaine's molecular structure."[151]

Once it is conceded that differences between crack and cocaine exist and that such differences are pertinent to sentencing, the appropriate disparity in sentencing justified by the differences between the two drugs must be determined. This determination can be made only by arbitrarily manipulating the relationship between the severity of the sentence and the quantity of the drug involved in the offense being punished. This process is arbitrary in that, although the sentence must be harsher for crack cocaine, there is no objective measure of how much harsher the penalty should be. Thus, essentially arbitrary

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F.2d 971, 975-76 (8th Cir. 1992), *cert. denied*, 507 U.S. 1020 (1993); United States v. Buckner, 894 F.2d 975, 978-79 n.9 (8th Cir. 1990).

145. *Jackson*, 64 F.3d at 1220.

146. *Jackson*, 64 F.3d at 1216; United States v. Clary, 34 F.3d 709, 712 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995). *See also* Days, *supra* note 44, at 191-92 (citing *Crack Cocaine Sentencing: Hearings Before Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1996) (statement of Jo Ann Harris, Assistant Attorney General, Criminal Division, U.S. Department of Justice); *Examining U.S. Sentencing Commission Recommendations for Cocaine Sentencing: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (statement of Jo Ann Harris, Assistant Attorney General, Criminal Division, U.S. Department of Justice)); Sklansky, *supra* note 45, at 1291.

147. *Jackson*, 64 F.3d at 1216, 1219. *See also* Days, *supra* note 44, at 192; Sklansky, *supra* note 45, at 1291.

148. *Jackson*, 64 F.3d at 1219; *Clary*, 34 F.3d at 712. *See also* Days, *supra* note 44, at 192; Sklansky, *supra* note 45, at 1291.

149. *Clary*, 34 F.3d at 712. *See also* Days, *supra* note 44, at 192; Sklansky, *supra* note 45, at 1291.

150. Days, *supra* note 44, at 192; Sklansky, *supra* note 45, at 1291.

151. *Jackson*, 64 F.3d at 1220.

drug quantities and temporal sentencing minimums are established. Whether the differences between cocaine powder and crack justify a 100 to 1 ratio may be debatable;[152] however, because such a determination can be based only on arbitrary line-drawing, the federal courts are not the forum for contention of the appropriate ratio.[153] Instead, Congress is best suited to weigh the policy considerations relating to a particular quantity ratio for the sentencing of crack and powder cocaine offenses.[154]

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152. *See* Stewart Dalzell, *One Cheer for the Guidelines*, 40 VILL. L. REV. 317, 327-29, 334 n.53 (1995).

153. *See, e.g.*, Sproles v. Binford, 286 U.S. 374, 388-89 (1932). In *Sproles*, the Supreme Court stated:

> To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government .... [D]ebatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment, and its actions within its range of discretion cannot be set aside because compliance is burdensome.

Id.

See also Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 799-800, 804 (1991). Rubin states:

> [T]he facts presented by the case create the horizon of judges' legitimate decision making power .... They are on the safest and most legitimate ground when they restrict themselves to the range of situations that the case presents. This necessitates an incremental decision making style, one that proceeds by fact-specific stages rather than by broad generalizations. When courts, even constitutional courts, veer too far from this ideal, their decisions become suspect. The *Roe v. Wade* opinion, with its judicial statute about trimesters, is a familiar example.
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> ....
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> [In contrast] [l]egislators ... live in a regime of positive law .... For legislators, the law is an instrumentality by which they achieve their political or ideological goals.

Id.

Finally, *see* Freund, *Prolegemena to a Science of Legislation*, 13 ILL. L. REV. 264, 269-70 (1918). Freund states:

> Judicial reasoning is by its very nature incapable of producing many rules which may be the only or most adequate rules for dealing with a legal situation. The instrument of reasoning is logic, and its product a principle.... Principle can determine that a female employee shall not be overworked, it cannot say, ten hours, not eleven. Reasoning from principle does not produce measured quantities .... Measured quantity, conventional form, administrative arrangements, and ... compromise and concession, constitute the exclusive province of statute law ....

Id.

154. United States v. Lattimore, 974 F.2d 971, 976 (8th Cir. 1992), *cert. denied*,

Opponents of the current sentencing provisions are best advised to lobby Congress, not the courts.[155] Congress, as an elected body, will be more cognizant of the concerns of its constituencies. Indeed, in 1994, in response to the wave of criticism of the sentencing provisions, Congress charged the U.S. Sentencing Commission with the task of reevaluating the sentencing ratio.[156] Although Congress rejected the proposed amendments subsequently offered by the Sentencing Commission,[157] it requested that the Sentencing Commission report back with new recommendations for the reduction of the sentencing

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507 U.S. 1020 (1993). The *Lattimore* court noted that evidence of disparate impact was for Congress, not the courts, to consider. *Id.* Further, the court stated:

> This is not to say that a racially disparate impact is not a serious matter. Either Congress or the Sentencing Commission might decide to change the Guidelines or the harsh mandatory minimum sentences for crack offenses. They might believe, as a matter of policy, that racial disparities in sentencing are a good reason for such change. It is for them, not the courts, to make this decision. Our job is to decide whether the Guidelines or the statute run counter to [constitutional] principles . . . . We hold they do not.

Id.

For the reasons stated above, proposals to tailor a new equal protection analysis to the issue of the cocaine to crack sentencing ratio must fail. Such proposals encourage the courts to scrutinize not just the distinction Congress drew between the two drugs, but also Congress' choice of the more or less arbitrary ratio set between them. *See* Sklansky, *supra* note 45, at 1319. Were the courts to utilize this analysis, Congress would be left with little discretion, while the courts would set their own, equally arbitrary ratio.

155. *Lattimore*, 974 F.2d at 976.

156. *See supra* note 50 and accompanying text.

157. *See supra* note 52.

disparity.[158] Thus, Congress has been responsive to the criticism of the sentencing provisions.[159]

If the federal courts are not the appropriate forum for review of the specific crack to powder cocaine ratio set by Congress,[160] certainly the courts should not be encouraged to delve into the collective subconscious of Congress for this purpose.[161] The U.S. Supreme Court has held that legislative history (much less the unconscious motivations of legislators) may not be an appropriate source from which to scrutinize legislative purpose in the context of equal protection analysis.[162] Indeed, not so long ago, judges found delving into the motives of

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158. 141 CONG. REC. H10,283-84 (daily ed. Oct. 18, 1995); 141 Cong. Rec. S14,779-82 (daily ed. Sept. 29, 1995) (remarks of Sen. Kennedy stating that his amendment was designed to keep alive the debate over the issue of racial disparity in federal cocaine sentencing laws). Senator Kennedy's amendment reads in pertinent part:

> The United States Sentencing Commission shall submit to Congress recommendations (and an explanation therefore) regarding changes to the statutes and the Sentencing Guidelines governing sentences for unlawful manufacturing, importing, exporting, and trafficking of cocaine, and any like offenses . . . .

141 CONG. REC. S14,779 (daily ed. Sept. 29, 1995).

On April 29, 1997, pursuant to Senator Kennedy's amendment, the Sentencing Commission again proposed amendments to the Sentencing Guidelines that would narrow the cocaine to crack sentencing ratio. *See* 143 CONG. REC. H1312-01 (daily ed. June 24, 1997) (extended remarks of Rep. Rangel) ("[E]arlier this month, the U.S. Sentencing Commission again concluded that Federal drug laws that treat crack cocaine defendants 100 times more severely than powder cocaine defendants cannot be justified."); 143 CONG. REC. H1235-03, 1236-03 (daily ed. June 17, 1997) (extended remarks of Rep. Frank) ("Two weeks ago, the U.S. sentencing commission recommended reducing the disparities between sentences for possession of crack and powder cocaine.").

159. *See* Dalzell, *supra* note 152, at 327. Dalzell states:

> [T]he important point is that the ratio has been subject to a legislative response. That response, in turn, will, we trust, be based on a careful balancing of the scientific, social, and political vectors that all legitimately come into play in the line-drawing enterprise.

Id.

160. *See supra* notes 153-54 and accompanying text.

161. *See supra* notes 47 and 65 and accompanying text.

162. Some cases suggest that the *actual* purpose of the statute in question is irrelevant to equal protection analysis, and that the statute must be upheld "if any state of facts reasonably may be conceived to justify" its distinction. McGowan v. Maryland, 366 U.S. 420, 426 (1961); Flemming v. Nestor, 363 U.S. 603, 612 (1960).

Other cases suggest that, although the actual purpose of the statute may be relevant to the rational basis standard of equal protection analysis, legislative history should not be used to determine such purpose. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-77, n.10 (1980) (declining to scrutinize legislative history to determine the

Congress altogether improper.[163] Nonetheless, due to the difficulties raised by the isolated issue of the cocaine to crack sentencing ratio, at least one court has recommended departing from the deference traditionally paid Congress by the federal courts, so that courts may scrutinize the subconscious motivations of elected representatives.[164] Such caprice by the federal courts would be akin to a colloquy between the courts and Congress in which the courts would charge, "Congress, you are a racist."

Congress would answer, "No I am not."

But the courts would persist, "Yes you are; you just don't know it. But we are here to tell you."

Of course, to argue successfully with such profound judicial insight would be impossible, and Congress would be at the mercy of the courts every time the courts suspected the "unconscious" motivations of legislators.

Furthermore, it is axiomatic that establishing a new, custom-made judicial test for the purpose of virtually guaranteeing the failure of specified Congressional legislation[165] is contrary to the ideal of the objective application of law to fact.[166] Such ad hoc judicial activism degrades the integrity of the law and devalues precedent.[167] Indeed, hard cases do make bad law.[168]

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purpose of the Railroad Retirement Act of 1974, 45 U.S.C. § 231 *et seq.*). *See also* Dandridge v. Williams, 397 U.S. 471 (1970); Jefferson v. Hackney, 406 U.S. 535 (1972).

163. As late as 1953, the use of legislative history was dismissed as "psychoanalysis of Congress" and a "weird endeavor." United States v. Public Utils. Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring). What would Justice Jackson think of Judge Cahill's proposal to go beyond legislative history and peer into the souls of legislators? *See supra* note 65 and accompanying text. Surely, if resort to legislative history is "psychoanalysis," then judicial scrutiny of legislators' "unconscious predispositions" is nothing short of clairvoyance.

164. *See supra* note 65 and accompanying text.

165. *See* Sklansky, *supra* note 45, at 1292-1319; Gillmer, *supra* note 48, at 550; United States v. Clary, 846 F. Supp. 768, 782 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

166. *See, e.g.*, Board of Comm'rs v. O'Hare Truck Serv., 116 S. Ct. 2342, 2361 (1996) (Scalia, J., dissenting); Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 207 (1991) (O'Connor, J., dissenting).

167. *See O'Hare*, 116 S. Ct. at 2361; *Hilton*, 502 U.S. at 207.

168. The First Justice Harlan said over a century ago, "it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law." United States v. Clark, 96 U.S. 37, 49 (1877) (Harlan, J., dissenting). Justice Harlan elaborated:

> The will of Congress . . . has been expressed in plain and unambiguous language, which leaves no room for construction. It is obviously our duty to execute the statute without reference to our opinion as to its wisdom or policy. If, under the circumstances of particular cases, it seems harsh when construed

Finally, the inflammatory rhetoric of some commentators serves only to exacerbate the problems of black communities.[169] Despite the statistical equivocation concerning the relationship of the racial makeup of users of particular drugs to drug sentencing,[170] the statistics are quite clear concerning the effects of crack cocaine, and crime generally, on predominately black communities.[171] For example, in 1994, seventy-four percent of emergency room admissions for crack-related problems involved blacks.[172] Furthermore, blacks compose sixty-nine percent of admissions for treatment for crack abuse, whereas whites account for only twenty-four percent.[173] In light of such figures, why are not increased sentences for crack looked upon as a benevolent measure designed to protect black communities from those who would distribute crack to the poor and the children of the community?[174] Professor Kennedy suggests that perhaps we should "commend rather than condemn" the distinction Congress has made between powder cocaine and crack.[175] As Professor Kennedy points out, if in fact blacks are disproportionately victimized by the conduct punished by the

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according to its terms, the remedy is with another department of government, and not with the judiciary.

Id. at 46.

169. *See* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1257-58 (1994).

170. *See supra* notes 130-37 and accompanying text.

171. Kennedy, *supra* note 169, at 1255-56, 1278 nn.1-2. Kennedy states: "[C]rime afflicts African-Americans with a special vengeance. African Americans are considerably more likely than whites to be raped, robbed, assaulted, and murdered."

172. *See* Days, supra note 44, at 188 (citing Drug Enforcement Agency, Intelligence Division, *Crack Cocaine Intelligence Report* 22 (1994)).

173. *See* Days, *supra* note 44, at 188.

174. *See supra* note 149 and accompanying text. *See also* United States v. McMurray, 833 F. Supp. 1454, 1466-67 (D. Neb. 1993), *aff'd*, 34 F.3d 1405 (8th Cir.), *cert. denied*, 513 U.S. 1179 (1994). In *McMurray*, the court stated:

> If, indeed, "crack" trafficking was particularly striking the inner city and particularly hitting inner city youth, it should have surprised no one that the residents of the inner city, including blacks, would be disproportionately subjected to the penalty structure adopted by Congress to implement its [sentencing approach]. . . [I]f "crack" cocaine is as dangerous as Congress believes it to be, and poor people in general, and poor blacks in particular, are victimized more frequently by the sale of "crack" than whites, the social costs of "disproportionate" prosecution of African Americans might be deemed acceptable precisely so that other poor people, including poor blacks, are afforded some protection from the scourge of "crack."

Id.

175. Kennedy, *supra* note 169, at 1269.

crack statute, then a corollary is that blacks may be helped by measures discouraging such conduct.[176]

On the flip side, if the penalties for crack-related offenses were *less* than those for offenses involving powder cocaine, would commentators suspect such a sentencing ratio to be part of a "genocidal"[177] policy of destroying black communities by leaving crack-related offenses unpunished?[178] While at least one commentator condemns the current sentencing ratio as "genocidal,"[179] others claim that proposals for lowering drug-related penalties, or decriminalizing drug use altogether, would amount to genocide because minorities would constitute a disproportionatenumber of those allowed to pursue their self-destructive drug habits without intervention from the government.[180] Minorities also would constitute a disproportionate number of those victimized by the outwardly destructive behavior of unfettered drug offenders in their neighborhoods.[181]

Critics of the mandatory minimum sentencing ratio between cocaine and crack should not be so quick to dismiss it as racist or even genocidal. The statistical support for claims of racism are at best equivocal, and the courts have repeatedly found the relevant provisions of the Anti-Dug Abuse Act and U.S. Sentencing Guidelines to be constitutional. Indeed, the sentencing provisions may be seen as beneficial to the vast majority of blacks who do not deal in any way with crack cocaine, but who are victimized by those who do.

Let us remember that when the sentencing provisions are condemned as unfair to a defendant sentenced under the crack statute, that defendant necessarily has been duly convicted of dealing in crack cocaine. Not a single American individual, minority or otherwise, has anything to fear from the crack

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176. Kennedy, *supra* note 169, at 1269.

177. *See* Taifa, *supra* note 48, at 14.

178. *See, e.g.*, Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420 (1988) (calling for law enforcement to respond with equal vigor to crimes against blacks as to crimes against whites).

See also Kennedy, *supra* note 169, at 1259-60. Professor Kennedy states:

> [T]he principal problem facing African-Americans in the context of criminal justice today is not over-enforcement but under-enforcement of the laws... Unfortunately efforts to address the danger crime poses to minority communities are confused and hobbled by reflexive, self-defeating resort to charges of racism when a policy, racially neutral on its face, gives rise to racial disparities when applied. Such overheated allegations of racism obscure analysis of a wide range of problems in the criminal justice system. Consider, for instance, the stifling of intelligent debate over drug policy by the rhetoric of paranoia.

Id.

179. Taifa, *supra* note 48, at 14.

180. *See* Kennedy, *supra* note 169, at 1261.

181. *Supra* notes 171-73.

sentencing provisions, save the individual who chooses to deal in crack cocaine. This is not to suggest that such an offender lacks the right to challenge his conviction and sentence; rather it is merely to say that such defendant is hardly a martyr for any worthwhile cause. For nearly every defendant sentenced under the harsh crack provisions, there are numerous children on the streets of black communities to whom that dealer will never have an opportunity to sell crack cocaine. Though the cocaine to crack sentencing ratio may be extreme, it is clearly constitutional, and hardly racist.

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