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A DISPARITY THAT IS WORLDS APART: THE FEDERAL SENTENCING GUIDELINES TREATMENT OF CRACK COCAINE AND POWDER COCAINE

Kimberly Mache Maxwell¹

I. INTRODUCTION

Derrick Curry aspired to be a professional basketball player.² He was a star athlete at a Hyattsville, Maryland, high school and won a basketball scholarship from a junior college in Kansas.³ He had never been in any trouble with the law or at school, but he participated in a drug ring that distributed crack cocaine (crack) in the Washington, D.C. area.⁴ Curry was arrested and convicted of conspiracy and distributing crack in federal court. Curry, a twenty year old black male, was sentenced in October 1993 to nineteen years and seven months in prison, with no possibility of parole.⁵

Curry's sentence may seem harsh, but that was precisely Congress's intent. According to the Anti-Drug Abuse Act of 1986, criminals convicted of offenses involving crack receive longer prison terms than offenses involving powder cocaine.⁶ There is a one hundred to one sentencing disparity between crack and powder cocaine. For example, if a person possesses five grams of crack, he or she will receive a minimum five years in prison, and if that person possesses fifty grams of crack, the sentence will be at least ten years in prison.⁷ A person must possess

five thousand grams of powder cocaine to receive the same sentence.⁸

Crack and powder cocaine are basically the same substance, but there are a number of differences. Crack is very easy to make. Powder cocaine is mixed with baking soda and water, and that solution is heated, usually in a pot.⁹ The hardened material is then broken into small pieces that are sold as rocks, and the rocks are smoked in a glass pipe.¹⁰ Powder cocaine is a salt containing hydrochloric acid.¹¹ It is a powder-like substance, which users generally inhale through the nose.¹²

The effect of the sentencing laws is racially discriminatory; minorities, especially black Americans, are more apt to use and sell crack, while white Americans are likely to use and sell cocaine. Statistics from the U.S. Sentencing Commission in 1992 indicate that 2,070 defendants in the federal system were sentenced for selling crack, and of those defendants, about ninety-two percent were black, five percent Hispanic and three percent white.¹³ About forty-five percent of federal defendants in 1992 convicted of cocaine offenses were white, while twenty-one percent were black.¹⁴ As a result, black crack users and dealers tend to receive longer prison

¹ *Juris Doctor*, Washington and Lee University School of Law, 1995; *Bachelor of Arts*, University of North Carolina at Chapel Hill (1991).

² See Leiby, *A Crack in the System*, Washington Post, Feb. 20, 1994, at F1.

³ *Id.* at F4.

⁴ *Id.* at F1.

⁵ *Id.*

⁶ Pub. L. 99-570, 100 Stat. 3207.

⁷ 21 U.S.C. § 841(b)(1)(1988).

⁸ *Id.*

⁹ See Lamar, *Crack: A Cheap and Deadly Cocaine is a Fast-Spreading Menace*, Time, June 2, 1986, at 16. See also "Crack" Cocaine: Hearing Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Cong. 2d Sess., 14 (July 15, 1986)(statement of Dr. Charles R. Schuster) ("Apparently, the method of using the substance is more important than its purity. According to Dr. Schuster, "Crack doesn't require the use of elaborate paraphernalia. It is usually smoked in a simple glass pipe. This appeals to many

buyers of crack who are first-time users of cocaine. It sells for a lower unit price, which attracts younger and less affluent street customers. To the experienced user, an attractive aspect of crack is its rapid effect. These users know that when it is smoked, cocaine's onset of action is more rapid than when it is snorted. Previously, cocaine was generally purchased in lots of at least a gram for a price around \$100. Crack, on the other hand, is packaged and marketed in small vials that were designed to hold eyeglass or watch parts. Each small vial holds one dose, which sells, roughly, for around \$10. This packaging is very important since it reduced the price barrier that prohibited young children from being able to purchase the drug in the past"). *Id.* at 15.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Rankin, *Crack Cocaine Law Declared Racist, Illegal*, Atlanta Journal/Constitution, Feb. 19, 1994, at A1.

¹⁴ See *United States v. Clary*, 846 F.Supp. 768, 786 (E.D. Mo. 1994).

terms than their white counterparts who used and sold powder cocaine.¹⁵

The purpose of this article is to analyze the sentencing disparity between crack and powder cocaine. Part II addresses the political context behind the Anti-Drug Abuse Act of 1986. Part III addresses the reasons courts have upheld the disparity in sentencing between crack and powder cocaine, along with responses to those arguments. Part IV attempts to provide a solution to the sentencing disparities.

II. THE ANTI-DRUG ACT OF 1986

The political context in which the Anti-Drug Abuse Act arose is critical to this discussion. Crack

¹⁵ See Rankin, *The Courts Weighing Cocaine Justice: U.S. Crack Laws Tip Scales Against Blacks, Statistics Show*, Atlanta Constitution, Feb. 11, 1993, at A1 ("According to statistics from the U.S. Sentencing Commission, during the year ending September 30, 1992, blacks were sentenced for crack cocaine offenses in the Northern District of Georgia at a rate of 30-to-1 more than whites. Although large numbers of white defendants have been convicted of cocaine powder crimes, they are serving shorter sentences").

¹⁶ See Elmer-DeWitt, *A Plague Without Boundaries: Crack, Once a Problem of the Poor, Invades the U.S. Middle Class*, Time, Nov. 6, 1989, at 95; Barnes, *Downfall of a Neighborhood*, Life, July 1988, at 92; Lamar, *Where the War is Being Lost: The Booming Crack Business is Tearing the Heart out of U.S. Cities*, Time, March 14, 1988, at 21; Lamar, *The Drug War Bogs Down a Year After the Uproar Over Cocaine, The Crisis Has Grown Worse*, Time, Nov. 23, 1987, at 28; *Nine Days in June: Drugs Claimed Two Sports Stars - And 149 Others*, Life, Jan. 1987, at 83; Lamar, *Scoring Off the Field: The Penalty Flag Has Been Thrown for Drug Use Among Athletes*, Time, Aug. 25, 1986, at 25; Lamar, *The House is on Fire: Activists and Politicians Fight Back at Crack*, Time, Aug. 4, 1986, at 27; Lamar, *Crack: A Cheap and Deadly Cocaine is a Fast-Spreading Menace*, Time, June 2, 1986, at 16.

¹⁷ See Elmer-DeWitt *supra* note 16, at 95 ("On TV, crack addicts are almost invariably blacks and Hispanics from the ghetto. In real life, the problem is much broader: the number of white middle- and upper-class crack users may equal — or even exceed — the total from poor minority communities Between 1985-1988 . . . the number of Americans using crack cocaine at least once a week increased by one-third during that period, from under 650,000 to more than 860,000"); Barnes, *Downfall of a Neighborhood*, Life, July 1988, at 92 ("Then three years ago crack hit the Hook, and today every one of the project's 10,000 residents is either a dealer, a user or a hostage to the drug trade"); Lamar, *Where the War is Being Lost: The Booming Crack Business is Tearing the Heart out of U.S. Cities*, TIME, March 14, 1988, at 21 ("After Vivienne McPherson's common-law husband was murdered in a

entered the mainstream drug culture in the mid-1980s, and it, along with powder cocaine, garnered extensive media coverage.¹⁶ The media bombarded the public with stereotypes of drug users and dealers, leading people to believe that crack and its impact would ruin society.¹⁷

In 1986, two well-known athletes died within ten days of each other from using crack. Len Bias was a twenty-two year old basketball player for the University of Maryland, and two days after he was drafted by the Boston Celtics, he died from cocaine intoxication.¹⁸ Eight days after Bias's death, Don Rogers, safety for the Cleveland Browns, died of a heart attack induced by cocaine.¹⁹ Rogers, who was twenty-three years old,

shootout with rival drug dealers, she decided to take over his business Then, in the words of a vice cop, she "messed up the money." . . . It was bad enough that McPherson, nine months pregnant, had been pumped with eight bullets while her neighbors watched What really sickened the lawman is that "three of the slugs had gone right through the baby"); Lamar, *The Drug War Bogs Down a Year After the Uproar Over Cocaine, The Crisis Has Grown Worse*, Time, Nov. 23, 1987, at 28 ("Only a year ago everyone was obsessed with crack, the extremely addictive, smokable cocaine In the wake of the stock-market crash and tensions in the Persian Gulf, it is hard to believe that in September 1986 some opinion polls showed drug abuse topping economic woes and the threat of war as America's No. 1 national concern"); *Nine Days in June: Drugs Claimed Two Sports Stars - And 149 Others*, Life, Jan. 1987, at 83 ("For the nine days last June that included the Bias and Rogers deaths, Life found 147 others who had also died of drug abuse . . . Life's survey . . . showed that most drug victims were not athletes, rock stars or ghetto kids. Instead, a composite portrait suggests a thirty-three-year old white male with a steady job"); Lamar, *The House is on Fire: Activists and Politicians Fight Back at Crack*, Time, Aug. 4, 1986, at 27 ("Many New York law-enforcement authorities believe that a substantial increase in crime this year might be attributed to the crack epidemic. In May of this year cocaine arrests were up 68 percent over the figure for May 1985 Crack has all but consumed parts of neighborhoods such as Harlem, Bedford-Stuyvesant and the South Bronx that are primarily made up of poor blacks"); Lamar, *Crack: A Cheap and Deadly Cocaine is a Fast-Spreading Menace*, TIME, June 2, 1986, at 16 ("The National Cocaine Hotline . . . estimates that 1 million Americans in 25 states around the country have tried crack Crack busts already constitute 55 percent of all cocaine arrests in New York The rapid spread of crack leads some experts to fear a new wave of cocaine addiction in the U.S.").

¹⁸ See Lamar, *Scoring off the Field: The Penalty Flag Has Been Thrown for Drug Use Among Athletes*, Time, Aug. 25, 1986, at 52.

¹⁹ *Id.*

died two days before he was to marry his college sweetheart.²⁰

Soon after these two deaths, Speaker of the House Tip O'Neill announced plans for an omnibus anti-drug bill. All committee work on the bill was completed in five weeks.²¹

The legislative history from the Anti-Drug Abuse Act of 1986 is full of racially-tinged references to ghettos and dealers of different ethnicities.²² The Democrats, anxious to avoid being labeled soft on crime, pushed the legislation through Congress without regard for many of the usual legislative procedures.²³ The Anti-Drug Abuse Act, which allocated

\$1.7 billion for drug treatment, education and law enforcement, easily passed both houses of Congress.²⁴ Only eighteen lawmakers voted against the bill.²⁵ The provisions of the act were then incorporated into the Federal Sentencing Guidelines.

Another factor to consider in crack cases is the disparity in sentencing between state and federal jurisdictions. Not all drug dealers are prosecuted under federal law; there is a great deal of difference in the discretion given to state and federal drug-prevention agencies and to prosecutors as to who is targeted in investigations and prosecuted.²⁶

²⁰ *Id.*

²¹ See Manly, *Harsh Line Drawn on Crack Cocaine: Tough Penalties Found to Affect Blacks Most*, Boston Globe, July 24, 1994, at 1. Eric Sterling, Counsel for the House Judiciary Subcommittee on Crime, described the Congressional atmosphere as "sheer panic. Everyone felt that the spotlight for solving the drug crisis was on them. And if it wasn't they wanted it to be on them The crime bill was the distillation of every fear, anger and resentment that members of Congress felt about their impotence to solve the scary things in life." *Id.*

²² 132 Cong. Rec. S4670 (daily ed. April 22, 1986) ("Most of the dealers, as with past drug trends, are black or Hispanic . . . Haitians also comprise a large number of those selling cocaine rocks That's new and disconcerting . . . because they previously had not seen Haitians selling drugs. Whites rarely sell the cocaine rocks. Street sales of cocaine rocks have occurred in the same neighborhoods where other drugs were sold in the past: run-down, black neighborhoods But the drug market also is creeping into other neighborhoods. An interracial neighborhood . . . has become one of West Palm Beach's most highly visible cocaine rock areas. Less than a block from where unsuspecting white retirees play tennis, bands of young black men push their rocks on passing motorists, interested or not"); 132 Cong. Rec. S7125 (daily ed. June 9, 1986) ("One of the boldest dealers on the street is 'Eare,' a big-shouldered Trinidadian wearing gold chains and a diamond-studded bracelet with his name engraved on it, who claims a take of \$12,000 a week at \$10 per vial of crack Linda, another veteran of the Times Square crack trade, did make a change. An attractive Puerto Rican woman in her mid-20s, she had worked her way up from hustling drugs on the street to running two crack houses . . . for a Colombian coke dealer she met when working in a Times Square movie house").

²³ See *United States v. Walls*, 841 F.Supp. 29 (D.C.Cir. 1994) ("In further reference to departure from normal legislative procedure, amici also offered Sterling's observation that: [t]he 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"); 123 Cong. Rec. S13748 (daily ed. Sept. 26, 1986) (statement by Sen. Mathias) ("Members . . . should be commended for their efforts to confront this very serious problem and to move it into the direction of some successful solution. It is sometimes, however, that in our haste to do something about a serious problem, we create a whole new array of problems. And I fear that in our haste to do something about drugs before the end of this session of Congress . . . we are 'flattering the passions.' Because when we flatter the passions, we are all in danger of forgetting fundamental principles. The threat is . . . 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 beat 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 If we are contemplating changes to individual freedoms, if we are about to alter major social commitments, then those modifications simply must be discussed fully . . . the consequences must be anticipated"); *Id.* at S13969 (daily ed. Sept. 27, 1986) (statement by Sen. Bingaman) ("Despite the necessity of this legislation, our haste to enact a drug bill before we adjourn this Congress raises some questions and some potential concerns. Are we acting to insure short term political gain from a sudden and popularly recognized problem? Or are we making a commitment to address a serious social malaise?").

²⁴ See Lamar, *The Drug War Bogs Down a Year After the Uproar Over Cocaine, The Crisis Has Grown Worse*, Time, Nov. 23, 1987, at 28.

²⁵ *Id.*

²⁶ Leiby, *supra* note 2, at F5.

Generally, federal prosecutions are much more likely to result in conviction, with more severe punishment. In cases where there is joint jurisdiction of similar offenses, careful discernment by conscientious state and federal prosecutors can carefully select among the charges (state and federal) the ones that more nearly result in the most appropriate penalty. There would be inefficiency in double prosecutions, so a choice ought to be made. While various factors would be considered in selecting federal or state actions, certainly a decision based upon race would not be appropriate. And yet — when an examination of all the crack cocaine violations in the district court is made, they are nearly all black (fifty-five of fifty-seven).²⁷ As a result, there are disparities between federal and state laws and the sentence a defendant receives.²⁸

III. ARGUMENTS MADE AGAINST THE DISPARITY IN SENTENCING AND RESPONSES

Federal courts of appeals and district courts have upheld the disparity in sentencing between crack and powder cocaine convictions.²⁹ Recently, three federal district court cases have held contrary to the settled precedent.³⁰ Successful defendants have challenged their crack sentences under the Due Process Clause, the Equal Protection Clause and the Cruel and Unusual Punishment Clause in the Constitution.

²⁷ *Clary*, 846 F.Supp. at 788.

²⁸ Rankin, *supra* note 13, at A1 (holding that “[t]he bulk of cocaine cases are tried in Georgia’s Superior Courts, but some enter federal court when there are multijurisdictional or multistate offenses; local law enforcement agencies occasionally hand off larger cases to federal agencies because their drug convictions mean longer prison time”).

²⁹ See *United States v. Johnson*, 40 F.3d 436 (D.C. Cir. 1994); *United States v. Colbert*, 894 F.2d 373 (10th Cir. 1990) *cert. denied*, 496 U.S. 911 (1990); *United States v. Buckner*, 894 F.2d 975 (8th Cir. 1990); *United States v. Galloway*, 951 F.2d 64 (5th Cir. 1992); *United States v. Metcalf*, 898 F.2d 43 (5th Cir. 1990); *United States v. Griffin*, 945 F.2d 378 (11th Cir. 1991); *United States v. Williams*, 996 F.2d 1218 (6th Cir. 1993); *United States v. Pickett*, 941 F.2d 411 (6th Cir. 1991); *United States v. Levy*, 904 F.2d 1026 (6th Cir. 1990), *cert. denied*, *Black v. United States*, 498 U.S. 1091 (1991); *United States v. Avant*, 907 F.2d 623 (6th Cir. 1990); *United States v. McMurray*, 833 F.Supp. 1454 (D.Neb. 1993); *United States v. D’Anjou*, 16 F.3d 604 (4th Cir. 1994); *United States v. Edmonds*, 1991 WL 702813 (D.D.C. 1994); *United States v. Abrams*, 943 F.2d 52 (6th Cir. 1991); *United States v. Simmons*, 964 F.2d 763 (8th Cir. 1992); *United States v. Reed*, 977 F.2d

A. Due Process Argument

Attorneys have argued that the Federal Sentencing Guidelines violate the Due Process Clause, because Congress did not give any legitimate purpose for the distinctions in crack and powder cocaine sentencing. Courts have dismissed this argument, citing three justifiable distinctions. First, crack is a different substance than powder cocaine, and it is much more addictive than cocaine.³¹ Second, crack has certain attributes, such as its small physical size and inexpensive price per dose, that may create other societal problems.³² Third, the purpose of Congress in establishing more stringent punishments for crack convictions was to discourage its use and distribution, since crack is more addictive than powder cocaine.³³ Courts have looked to the legislative history of the Anti-Drug Abuse Act to justify the differences in sentencing.³⁴

B. Equal Protection Argument

The equal protection argument asserts that the sentencing guidelines for crack have a disproportionate effect on black Americans, since blacks are more likely to use and distribute crack than powder cocaine. The courts have dismissed this argument, based on the test from *Personnel Administrator v. Feeney*.³⁵ This case held that in order for a law that is facially neutral to be found unconstitutionally discriminatory against a racial

584 (6th Cir. 1992); *United States v. King*, 972 F.2d 1259 (11th Cir. 1992); *United States v. Chandler*, 996 F.2d 917 (7th Cir. 1993); *United States v. Singleterry*, 29 F.3d 733 (1st Cir. 1994); *United States v. Thompson*, 27 F.3d 671 (D.C. Cir. 1994); *United States v. Bailey*, 36 F.3d 106 (D.C. Cir. 1994); *United States v. Frazier*, 981 F.2d 92 (3rd Cir. 1992).

³⁰ *Walls*, 841 F.Supp. at 24 (refusing to apply the Federal Sentencing Guidelines to two black crack users who cooked powder cocaine into crack, based on their drug addiction, but the sentences for two other black defendants in the conspiracy were upheld, because of their conduct, prior convictions and amount of money and drugs dealt); *United States v. Majied*, 1993 WL 315987 (D.Neb. 1993) (refusing to apply sentencing guidelines to defendant who was found guilty of distribution of cocaine and crack and conspiracy to distribute and possession of 500 grams); *Clary*, 846 F.Supp. at 768 (finding sentencing disparity unconstitutional under the Eighth Amendment); *rev’d United States v. Clary*, 34 F.3d 709 (8th Cir. 1994).

³¹ *Galloway*, 951 F.2d at 65.

³² *Pickett*, 941 F.2d at 418.

³³ *Id.*

³⁴ *Schuster*, *supra* note 9, at 75-76.

³⁵ 442 U.S. 256 (1979).

minority, there must be a finding of discriminatory purpose in the law.³⁶ In *United States v. Galloway*, the court found no discriminatory purpose in the legislative history of the Federal Sentencing Guidelines.³⁷ In order to pass judicial scrutiny, the sentencing guidelines only had to meet a rational basis test, which means the state must merely show a reasonable connection between the statute and the justification behind it.³⁸ The court held that the rational basis for the statute was the protection of public welfare, and thus, the sentencing guidelines were held constitutional.³⁹

C. Cruel and Unusual Punishment Argument

The final argument against the sentencing disparity is that the sentencing guidelines are cruel and unusual punishment, because the sentencing is unduly severe compared with the crime committed. In response, the Court of Appeals for the Sixth Circuit said that "we must grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."⁴⁰ Again, the court justified the sentencing disparities based on the reasons for enacting the laws as stated in the legislative history.⁴¹ In *United States v. Levy*, the Sixth Circuit cited *United States v. Cyrus* in support of the conclusion that the defendant's sentence for crack cocaine was constitutional:

There have been only three recognized instances of disproportionality rising to the level of an Eighth Amendment violation. These involved condemning a man to death for a non-homicide crime, imposing life without parole for a nonviolent recidivist who passed a bad check for \$100, and sentencing a man in the Philippines to 15 years hard labor for falsifying a government form. A ten-year sentence for drug possession simply does not approach the same level of gross inequity.⁴²

Many other circuits have rejected the cruel and unusual punishment argument.⁴³

D. Response

There are numerous problems with the justifications courts have used for the sentencing disparity between crack and powder cocaine. First, there is a great deal of evidence indicating that crack is more harmful than powder cocaine, but there is also information showing that crack and powder cocaine are equally harmful. Second, the discriminatory purpose test, the test courts must use to determine if a statute discriminates against a class of people, does not take into account unconscious racism when Congress enacted legislation. The application of the test makes it nearly impossible for any legislation to be held unconstitutional on equal protection grounds.

Third, there is evidence of race-oriented arguments in the legislative history of the Anti-Drug Abuse Act of 1986, which should provide sufficient evidence of discriminatory intent by Congress in enacting this legislation. Fourth, courts have dismissed the precedential value of *State v. Russell*,⁴⁴ a Minnesota case that struck down sentencing laws substantially similar to the federal guidelines. Fifth, the disparity should be found unconstitutional, because they violate the Cruel and Unusual Punishment clause. The sentencing guidelines seriously undermine the perception of what is fair and just. Finally, the effect of the disparity in the sentencing guidelines is increased prison costs for housing non-violent offenders. In a political climate where less expensive government is the goal, eliminating the disparity may help solve the government's fiscal problems.

1. Addictiveness of Crack and Cocaine

There is no tangible, persuasive evidence that there is a substantial difference in addictiveness and chemical structure between crack and powder cocaine; both substances are equally addictive.⁴⁵ Crack

³⁶ *Id.* at 272.

³⁷ 951 F.2d at 65.

³⁸ *Id.* at 66.

³⁹ *Id.*

⁴⁰ *Avant*, 907 F.2d at 627 (quoting *Solemn v. Helms*, 463 U.S. 277, 290 (1983)).

⁴¹ *Avant*, 907 F.2d at 627.

⁴² 904 F.2d at 1034; *See also United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989).

⁴³ *See United States v. Buckner*, 894 F.2d 975 (8th Cir. 1990); *United States v. Colbert*, 894 F.2d 373 (10th Cir. 1990), *cert. denied*, 496 U.S. 911 (1990); *United States v. Malone*, 886 F.2d 1162 (9th Cir. 1989).

⁴⁴ 477 N.W.2d 886 (Minn. 1991).

⁴⁵ *See Leiby*, *supra* note 2, at F4; *See also Locy, Second Judge Rejects Guidelines for Sentencing in Crack Case: Pressure by DEA Agency Cited as Term is Reduced*, Washington Post, July 21, 1994, at B1 (Medical research, however, has shown that crack is not more dangerous than cocaine in powder form; both are destructive); *See also Rankin, The Courts Weighing Cocaine Justice: U.S. Crack Laws Tip Scales Against Blacks, Statistics Show*, Atlanta Constitution, Feb. 11, 1993, at A1 (Robert Byck, a professor of pharmacology at Yale University, notes that there are no studies documenting whether inhaling crack smoke is more addictive than snorting cocaine. But because crack inha-

is often portrayed as far more dangerous and addictive than powder cocaine – in fact, it is neither. The medical evidence is unchallenged on this; crack is bad, powder is bad. It is all the same stuff. Identical molecules. If anything, crack actually causes fewer fatal overdoses than powder . . . And traffickers in powder tend to be higher level dealers than traffickers in crack. Powder dealers sell to crack dealers.⁴⁶

Since there is a reasonable amount of debate on whether or not there is a difference between powder cocaine and crack, the disparity in sentencing between the two substances should not be upheld on this basis.

2. Discriminatory Purpose Test

The discriminatory purpose test, used by courts to determine whether the Federal Sentencing Guidelines are unconstitutional, is problematic. The test from *Personnel Administrator*,⁴⁷ requiring a finding of discriminatory purpose, fails to consider the unconscious and institutional racism in the legislative history. After the Civil Rights Movement, discrimination has generally been hidden. There is a certain stigma attached to being considered racist.⁴⁸ There are two types of people who have racist beliefs: the dominant racist who is open about his or her belief that blacks are inferior⁴⁹ and the aversive racist who holds such beliefs but is prevented from acting by his or her conscious.⁵⁰ Generally, those who are racist are more apt to hide their beliefs to avoid such stigma.

There remains the possibility that unconscious racism played a part in enacting the sentencing guidelines. As the court explained in *United States v. Clary*: The influence of “unconscious racism” on legislative

lation brings an intensive but brief euphoria, ‘It’s a far more threatening form of drug abuse,’ he says).

⁴⁶ See, Leiby, *supra* note 2, at F4.

⁴⁷ 442 U.S. 256 (1979).

⁴⁸ See Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 336 (1987).

⁴⁹ *Id.* at 335.

⁵⁰ *Id.* Aversive racists range from individuals who lapse into demonstrative racism when threatened – as when blacks get “too close” – to those who consider themselves liberals and, despite their sense of aversion to blacks (of which they are often unaware), do their best within the confines of the existing societal structure to ameliorate blacks’ condition.

⁵¹ *Clary*, 846 F.Supp. at 781.

⁵² *Id.*

decisions has never been presented to any court in this context. Constitutional redress to racial discrimination has resulted primarily from judicial vigilance directed toward correcting overt and facially discriminatory legislation forged first by slavery and followed by continuing racial animosity toward black and other ethnic minorities. Consequently, the focus on “purposeful” discrimination is inadequate as a response to more subtle and deeply buried forms of racism.⁵¹

Despite attempts to eliminate overt racism, there still remains cultural bias, where the majority is the “us,” and minorities are the “them.”⁵² If the discriminatory purpose test relies on blatant discrimination, it will be virtually impossible for courts to find a law unconstitutional.⁵³ Underlying racism in any laws, including the Federal Sentencing Guidelines, will remain unchecked by the judiciary.

3. Racist Ideas in the Legislative History

Despite what appellate and district courts have held, there was evidence of race-oriented arguments and racial tension in the legislative history of the Controlled Substance Act. Congressional testimony that most crack sellers are Haitians, blacks, or Trinidadians, “[who] wear gold chains and a diamond-studded bracelet[s]”⁵⁴ and statements that black crack dealers would corrupt white drug users and white communities⁵⁵ clearly indicate an underlying racial bias. If the various courts had considered these examples of racial bias, the disparate sentences that various defendants received would have been found unconstitutional under the *Personnel Administrator* test.⁵⁶

⁵³ “If the purpose of the law’s search for racial animus or discriminatory intent is to identify a morally culpable perpetrator, the existing intent requirement fails to achieve that purpose. There will be no evidence of self-conscious racism where the actors have internalized the relatively new American cultural morality which holds racism wrong or have learned racist attitudes and beliefs through tacit rather than explicit lessons. The actor himself will be unaware that his actions, or the racially neutral feelings and ideas that accompany them, have racist origins.” 39 Stan. L. Rev. at 343–344.

⁵⁴ Schuster, *supra* note 9.

⁵⁵ *Id.*

⁵⁶ One defendant has challenged the statutory minimums based on the legislative history. The Circuit Court of Appeals for the District of Columbia held that the information in the legislative history is insufficient to find discriminatory purpose. See *United States v. Edmonds*, 1994 WL 702813 (D.C.Cir. 1994).

4. Precedential Value of *State v. Russell*

In *United States v. Galloway*,⁵⁷ the Fifth Circuit Court of Appeals summarily dismissed the defendant's argument that the test used in *State v. Russell* applied.⁵⁸ In *Russell*, the Minnesota Supreme Court struck down the state sentencing statute for crack, a statute patterned after the Federal Sentencing Guidelines, on equal protection grounds.⁵⁹ The *Galloway* court relied on federal court precedent to reject the defendant's argument, without clear or independent inquiry into the issues presented at the state level.⁶⁰ The court also found that Minnesota's rational basis test was different than the federal test.⁶¹

The *Galloway* court dismissed the defendant's argument in part because *Russell* was a state court case, not federal. However, the argument raised did merit some inquiry on a federal level, despite the federal precedent.

5. Cruel and Unusual Punishment

The sentencing guidelines constitute cruel and unusual punishment. There is little proportionality in the sentencing of a crack dealer or user compared to a cocaine dealer or user. Lighter sentences for cocaine dealers and users send a message to the public that those activities are not as serious as using and dealing in crack. In the words of U.S. District Court Judge J. Spencer Letts:

It is hard to image that there is any other nation in which Mike Tyson, a convicted rapist with a long and unsavory history of prior misconduct, could be sentenced by the judge who presided over his trial to a sentence which will make him eligible for parole in little more than three years, while Johnny Pattillo, a first-time offender with a spotless prior record, stands to be sentenced by a Congress that has never seen him and never judged him to from 12 years, 7 months to 15 years.⁶²

The interests of justice mandate major changes in the sentencing disparities between crack and cocaine.

⁵⁷ 951 F.2d 64 (5th Cir. 1992).

⁵⁸ *Id.*

⁵⁹ 477 N.W.2d 886 (Minn. 1991).

⁶⁰ *Galloway*, 951 F.Supp. at 66.

⁶¹ *Id.*

⁶² See Newton, *Judge Denounces Mandatory Sentencing Law*, Los Angeles Times, Dec. 19, 1992, at B1. Pattillo was convicted for attempting to ship a package that contained 681 grams of crack cocaine, which triggered the mandatory minimum sentence. Pattillo was a first-time drug offender.

6. Perception of Justice

Another concern is the perception of justice, particularly within the black community. The disparity in sentences between crack and powder cocaine may be perceived as unjust. Given the comparison between a crack dealer and a cocaine dealer in sentencing, there seems to be no justice. The fact that great numbers of black males are currently imprisoned or on parole is an additional problem. There is the belief among some in the black community that black males are being persecuted unjustly.⁶³

A large part of what is just and fair comes from personal perception. For example, a law or court ruling may not be correct, but as long as the decision is made without bias or prejudice, there is not as much problem with it. On the other hand, if there are hints of bias in a law or court decision, there remains the possibility that the integrity of our governmental system may be undermined. Part of the reason why people bring their problems before courts and legislatures is their belief that they will have a fair hearing. If that is not the case, people will take their ideas of law into their own hands, resulting in anarchy. Accordingly, the perception of justice is very important.

An argument that can be made in favor of such stringent sentences for crack is that the harsh sentences help protect the black community, where drug use and dealing is generally more visible. It is likely that some black Americans have been championing longer prison sentences for crack dealers and users. By imprisoning those crack users and dealers for a long time, the community will be free of such undesirable influences. It will also deter others from such behavior.

There are two problems with this argument. First, the argument reeks with paternalism — black people and their communities need to be taken care of by the government. This underlying idea can create animosity between black communities and the government. Any ethnic community generally wants to be perceived as self-sufficient, not dependent on the government or other entities. Second, for each

⁶³ *Clary*, 846 F.Supp. at 794. "The reason why we cannot wait for congressional modification and changes that the Court believes will occur in time is that the horror of continuing is so very destructive. There are many prisoners serving 10-year sentences for possessing with intent to distribute 50 grams of crack. They are usually between 18-30 years of age, and about 90 percent are black. Their absence in such numbers, if continued, threatens the possibility of the ultimate extinction of the black race in America."

crack dealer that is imprisoned, there is generally someone else there to continue the trade, because of low employment rates and poor education in urban communities. Illegal activities, particularly drugs, are a means of survival or respect for many black youths who have no other viable legal alternatives.⁶⁴

7. The Effect of Disparate Sentencing

The most visible effect of the greater mandatory minimum sentences for crack convictions is the increase of federal prisoners and the cost required to house those inmates, many of whom are non-violent offenders. Estimates for the cost of imprisoning one inmate in the federal system range from \$20,000 to \$25,000 a year.⁶⁵ This cost may not seem excessive, until one considers the numbers of inmates involved as well as the number of prisons that are required. Within ten years, the federal and state population has doubled to 925,000 inmates, and sixty-one percent of those prisoners are drug offenders.⁶⁶ As the number of inmates increase, eventually new jails must be built to house them. In a national climate that encourages less government spending, to require greater mandatory minimum sentences for crack offenses is unfair and expensive.⁶⁷

IV. SOLUTION

The solution to this sentencing problem is very simple; crack and powder cocaine convictions should

be punished equally.⁶⁸ The specific length of imprisonment or fine for these offenses is irrelevant. The punishments should be substantially similar, instead of disparate as they are now. Changing the law in this respect will enhance the legitimacy of the justice system. In the words of Judge Cahill:

It would be far more fair and just, and in keeping with the "get tough" rhetoric of today, to require that both black and white violators serve the same 10 years imprisonment, be it "crack" or powder cocaine. Cocaine is, really, cocaine!! No crack could exist without cocaine powder. Eliminate cocaine, and crack disappears!! This would be simple and fair and would eliminate racial injustice. Of paramount value would be the enhanced respect for the judiciary and the nation by bringing about equal justice for all — not merely punishment for "JUST US."⁶⁹

V. PRESENT ATTEMPTS TO CHANGE THE LAW

Some attempts have been made to change the disparity in federal crack and powder cocaine sentencing. Dr. Arthur Curry, a high school principal and Derrick Curry's father, testified before Congress in a hearing to reform mandatory minimum drug sentences.⁷⁰ No legislation came out of that hear-

⁶⁴ See Lamar, *A Bloody West Coast Story: L.A.'s Police Fight Back Against Crack-Dealing Street Gangs*, Time, April 18, 1988, at 32 ("Children of the underclass, weaned on violence and despair, have become bloodthirsty entrepreneurs. Some have made small fortunes marketing the cheap, explosive cocaine derivative — known as 'rock' in L.A. — while settling business differences with state-of-the-art firearms"); Lamar, *Kids Who Sell Crack: The Drug Trade Has Become the Nation's Newest — And Most Frightening — Job Program*, Time, May 9, 1988, at 20 ("Frog is happy to tell you that he rakes in \$200 a week selling crack . . . Frog is 13 years old. One night Frog was teaching the tricks of his trade to a couple of eager apprentices, ages 10 and 11. Just as he was selling a \$20 packet of crack to a customer, a squad car pulled up. With 15 rocks on his person, Frog was promptly busted. He was also thrilled.").

⁶⁵ See Smolowe, . . . *And Throw Away the Key: America's Overcrowded Prisons Have Failed as a Deterrent*, Time, Feb. 7, 1994, at 54.

⁶⁶ *Id.*

⁶⁷ See Heymann, *The Lock-'Em-Up Debate: What Pols Won't Say: Three Strikes and - We're Out of Money*, Washington Post, Feb. 27, 1994, at 1 ("Congress did not know the effect of the drug minimum sentences on the federal prison population. Fueled by these sentences, that popu-

lation is now swelling at a rate that would justify a new prison every two months. Congress did not know that the drug sentences it was requiring are greater than the median penalties for armed robbery, kidnapping and extortion . . . It did not know that a very large proportion of those caught up in the mandatory minimum sentences would have no significant criminal record, no involvement in violence and no significant role in any substantial drug organization.").

⁶⁸ There are many people convicted for crack offenses in the federal system who receive a mandatory minimum sentence who are non-violent offenders, such as runners and mules who help distribute the drug. On the other hand, there are many violent offenders who receive the same sentence. Knowing that the Federal Sentencing Guidelines take into account past convictions, use of a firearm and other factors in the sentencing recommendation, the sentences between both types of offender should remain the same. The disparity between sentencing for crack and cocaine seems more unfair to those offenders who have never been in trouble with the law before but basically get the harshest penalty available for a first conviction.

⁶⁹ Clary, 846 F.Supp. at 796.

⁷⁰ Leiby, *supra* note 21, at F5.

ing, primarily because of the anti-crime climate throughout the nation.⁷¹

There are several influential politicians and organizations who support changing the mandatory minimum sentences for nonviolent offenders, such as Attorney General Janet Reno, the U.S. Sentencing Commission, the Judicial Conference of the United States, as well as the American Bar Association.⁷² U.S. Supreme Court Justice Anthony M. Kennedy has testified before Congress, criticizing the mandatory minimums.⁷³ Members of Congress have introduced legislation to change the mandatory minimum sentences to no avail.⁷⁴ Despite federal district court rulings that have refused to uphold the sentencing guidelines for people convicted of crack offenses, the debate continues.

The District of Columbia's U.S. Attorney's Office will appeal the *Walls* decision, where the fed-

eral district court did not apply the guidelines to two people convicted of crack offenses.⁷⁵ The United States Attorney for the District of Columbia has publicly criticized the mandatory sentencing, but his office is appealing as part of his public obligation to enforce the law.⁷⁶ The *Walls* decision does not have the binding force of an appellate ruling, but it is possible that other judges may follow Judge Oberdorfer's lead because of his reputation as an "astoundingly brilliant" judge.⁷⁷

Federal district courts and courts of appeals have tried to justify the disparity in sentencing between crack and powder cocaine, but basic justice and the facts show that this disparity is nothing short of unfair. The most logical solution to this problem is to make the punishments the same, since the drug is the same. Cocaine is cocaine, but for many black Americans serving lengthy prison sentences, crack and powder cocaine are worlds apart.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Manly, *supra* note 21, at F1.

⁷⁴ See Newton, *Judge Denounces Mandatory Sentencing Law*, Los Angeles Times, Dec. 19, 1992, at B1 (Rep. Don Edwards has introduced legislation to eliminate the mandatory minimum sentences); See also Manly, *Harsh Line Drawn on Crack Cocaine: Tough Penalties Found to*

Affect Blacks Most, Boston Globe, July 24, 1994, at 1 (Rep. Charles Rangel and Rep. William Hughes have introduced bills to change the sentencing guidelines).

⁷⁵ 841 F.Supp. at 24; See also Duggan, *U.S. Will Challenge Sentences*, Washington Post, February 27, 1994, at B1.

⁷⁶ *Id.*

⁷⁷ *Id.* at B1-B2.