

NOTES

GETTING A FIX ON COCAINE SENTENCING POLICY: REFORMING THE SENTENCING SCHEME OF THE ANTI-DRUG ABUSE ACT OF 1986

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The now-infamous “War on Drugs” campaign of the 1980s culminated in the adoption of the Anti-Drug Abuse Act of 1986, which included a provision for a one-hundred-to-one sentencing ratio of powder cocaine to crack cocaine. This ratio provides that the penalty for a crime involving five or ten grams of crack cocaine is equivalent to the sentence for a crime involving five hundred or one thousand grams of powder cocaine. This structure has led to a racial disparity in sentencing because African Americans are more often charged with a crack cocaine offense than Caucasians, who are usually indicted for powder cocaine possession. Despite importunate pleas from various social justice groups, Congress has not amended the statute, causing courts to grapple with addressing the flaws of the Act. The result is a split among U.S. courts of appeals regarding not only the meaning of the Act but also the policy behind the penalty scheme. This Note addresses the unresolved circuit split and courts’ policy disagreements with the sentencing structure, ultimately advocating for a joint legislative and judicial solution that permits courts to embrace a modern comprehension of the drug problem in the United States while achieving a consistent federal policy.

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INTRODUCTION

In conjunction with the War on Drugs, launched in the early 1980s, federal and state attorneys devoted more resources to prosecutions of illegal drug dealers and users.¹ At that time, jurors' knowledge of drug-related issues was minimal and the average juror could not grasp the facts of a particular case or the applicable law; thus, it was difficult for prosecutors to secure convictions.² To ameliorate the problem of uninformed jurors, the government relied on expert witnesses to explain the chemical properties of drugs and the dangers associated with their use.³

Prosecutors in Washington D.C. lionized Johnny St. Valentine Brown, Jr., a police investigator who had emerged as the "resident narcotics expert" of the Superior Court of the District of Columbia.⁴ Brown, a flamboyant witness who brought theater to the courtroom, made the vernacular of illegal narcotics accessible for the average juror. He translated chemical formulas into street names of drugs, explained how drugs were used, and detailed the manner in which drugs were sold.⁵ At the outset of his testimony, Brown declared his credentials, which purportedly included a doctorate in pharmacology from Howard University and board certification in pharmacology.⁶ By 1983, Brown had served as an integral witness in

1. See Edward D. Sargent, *Flamboyant Narcotics Expert Is Key Witness in Drug Cases*, WASH. POST, May 6, 1983, at C1. For a discussion on the War on Drugs, see *infra* notes 108–17 and accompanying text.

2. See Sargent, *supra* note 1.

3. See *id.* ("The average person doesn't know the particulars of street drugs [An expert] can make or break a case."); see also *infra* notes 63–73 and accompanying text (detailing the evolution of public perception of crack cocaine during the 1980s).

4. See Sargent, *supra* note 1.

5. See *id.* (noting that the District of Columbia paid Brown about \$28,000 per year to be an expert witness).

6. See *id.*; Bill Miller, *Narcotics 'Expert' Said To Be Fraud: Witness in D.C. Criminal Cases Is Charged with Perjury*, WASH. POST, Feb. 4, 2000, at B8.

over one thousand narcotics cases, testifying at as many as five trials per day.⁷

Based on his strong reputation among D.C. prosecutors, Congress called on Brown for advice during the drafting of the Anti-Drug Abuse Act of 1986 (the Act or 1986 Act).⁸ Brown testified before Congress, stating that, based on his independent research, possession of twenty grams of crack cocaine was just as dangerous as having one thousand grams of powder cocaine.⁹ Based in part on Brown's "expert" testimony, Congress derived a one-hundred-to-one ratio of powder cocaine to cocaine base, which includes crack cocaine.¹⁰ The Act's penalty scheme instructs courts to issue a five-year minimum federal prison sentence to defendants convicted of crimes involving five hundred grams of powder cocaine or five grams of crack cocaine.¹¹ Similarly, a defendant convicted of possession of five thousand grams of powder cocaine will receive the same ten-year minimum sentence as a defendant with fifty grams of crack cocaine.¹²

After Brown had testified in narcotics trials for twenty years, a defense attorney proved that Brown had fabricated his credentials.¹³ After being indicted on eight counts of perjury, Brown pleaded guilty and was sentenced to one year in prison.¹⁴

Brown's now-dubious testimony about crack cocaine is representative of the caliber of information Congress relied upon while drafting an act that changed the landscape of drug enforcement: ambiguous and speculative. The term "crack cocaine" entered the lexicon in 1985 and intense media coverage of the crack cocaine epidemic ensued.¹⁵ A flurry of high-profile crack-cocaine-related deaths raised public concern about widespread addiction to crack cocaine.¹⁶ Without full comprehension of the chemical compounds of cocaine and its derivatives or a thorough exploration of the relative harms of cocaine and crack cocaine, Congress allowed the atmosphere of panic to dictate the one-hundred-to-one ratio.¹⁷

An unintended consequence of the Act's ratio is a racial disparity in sentencing, which became apparent almost immediately after the Act took

7. See Sargent, *supra* note 1.

8. Pub. L. No. 99-570, 100 Stat. 3207; see *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 110th Cong. 166–73 (2007) (statement of Eric E. Sterling, President, Criminal Justice Policy Foundation) [hereinafter *Hearing on Mandatory Minimum Sentencing Laws*].

9. See *Hearing on Mandatory Minimum Sentencing Laws*, *supra* note 8, at 171.

10. Crack cocaine is a subset of cocaine base, which encompasses all forms of smokeable cocaine. See *infra* Part I.A.3.

11. See 21 U.S.C. § 841(b) (2006).

12. See *id.*

13. See Bill Miller, *Challenges Planned After 'Expert' Resigns*, WASH. POST, Oct. 11, 1999, at B2.

14. See Miller, *supra* note 6.

15. See TIM MADGE, *WHITE MISCHIEF: A CULTURAL HISTORY OF COCAINE* 165 (2001); *infra* notes 62–73 and accompanying text.

16. See MADGE, *supra* note 15, at 165; *infra* notes 63–74 and accompanying text (discussing the media coverage of the crack cocaine phenomenon).

17. See *Hearing on Mandatory Minimum Sentencing Laws*, *supra* note 8, at 171.

effect.¹⁸ African American defendants were more likely to be charged with crack cocaine offenses, while Caucasian offenders were usually indicted for powder cocaine possession.¹⁹ Thus, African American defendants were subject to harsher sentences and sent to prison more frequently.²⁰ Social justice groups such as the American Civil Liberties Union have joined the U.S. Sentencing Commission and the American Bar Association in voicing opposition to the ratio.²¹

Despite importunate pleas from these various organizations, Congress has taken no action to amend the statute, causing courts to grapple with addressing the flaws of the Act.²² The result is a split among U.S. courts of appeals regarding not only the meaning of the Act but also the policy behind the penalty scheme.²³ For the purpose of sentencing, some circuits interpret the term “cocaine base”²⁴ to refer to crack cocaine only, while other circuits believe that “cocaine base” refers to all nonpowder forms of cocaine. Courts have implored the U.S. Supreme Court and the legislature to take steps to resolve the split, but to no avail.²⁵

This Note addresses the unresolved circuit split and judicial disagreement with the sentencing disparity. Part I details the history of the United States’ affair with illicit drugs, including legislative attempts to regulate cocaine through the Act and the subsequent racial disparity wreaked by the Act’s sentencing structure. Next, Part II explores the circuit split regarding the meaning of “cocaine base” and recent judicial attempts to remedy the disparity caused by the Act’s penalty scheme. Finally, Part III advocates for a joint legislative and judicial solution that permits courts to advance a modern approach to the drug problem in the United States while achieving a consistent federal drug policy. Although the Act targets crack cocaine more severely than any other form of cocaine base, justifications for this one-hundred-to-one ratio are now untenable. This Note further contends that Congress should repeal the ratio and courts should refrain from sentencing offenders based upon policy concerns.

I. COCAINE IN THE PUBLIC DISCOURSE: PUBLIC CONCERN BEGETS ATTEMPTS TO REGULATE

Cocaine has been part of the national drug scene for over a century, but crack cocaine was not created until the 1980s.²⁶ This section discusses the

18. Vice President Joe Biden, who was an ardent supporter of the Act as a senator, has stated that Congress did not foresee the disparity the Act caused, nor did the drafters have any malicious intent in creating the penalty scheme. See Ellis Cose, *Closing the Gap: Obama Could Fix Cocaine Sentencing*, NEWSWEEK, July 20, 2009, at 25, 25.

19. See *id.*

20. See *id.*

21. See *infra* Part I.C.2, D.

22. See *infra* Part II.B.

23. See *infra* Part II.

24. See 21 U.S.C. § 841(b) (2006).

25. See *infra* Part II.

26. See MADGE, *supra* note 15, at 162–65.

history of cocaine and crack cocaine in the United States. First, it explores the trajectory of powder cocaine from medicinal resource to illicit narcotic and the accompanying public alarm. It then surveys the legislative and executive responses to growing public concern about drug addiction, which were ineffective until the passage of the 1986 Act, explored in detail in Part I.C. Next, this part examines the U.S. Sentencing Commission's reaction to the Act's penalty scheme and Supreme Court precedent expanding judicial discretion in sentencing narcotics offenders. The section concludes with an overview of current movements to change the Act's penalty scheme, including a bill currently before Congress.

A. *Sociological and Chemical History of Cocaine*

Legislative attempts to regulate narcotics have punctuated the last century, all following a similar trend: laws have been swiftly enacted as an immediate response to heightened media attention or public outcry. To determine legislative intent with respect to the meaning of "cocaine base," as well as the rationale behind the one-hundred-to-one ratio set forth in the Act, a historical survey of cocaine, including details of the intense media coverage immediately prior to the Act, is instructive. Finally, the chemical evolution of the drug, which has yielded a range of versions of cocaine, demonstrates the difficulty its regulation poses to lawmakers.

1. The History of Cocaine Addiction: From Incan Tribes to Hollywood Icons

The use of cocaine has persisted for centuries: sixteenth century Incan tribes' use of cocaine fascinated conquistadores²⁷ in the same way Americans were mesmerized by the drug's prevalence among Hollywood stars in the 1980s.²⁸ Until the end of the nineteenth century, cocaine was a prominent feature of U.S. medical journals.²⁹ Druggists believed that the coca plant, the source of all forms of cocaine, could relieve ailments from stomach pain to headaches.³⁰ By the beginning of the twentieth century, however, the dangers of addiction became apparent, and a movement to outlaw cocaine was born.³¹

Hamilton Wright, a prominent physician who led the effort to achieve federal legislation on narcotics, based his campaign on what he believed were insidious effects of cocaine on African Americans in the South.³² In

27. *See id.* at 34 (noting that once the conquistadores arrived in Peru in 1532, they observed the Incas' cocaine use and returned to the Iberian Peninsula with a vast supply).

28. *See id.* at 148 (stating that "[m]any Hollywood stars admitted to taking the drug," adding that "[s]uited Wall Street lawyers . . . were indulging in . . . drug-taking").

29. *See id.* at 107.

30. *See id.* at 75.

31. *See id.* at 88–89 (stating that by the early 1900s, many states had passed laws banning cocaine).

32. *See* DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 43–44 (3d ed. 1999).

an attempt to galvanize support from Southern Democrats, Wright and other doctors suggested that “[t]he use of ‘coke’ is probably much more widely spread among negroes than among whites.”³³ With the advent of Wright’s campaign came the first characterization of drug use along racial lines.³⁴

Proponents of federal narcotics regulation launched a far-reaching campaign grounded in racially divisive tactics, but statistics from the time period did not support their contentions. From 1910 to 1914, of the 2119 African Americans admitted to the Georgia State Sanitarium,³⁵ three were institutionalized for narcotics addiction and only one was actually addicted to cocaine.³⁶ Additionally, national surveys demonstrated that cocaine use had been waning since 1912.³⁷

Despite the statistical evidence showing that the incidence of drug abuse had diminished, in 1914, Representative Francis B. Harrison of New York introduced a bill regulating the sale and importation of narcotics.³⁸ The Harrison Act rendered the unauthorized distribution and use of cocaine illegal but permitted companies and individuals to register as authorized distributors.³⁹ Doctors were allowed to prescribe cocaine, provided it was done “in the course of [their] professional practice only.”⁴⁰ This limitation prevented doctors from prescribing cocaine for the sole purpose of maintaining patients’ addictions.⁴¹

Almost immediately after its enactment, opposition to the Harrison Act was expressed in medical journals including the *New York Medical Journal* and *American Medicine*.⁴² Instead of curbing illicit drug use, the *New York Medical Journal* asserted, the intense regulation of cocaine led to heightened violence on the black market.⁴³

Through the 1950s, the use of narcotics continued to decline consistently.⁴⁴ Because antinarcotic sentiment was so pervasive, however, politicians were compelled to enact severe penalties for the sale and use of illegal drugs.⁴⁵ Congress strengthened federal regulations,⁴⁶ applying the death penalty to the sale of heroin to minors.⁴⁷

33. See MADGE, *supra* note 15, at 89.

34. See *id.*

35. See *id.* at 90. The Georgia State Sanitarium, now called Central State Hospital, was created in 1837 as an alternative to prison for drug addicts and the mentally ill.

36. See *id.*

37. See James Inciardi, *Introduction* to HANDBOOK OF DRUG CONTROL IN THE UNITED STATES 1, 6 (James Inciardi ed., 1990).

38. Harrison Drug Act of 1914, Pub. L. No. 223, 38 Stat. 785 (repealed 1970).

39. See John C. McWilliams, *The History of Drug Control Policies in the United States*, in HANDBOOK OF DRUG CONTROL IN THE UNITED STATES, *supra* note 37, at 29, 30–31.

40. See Harrison Drug Act § 2(a).

41. See MADGE, *supra* note 15, at 107.

42. See *id.*

43. See *id.*

44. See MUSTO, *supra* note 32, at 245–46.

45. See *id.*

46. See *id.*; Arnold M. Washton, *Cocaine: Drug Epidemic of the ‘80’s*, in THE COCAINE CRISIS 33, 50 (David Allen ed., 1985).

47. See MUSTO, *supra* note 32, at 246.

As the political climate shifted in the 1960s, so did public perception of drug usage: hallucinogens such as LSD appeared and quickly swept the nation.⁴⁸ Cocaine usage reemerged, initially among Hollywood elite,⁴⁹ by the late 1960s, a “significant portion” of Americans were using drugs.⁵⁰ Cocaine usage spread rapidly during the 1970s, not only for its euphoric effect but also because the drug symbolized affluence:⁵¹ the price of powder cocaine ranged from \$75 to \$100 per gram.⁵²

Developed as an alternative to the highly flammable cocaine freebase,⁵³ crack cocaine was first created in Los Angeles in 1981, and six crack cocaine laboratories were uncovered that year.⁵⁴ Three years later, dozens of laboratories were operating nationwide.⁵⁵ By 1985, crack cocaine was available in nearly every major city, particularly in predominantly African American and Hispanic neighborhoods.⁵⁶ The quick expansion of crack cocaine has been attributed to its low cost—crack cocaine ranged from \$3 to \$20 per vial⁵⁷—as well as to inner-city gangs, who actively distributed the drug.⁵⁸

Between 1983 and 1985, crack cocaine usage among African American and Hispanic populations doubled,⁵⁹ while Caucasian upper- and middle-class males between twenty-five and thirty-five years old became less associated with the drug.⁶⁰ As crack cocaine became cheaper, the number of cocaine-related deaths increased.⁶¹ Donald J. McConnell, executive director of the Alcohol and Drug Abuse Commission, warned that cocaine “went from the champagne drug to the beer drug.”⁶² As death tolls rose, media coverage of the crack cocaine “epidemic” escalated, bringing national attention to a new chapter in drug addiction.

48. See MADGE, *supra* note 15, at 142.

49. See, e.g., *id.* at 146–48 (noting that Woody Allen and Elton John were two Hollywood icons known for using the drug).

50. Peter Kerr, *Anatomy of the Drug Issue: How, After Years, It Erupted*, N.Y. TIMES, Nov. 17, 1986, at A1 (reporting that cocaine usage had become en vogue for the first time since the 1920s, following the introduction of heroin and marijuana).

51. See MADGE, *supra* note 15, at 146 (“If you could afford to take cocaine you were making a social statement as well as a recreational choice.”).

52. See EDITH FAIRMAN COOPER, *THE EMERGENCE OF CRACK COCAINE ABUSE* 3 (2002).

53. See *infra* Part I.A.3.

54. See *id.* at 27 & n.4 (stating that crack probably first became available in Los Angeles in 1981 and in New York City by 1983).

55. *Id.* at 94.

56. See MADGE, *supra* note 15, at 165.

57. See COOPER, *supra* note 52, at 10.

58. See *id.* at 29.

59. See Washton, *supra* note 46, at 50 (citing a survey conducted in 1985, which also demonstrated the shift from snorting powder to smoking freebase).

60. See *id.*

61. See Kerr, *supra* note 50 (providing statistics showing that the number of “[c]ocaine-related cases in hospital emergency rooms rose from 3,300 in 1981 to nearly 10,000 in 1985”).

62. *Id.*

2. Media Coverage of Narcotics Abuse

Most Americans first learned about crack cocaine through media stories, which usually disclosed tragic details of public figures' addictions. Coverage of the dangers associated with the use of all forms of cocaine intensified in 1979 with the emergence of the practice of smoking cocaine, colloquially referred to as "freebasing."⁶³ *Rolling Stone* magazine focused on smokeable forms of cocaine, calling it the "top-of-the-line model of the Cadillac of drugs," yet cautioned that "freebasing seemed to be much more dangerous than snorting."⁶⁴ In 1980, when comedian Richard Pryor sustained third-degree burns after reportedly using a butane torch to light cocaine freebase, newspapers capitalized on the incident.⁶⁵ Outlets including *The Philadelphia Inquirer*, *Chicago Tribune*, and *The Boston Globe* ran stories about the new trend of freebasing cocaine.⁶⁶

In 1985, *The New York Times* became the first major media outlet to use the term "crack cocaine,"⁶⁷ and a follow-up article appeared on the front page less than two weeks later, detailing crack cocaine and its intensely addictive quality.⁶⁸ By 1986, major news outlets had declared crack cocaine usage to be in "epidemic proportions."⁶⁹

High-profile deaths by drug overdoses instigated a flurry of media coverage of the issue of crack cocaine. Len Bias, a University of Maryland basketball star, died of an apparent cocaine overdose just two days after he was drafted to play for the Boston Celtics.⁷⁰ Within weeks, a media frenzy had erupted.⁷¹ On May 18, 1986, three New York City newspapers printed articles about rampant use of crack cocaine.⁷² Television programs also spotlighted increased drug use, including a two-hour CBS broadcast, *48 Hours on Crack Street*.⁷³ Media coverage undoubtedly accelerated political efforts to combat crack cocaine and cocaine usage. Interpretation of media reports as well as congressional debates requires an understanding of the

63. See COOPER, *supra* note 52, at 17. Cocaine freebase was a precursor to crack cocaine; it was created in the late 1970s and is ingested through inhalation. See *infra* Part I.A.3.

64. COOPER, *supra* note 52, at 17; Charles Perry, *Freebase: A Treacherous Obsession*, ROLLING STONE, May 1, 1980, at 43.

65. See COOPER, *supra* note 52, at 18–19.

66. See Kevin B. Blackstone, *Free Base: Cocaine Mixed with Ether*, BOSTON GLOBE, June 11, 1980, at 1; *Hot Line Survey: Cocaine Users Believe That the Drug Is Addictive*, PHILA. INQUIRER, Sept. 19, 1983, at B8; *Medic Warns of Peril in Use of Costly 'Free Base'*, CHI. TRIB., June 12, 1980, at 14; see also COOPER, *supra* note 52, at 18.

67. See COOPER, *supra* note 52, at 1; Jane Gross, *A New, Purified Form of Cocaine Causes Alarm As Abuse Increases*, N.Y. TIMES, Nov. 29, 1985, at A1.

68. See Gross, *supra* note 67.

69. See *id.*

70. See *Examiner Confirms Cocaine Killed Bias*, N.Y. TIMES, June 25, 1986, at D25.

71. See Kerr, *supra* note 50 (reporting a *Newsweek* editor's comment: "I felt the need to put the drug problem in a larger context than we had in the past").

72. See *id.*

73. See John Corry, *CBS on 'Crack Street'*, N.Y. TIMES, Sept. 4, 1986, at C22.

term “cocaine base,” along with the chemical composition of other forms of cocaine.

3. Chemical Analysis of Cocaine

Crack cocaine is not the only form of cocaine base, but it is the most prevalent.⁷⁴ The complexity of the chemistry of cocaine underscores the problems its regulation has posed to lawmakers.

Cocaine is derived from the coca plant, which, upon consumption, anesthetizes and stimulates the central nervous system.⁷⁵ The coca plant can be chewed to induce a high and is difficult to obtain in the United States, as cocaine is usually exported from South America in powder form.⁷⁶

The chemical name for powder cocaine is cocaine hydrochloride, which is created through a complex process of heating and cooling coca leaves.⁷⁷ After pulverizing coca leaves into a coarse powder, alcohol is added and distilled off in order to extract the most pure form of cocaine alkaloid.⁷⁸ Powder cocaine is ingested intranasally, through snorting, and takes effect within five to fifteen minutes; the euphoria lasts up to two hours.⁷⁹

Cocaine freebase, first created in the 1970s, is smokeable. To create cocaine freebase, cocaine hydrochloride must be heated and then mixed with ammonia and ether.⁸⁰ The substance cools and yields smokeable cocaine crystals after drying.⁸¹ Ether, an extremely flammable substance, renders the process of smoking cocaine freebase quite dangerous.⁸² After inhalation, cocaine reaches the brain within ten seconds, and the high lasts for up to five minutes.⁸³

In the 1980s, a less dangerous form of cocaine freebase was invented: crack cocaine.⁸⁴ When cocaine powder is mixed with baking soda to form a paste and heated, the substance hardens into rocks.⁸⁵ This product was given the street name “crack,” for the crackling sound it makes when smoked.⁸⁶

74. See COOPER, *supra* note 52, at 7–10.

75. See *id.* at 3.

76. See Spencer A. Stone, Note, *Federal Drug Sentencing, What Was Congress Smoking? The Uncertain Distinction Between “Cocaine” and “Cocaine Base” in the Anti-Drug Abuse Act of 1986*, 30 W. NEW ENG. L. REV. 297, 303, 307 (2007).

77. See COOPER, *supra* note 52, at 5; Andrew C. Mac Nally, Comment, *A Functionalist Approach to the Definition of “Cocaine Base” in § 841*, 74 U. CHI. L. REV. 711, 717 (2007).

78. See MADGE, *supra* note 15, at 192.

79. See COOPER, *supra* note 52, at 4.

80. See Stone, *supra* note 76, at 306.

81. See *id.*

82. See *id.*

83. See COOPER, *supra* note 52, at 6.

84. See Stone, *supra* note 76, at 306–07.

85. See COOPER, *supra* note 52, at 6.

86. See *id.*

Cocaine base may refer to many different forms of cocaine. Among chemists, cocaine base refers to either crack cocaine or freebase cocaine.⁸⁷ Among dealers and users, cocaine base is unusable as it has yet to be converted into the smokeable “rocks.”⁸⁸ Such diverse meanings of the term “cocaine base” further complicate the issue of legislative intent.

Table 1 is intended to elucidate the differences among the various forms of cocaine, demonstrating the complexity of the drug and why it causes consternation among lawmakers and jurists.

Table 1: Cocaine Forms, Creation, Ingredients, and Ingestion⁸⁹

	Cocaine Form				
	Coca Leaves	Powder Cocaine	Cocaine Freebase	Crack Cocaine	Cocaine Base
Chemical Ingredients	coca leaves	cocaine hydrochloride, and sugar (in street forms)	cocaine hydrochloride, ammonia, and ether	cocaine hydrochloride, baking soda or sodium hydroxide, and alkaline	cocaine hydrochloride, with ammonia, ether or baking soda
Ingestion Method	Orally	Intranasally (i.e., “Snorting”)	Smoking	Smoking	<u>Among users:</u> none <u>Chemically:</u> Smoking
Time To Enter Bloodstream	30 minutes	5–15 minutes	30 seconds	30 seconds	<u>Among users:</u> none <u>Chemically:</u> 30 seconds
How the Form Is Made	Natural	Extract cocaine alkaloid from coca plant; add sugar to decrease purity and increase weight	Heat cocaine hydrochloride and mix with ammonia and ether	Mix cocaine powder with baking soda and heat until “rocks” harden	<u>Among users:</u> Mix powder cocaine with ether and ammonia or baking soda but do not heat, which would render it incomplete and unusable <u>Chemically:</u> Mix cocaine with any ether, including baking soda, and/or ammonia, cool into hardened, smokeable substance

87. See COOPER, *supra* note 52, at 6; Mac Nally, *supra* note 77, at 717.

88. See Mac Nally, *supra* note 77, at 717.

89. See *infra* Part I.C.1. In interpreting the terms of the Act, district and circuit courts have attempted to analyze the drug’s chemical properties, a difficult task that has contributed to the circuit split. See *infra* Part II.A. For more information on the chemical composition of cocaine, see COOPER, *supra* note 52; MADGE, *supra* note 15; Mac Nally, *supra* note 77; Stone, *supra* note 76.

B. *Ineffective Political Initiatives Prior to the Anti-Drug Abuse Act of 1986*

In the 1980s, public awareness of the problems related to cocaine addiction made narcotics regulation a popular political issue, pursued by the Democrat-controlled Congress.⁹⁰ This section discusses failed attempts by both the executive and legislative branches to curb the growing use of cocaine prior to 1986. Congressional hearings produced recommendations from various drug researchers, yet legislators took no significant action. Similarly, President Ronald Reagan commissioned various task forces to intercept drugs during their importation to the United States, but these efforts failed to decrease drug trafficking. Reagan also launched the unsuccessful “Just Say No” campaign but made no attempts to change the law enforcement of drug dealing.

1. Legislative Inertia: Congressional Hearings Yield No New Regulation

Heightened awareness of drug addiction among Americans compelled Congress to begin investigations, yet it took no significant action.⁹¹ The House Select Committee on Narcotics Abuse and Control held a series of hearings in 1979 to learn about the health risks posed by drug addiction.⁹² Though these hearings were intended to address general drug abuse, most witnesses focused on the emerging trend of smokeable cocaine.⁹³ Researchers for the National Institute on Drug Abuse (NIDA), Dr. Robert C. Petersen and Dr. Robert Byck, portended the drug problems of the coming decade, asserting that smoking cocaine was far more dangerous than snorting it because psychological dependency developed almost immediately.⁹⁴ While both researchers acknowledged that the smoking phenomenon was not widespread, they warned that it could become a major threat to public health.⁹⁵

At the conclusion of their testimony in 1979, Byck and Petersen conveyed three recommendations to the House Select Committee, which they believed would prevent the onset of a crack cocaine epidemic.⁹⁶ The researchers (1) requested funding for additional research on the drug, (2) urged that the government collaborate with the media on a campaign to educate the public on the hazards of smoking cocaine, and (3) suggested

90. See Mac Nally, *supra* note 77, at 755–69.

91. See MUSTO, *supra* note 32, at 265 (discussing the parents’ movement against increased tolerance of drugs, which gained traction after research found that the most popular parties among teenagers were “drug parties”).

92. See *Cocaine: A Major Drug Issue of the Seventies: Hearing Before the H. Select Comm. on Narcotics Abuse and Control*, 96th Cong. 16 (1979).

93. See *id.* (statements of Dr. Robert Byck and Dr. Robert C. Petersen, Researchers, National Institute on Drug Abuse).

94. See *id.* at 63 (statement of Dr. Robert Byck, Researcher, National Institute on Drug Abuse).

95. See *id.* at 62–68.

96. See *id.* at 136–42.

that U.S. scientists and South American scientists collaborate on an investigation into the causes of drug addiction.⁹⁷

While Congress never specifically addressed the three recommendations from NIDA, the 1980 federal budget reflected minor increases in appropriations to the Division of Community Assistance for drug abuse prevention efforts.⁹⁸ The Select Committee also passed legislation during the early 1980s creating “National Drug Abuse Education and Prevention Week” and “Just Say No to Drugs Week.”⁹⁹ These efforts were widely criticized as inadequate and ultimately failed to achieve a reduction in drug abuse.¹⁰⁰

From the inception of the War on Drugs, congressional policy was to increase funding to law enforcement agencies and allocate less to research and treatment.¹⁰¹ Much of the appropriations to law enforcement were earmarked for task forces to intercept drugs before entering the country;¹⁰² by 1984, over one dozen task forces operated in states known for having high volumes of drug trafficking.¹⁰³ Despite these efforts during the early 1980s, however, drug use only continued to increase.¹⁰⁴ Just as congressional hearings did not spur any meaningful regulation, presidential administrations were similarly engaged in futile attempts to combat the drug problem during the 1970s and 1980s.

2. Lackluster Executive Initiatives Fail To Curb Cocaine Use

By the 1970s, public attention to cocaine abuse forced presidential candidates to address the issue during their campaign speeches. At the beginning of his second term in 1973, Richard Nixon boasted that Americans had “turned the corner on drug addiction in the United States.”¹⁰⁵ President Jimmy Carter’s 1976 platform included a promise to decriminalize marijuana,¹⁰⁶ yet in an open letter to Congress in 1977, he indicated that law enforcement and research with respect to other drugs should be enhanced.¹⁰⁷ Neither Nixon nor Carter crafted a consistent

97. *See id.*

98. *See* William J. Bukoski, *The Federal Approach to Primary Drug Abuse Prevention and Education*, in *HANDBOOK OF DRUG CONTROL IN THE UNITED STATES*, *supra* note 37, at 93, 104.

99. *See* COOPER, *supra* note 52, at 60–61.

100. *See* Kerr, *supra* note 50.

101. *See* MUSTO, *supra* note 32, at 267.

102. *See* MADGE, *supra* note 15, at 164–65.

103. *See id.*

104. *See* COOPER, *supra* note 52, at 61.

105. *See* Remarks at the First National Treatments Alternatives to Street Crime Conference, 1 *PUB. PAPERS* 788 (Sept. 11, 1983).

106. *See* NPR, *Timeline: America’s War on Drugs*, <http://www.npr.org/templates/story/story.php?storyId=9252490> (last visited Mar. 15, 2010).

107. *See* Message to the Congress on Drug Abuse, 2 *PUB. PAPERS* 1400 (Aug. 2, 1977) (“We can no longer concern ourselves merely with keeping illicit drugs out of the United States, but we must join with other nations to deal with this global problem by combating

federal anti-drug policy, and while the election of Ronald Reagan in 1980 heralded the War on Drugs,¹⁰⁸ Reagan's substantive initiatives for drug abuse prevention did not begin in earnest until well into his second term.¹⁰⁹

A myriad of high-profile but ultimately unsuccessful campaigns against drug abuse defined President Reagan's strategy to combat the drug epidemic. Reagan officially launched the "War on Drugs" on June 24, 1982, with the creation of the White House Office of Drug Abuse Policy.¹¹⁰ First Lady Nancy Reagan joined the movement, announcing the "Just Say No" campaign in 1982.¹¹¹ Another campaign entitled "Cocaine: The Big Lie" targeted individuals eighteen to thirty-five years old and sought to explain the dangers of cocaine abuse.¹¹² By the end of Reagan's first term, however, drug abuse had not declined in any appreciable sense.¹¹³

During his reelection campaign, Reagan promised a shift in focus of his War on Drugs, from law enforcement efforts to education and treatment, specifically addressing crack cocaine.¹¹⁴ In 1986, thirteen public service announcements about crack cocaine use were aired in seventy-five markets.¹¹⁵ Reagan and his wife delivered a national public address on drug abuse, identifying crack cocaine as the most imminent threat.¹¹⁶ This series of public addresses was widely regarded as ineffective in deterring drug abuse.¹¹⁷

By the mid-1980s, the problem of drug addiction had gained national attention and the media warned of a crack cocaine epidemic. In 1986, public concern finally reached new levels, compelling Congress and the President to take a significant step toward curbing drug addiction. In just over a month, the Anti-Drug Abuse Act of 1986 was drafted, debated, and passed.

drug traffickers and sharing our knowledge and resources to help treat addiction wherever it occurs.").

108. See MUSTO, *supra* note 32, at 266–67.

109. See Joel Brinkley, *Some Flaws in the Presidential Rivals' Drug Plans*, N.Y. TIMES, Oct. 16, 1984, at A24 (suggesting that while President Ronald Reagan employed strong rhetoric on fighting drugs, his "strategy include[d] few new initiatives" aimed at preventing and reducing drug abuse).

110. See COOPER, *supra* note 52, at 65.

111. See *id.*; Philip H. Dougherty, *Drug Drive Outlined to First Lady*, N.Y. TIMES, Oct. 12, 1983, at D22.

112. See COOPER, *supra* note 52, at 66.

113. See Brinkley, *supra* note 109 ("In fact, the Government's official estimate is that use of the three major illicit drugs, heroin, cocaine and marijuana, has increased.").

114. See Joel Brinkley, *Anti-Drug Law: Words, Deeds, Political Expediency*, N.Y. TIMES, Oct. 27, 1986, at A18; Kerr, *supra* note 50.

115. See COOPER, *supra* note 52, at 66.

116. See Address to the Nation on the Campaign Against Drug Abuse, 2 PUB. PAPERS 1179 (Sept. 14, 1986) ("[A] new epidemic: smokeable cocaine, otherwise known as crack. It is an explosively destructive and often lethal substance which is crushing its users.").

117. See Brinkley, *supra* note 114; Kerr, *supra* note 50.

C. *The Anti-Drug Abuse Act of 1986*¹¹⁸

In addition to mandating penalties for offenders convicted of cocaine possession, the Act also appropriated funds for educational and preventative efforts.¹¹⁹ The term “crack cocaine” does not appear in the Act’s penalty scheme; rather, the Act imposes a one-hundred-to-one ratio of powder cocaine to cocaine base.¹²⁰ Because crack cocaine is a form of cocaine base, it is unclear whether the heightened sentences should be meted out for only crack cocaine or for all crimes involving a form of cocaine base—the brevity of the floor debates yield a paucity of indicia as to the drafters’ intent. After the bill’s enactment, a racial disparity emerged among offenders sentenced under the statute because African American offenders have traditionally been associated with crack cocaine and Caucasian offenders with other forms. This section discusses the legislative history of the Act, its provisions for sentencing crimes involving cocaine, as well as the racial disparity that emerged as a result of the sentencing structure.

1. Legislative History of the Anti-Drug Abuse Act

The bipartisan response to increased media attention to crack cocaine made floor discussion about the Act’s provisions almost entirely amicable.¹²¹ The first federal legislation to address drug abuse since 1970, the Act was adopted just two weeks before the November 1986 elections.¹²² In drafting the 192-page bill, senators and representatives instituted draconian penalties for all drug offenses and appropriated funds for law enforcement.¹²³

During early discussions about the bill, senators used media reports to buttress their claims about the dangers associated with crack cocaine. Senator Arlen Specter of Pennsylvania cited a “cover story in the June 16, 1986 issue of *Newsweek* . . . [noting that] the crack trade is similar to a

118. Pub. L. No. 99-570, 100 Stat. 3207.

119. Gerald M. Boyd, *Reagan Signs Anti-Drug Measure; Hopes for ‘Drug-Free Generation,’* N.Y. TIMES, Oct. 28, 1986, at B19.

120. 21 U.S.C. § 841(b)(B)(ii)–(iii) (2006) (defining the sentence for “500 grams or more of a mixture or substance containing a detectable amount of . . . cocaine” and “5 grams or more of a mixture or substance . . . which contains cocaine base” as a minimum of five years).

121. While Democrat Thomas P. “Tip” O’Neill, Jr., then–Speaker of the House, was the first to hold a meeting among the House Committees, Minority Leader Robert H. Michel brought the Republicans in quickly, out of concern that the drug issue would be co-opted by the Democrats for the next election. See Kerr, *supra* note 50.

122. See DRUGS AND DRUG POLICY IN AMERICA 306–07 (Steven R. Belenko ed., 2000); Kerr, *supra* note 50; see also STEVEN B. KARCH, A BRIEF HISTORY OF COCAINE 144 (2d ed. 2006).

123. DRUGS AND DRUG POLICY IN AMERICA, *supra* note 122, at 306–07 (noting that the Act “established increased prison sentences for drug sale and possession, eliminated probation or parole for certain drug offenders, increased fines, and allowed for forfeiture of assets and that “[m]ost federal funding authorized under the 1986 act went to law enforcement”).

'guerrilla insurgency,' which makes an 'infuriatingly elusive target for police.'"¹²⁴

Upon introducing the bill in the House of Representatives, Representative Mario Biaggi of New York noted that the dangers of crack cocaine compelled swift congressional action.¹²⁵ The Senate's version was in draft form by September 26, 1986.¹²⁶ Democrat Lawton Chiles of Florida was the first senator to address the penalty scheme,¹²⁷ joined by his colleagues who specifically referred to the need for stringent penalties for crack cocaine.¹²⁸

Congress proffered five justifications for the one-hundred-to-one ratio: (1) the addictive quality of crack cocaine, (2) that crack cocaine was associated with violent crime, (3) that the use of crack cocaine among pregnant women posed threats to children in utero, (4) that more young people were using crack cocaine, and (5) that the low cost of crack cocaine made it especially prevalent and more likely to be consumed in large quantities.¹²⁹

In arguing that immediate passage of the bill was imperative, senators and representatives underscored the epidemic of crack cocaine use among youth, as well as the drug's intense addictive quality. Senator Edward M. Kennedy of Massachusetts noted that almost two-thirds of high school seniors had tried an illicit drug and almost twenty-six percent of high school seniors had used cocaine.¹³⁰ Senator Patrick Leahy of Vermont reported that crack cocaine was "sweeping the Nation" because of its availability and addictive quality.¹³¹

Members of Congress indicated an extreme fear of crack cocaine and its implications on youth and inner cities. Representative James Traficant asserted that "[c]rack is reported by many medical experts to be the most addictive narcotic drug known to man."¹³² Traficant added, "I am relieved that provisions I coauthored in H.R. 5394 . . . [will] create new stiff penalties for dealing crack."¹³³

124. 132 CONG. REC. 17,919 (1986) (statement of Sen. Specter).

125. *See id.* at 22,709 (statement of Rep. Biaggi) ("Mr. Chairman, finally, the straw that broke the camel's back. Crack.").

126. *See id.* at 26,429 (meeting minutes).

127. *See id.* at 26,435 (statement of Sen. Chiles).

128. *See id.* ("This bill deals basically with the gamut of the problems that most of us have been so terribly concerned with. . . . We have enhanced the penalties for drugs, but especially for crack cocaine."). Senator Lawton Chiles further stated that the bill "will help our law enforcement officials by strengthening criminal penalties for drugs like crack cocaine. This is an absolutely essential first step. Current law makes it very difficult to arrest and convict crack dealers and traffickers." *See id.*

129. *See* DEBORAH J. VAGINS & JESSELYN MCCURDY, *ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 2* (2006), available at http://www.aclu.org/pdfs/drugpolicy/cracksinsystem_20061025.pdf.

130. *See* 132 CONG. REC. 27,173 (statement of Sen. Kennedy).

131. *See id.* at 27,187 (statement of Sen. Leahy) ("One hit costs just \$10. Users say addiction can begin after only the second use of crack.").

132. *Id.* at 22,667 (statement of Rep. Traficant).

133. *Id.*

Debates in the House of Representatives and Senate equated nonpowder forms of cocaine with crack cocaine.¹³⁴ Legislators explicitly recognized that they sought to treat cocaine powder differently from crack cocaine, believing that a penalty scheme that punishes crack cocaine harshly was the best way to curb the crack cocaine epidemic.¹³⁵ Lawton Chiles, Senator from Florida, a major drug hub, was an ardent supporter of the bill and lauded it for recognizing “crack as a distinct and separate drug from cocaine hydrochloride with specified amounts of five grams and fifty grams for enhanced penalties.”¹³⁶

A handful of senators opposed the Act on the grounds that measures taken against crack cocaine were too extreme. Senator Daniel Evans of Washington stated that because drug use peaked in the late 1970s, “there is no compelling evidence that the overall problem is significantly worse now than it has been for the last decade.”¹³⁷ Citing a study by the Federal Drug Administration, Evans noted that “crack . . . is not the drug of choice for most users.”¹³⁸ Evans suggested that unbalanced media attention exaggerated the insidiousness of crack cocaine.¹³⁹ Senator Chiles challenged the accuracy of Evans’s statements, observing that the studies were conducted in 1980 and 1984 and thus did not reflect the explosion of crack cocaine usage, which happened in 1985.¹⁴⁰

Throughout the drafting process, senators and representatives were acutely aware of the scrutiny from the media.¹⁴¹ Press reports at the time of the Act’s passage criticized both the Senate and the House for hastily putting together the Act.¹⁴² Drafters were confident that the Act would be vindicated in practice, as it set forth a systematic scheme to stop drug use, through interdiction, treatment, and prevention.¹⁴³

134. See *id.* at 32,762 (meeting minutes) (“cocaine free base (known as ‘crack’)”).

135. See *id.* at 22,667 (statement of Rep. Traficant) (noting that the bill imposes stringent penalties and appropriates “additional funds [to] our law enforcement officers in the field—at the local, State, and Federal levels”).

136. See *id.* at 27,180 (statement of Sen. Chiles). Cocaine hydrochloride is the chemical name for powder cocaine, while the term cocaine base refers to a number of different chemical compounds. See *supra* Part I.A.3.

137. See *id.* at 26,441 (statement of Sen. Evans).

138. See *id.*

139. See *id.*

140. See *id.* (statement of Sen. Chiles) (“I think we need to review those [studies] and make sure how current they are because I think those are reflecting what they thought were trends or statistics that are 3 and 4 years old and that are not current.”).

141. See *id.* at 26,437 (statement of Sen. Biden) (“The press look[s] down at us and say, ‘Wait a minute. There they go again, another war on drugs.’”).

142. See David Hoffman, *A Flawed Legacy: The Reagan Era Is Winding Down, and the Time Bombs—Budget Deficits and Arms Proliferation—Are Ticking*, WASH. POST, Nov. 30, 1986, at W19; see, e.g., Bobby Bearak & Richard Meyer, *Extent of Use Argued: Drug Furor: Overdue or Much Ado?*, L.A. TIMES, Oct. 20, 1986, at A1; Anthony Lewis, *Abroad at Home: The Political Narcotic*, N.Y. TIMES, Sept. 29, 1986, at A15.

143. See 132 CONG. REC. 26,464 (statement of Sen. Abdnor) (“[T]his bipartisan legislation calls for a 3-pronged attack in our war on drugs. I wish to commend our majority leader and our colleagues from both sides of the aisle who have led the effort to bring this legislation before the Senate.”).

To address interdiction, the Act provides that the sentence for a defendant found guilty of possession with intent to distribute five hundred grams or more of powder cocaine is a minimum of five years in prison.¹⁴⁴ Individuals convicted of possession with intent to distribute only five grams of cocaine base, however, are also subject to a minimum of five years in prison.¹⁴⁵ The same ratio was instituted for the amount needed to trigger a ten-year prison sentence: five thousand grams of powder cocaine or fifty grams of cocaine base.¹⁴⁶

With respect to treatment, Congress allocated \$675 million for recovery programs¹⁴⁷ and earmarked \$125 million for state drug and alcohol programs, which were distributed on the basis of population and need.¹⁴⁸ Toward prevention, Congress allocated \$80 million for state and local educational agencies to combat drug use.¹⁴⁹ NIDA received \$27 million to expand its drug research program: it created primary prevention projects for the purpose of understanding the progression of drug dependence and the criteria for identifying adolescents at high risk for drug abuse.¹⁵⁰ In addition, \$1.1 billion was granted to law enforcement agencies,¹⁵¹ of which local police agencies received \$230 million.¹⁵²

The appropriations and earmarks that accompanied the Act are more easily deciphered than the penalty scheme. While the funding has long since been exhausted, however, the one-hundred-to-one ratio is still in place.¹⁵³ As a result, racial disparities continue to plague the nation's prison populations.

2. The Racial Disparity Promulgated by the Act's Sentencing Scheme

Because possessing five grams of cocaine base triggers the same five-year sentence as five hundred grams of powder cocaine,¹⁵⁴ the result is a one-hundred-to-one ratio of powder cocaine to cocaine base in sentencing.¹⁵⁵ In practice, even low-level crack cocaine offenders are punished severely: the average sentence for an individual found guilty of possessing twenty-five grams of powder cocaine is fourteen months, while

144. See 21 U.S.C. § 841(b)(1)(B) (2006).

145. See *id.*

146. See *id.* § 841(b)(1)(A).

147. See 132 CONG. REC. 26,460 (statement of Sen. Broyhill).

148. See *id.* at 26,451–52 (statement of Sen. Abdnor).

149. See *id.* at 26,452 (“Thus, education for prevention is a key element in our war on drugs. It offers the most effective, yet least expensive, means for fighting substance abuse.”).

150. See HANDBOOK OF DRUG CONTROL IN THE UNITED STATES, *supra* note 37, at 110.

151. See Brinkley, *supra* note 114.

152. See *id.*

153. See HANDBOOK OF DRUG CONTROL IN THE UNITED STATES, *supra* note 37, at 109; Cose, *supra* note 18.

154. See 21 U.S.C. § 841(b)(1)(B) (2006).

155. See THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING 7 (2009), available at http://www.sentencingproject.org/doc/publications/dp_crack_sentencing.pdf.

a defendant found guilty of possessing less than twenty-five grams of crack cocaine is subject to an average of sixty-five months.¹⁵⁶

The one-hundred-to-one ratio adversely affects African Americans because crack cocaine is disproportionately consumed by African Americans as compared to Caucasians,¹⁵⁷ and the low cost of crack cocaine makes crack cocaine much more prevalent in inner cities.¹⁵⁸ In 1995, almost a decade after the Act was adopted, the *Los Angeles Times* reported that no Caucasian defendant had been charged with crack cocaine offenses in federal courts in Los Angeles, Boston, Denver, Chicago, Miami, Dallas, or in seventeen state courts.¹⁵⁹ In 2000, less than six percent of crack cocaine offenders were Caucasian, and more than eighty percent were African American.¹⁶⁰ By 2006, for every ten African Americans tried for crack cocaine possession, one white defendant was charged with a crime involving crack cocaine.¹⁶¹

The racial disparity is further magnified because African American drug offenders have a greater chance of being sentenced to prison than Caucasian drug offenders, given the average quantities involved in a drug offense.¹⁶² The median amount of crack cocaine a defendant is charged with is fifty-two grams, which triggers the statutory ten-year sentence.¹⁶³ Conversely, the median amount of powder cocaine is 340 grams, which is insufficient to warrant a prison sentence.¹⁶⁴

Several civil rights groups have criticized the Act for perpetuating racial discrimination in the criminal justice system.¹⁶⁵ The American Civil Liberties Union has urged Congress to eliminate the one-hundred-to-one ratio and enhance sentences for “high-level traffickers of both crack and powder cocaine.”¹⁶⁶ Families Against Mandatory Minimums and The Sentencing Project have joined the campaign to repeal the one-hundred-to-one ratio.¹⁶⁷ The American Bar Association has also observed that the ratio

156. See *id.* at 2–3.

157. See Vagins & McCurdy, *supra* note 129, at 3.

158. See *id.* at 1.

159. See Dan Weikel, *War on Crack Targets Minorities over Whites*, L.A. TIMES, May 21, 1995, at A1, A26.

160. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 63 tbl.3 (2002), http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm [hereinafter 2002 REPORT].

161. See *Hearing on Mandatory Minimum Sentencing Laws*, *supra* note 8, at 170.

162. See THE SENTENCING PROJECT, *supra* note 155, at 3–5.

163. See *id.* at 3.

164. See *id.*

165. See, e.g., Vagins & McCurdy, *supra* note 129, at 4.

166. See *id.* at 7 (“[T]here is no rational medical or penological reason for the 100:1 disparity between crack and powder cocaine, and instead it causes an unjustified racial disparity in our penal system.”).

167. See THE SENTENCING PROJECT, *supra* note 155, at 8; Press Release, Families Against Mandatory Minimums, 22 Years or Less than Half (Apr. 27, 2009), <http://www.famm.org/NewsandInformation/PressReleases/22yearsorlessthanhalf.aspx> (“Not only is the crack penalty unwarranted and insupportable, . . . it punishes small time users and dealers the same or worse than international drug kingpins. Moreover, it does so in a way that is

set forth in the Anti-Drug Abuse Act is “plainly unjust,” advocating that the gap be closed.¹⁶⁸ The high-profile U.S. Sentencing Commission echoes the concerns set forth by these social justice groups, urging Congress to take action to remedy the disparity.

D. *The Sentencing Commission Weighs In*

From the early 1990s, the Sentencing Commission has denounced the Act’s ratio of powder cocaine to crack cocaine. Its members have attempted to use the Commission’s special position as a congressional advisor to effect change.

Established in 1984 by the Sentencing Reform Act, the Sentencing Commission is an independent agency of the judicial branch.¹⁶⁹ The Commission’s objectives include guiding federal courts in issuing sentences, advising Congress and the President in creating an effective crime policy, and compiling surveys on a broad range of sentencing trends.¹⁷⁰ As such, the Sentencing Commission’s duties extend beyond issuing Sentencing Guidelines for federal courts and include evaluating the effectiveness of various sentencing structures.¹⁷¹ During public meetings,¹⁷² the Commission’s seven members not only promulgate sentencing recommendations but also consider federal sentencing statistics, compiled in annual reports issued by the Commission to Congress.¹⁷³

The Sentencing Commission has devoted a significant portion of many of its annual reports to imploring Congress to change its approach to cocaine and crack cocaine policy. In addition to defining cocaine base as “crack” in a 1993 report to Congress,¹⁷⁴ the Sentencing Commission has sent numerous reports to Congress detailing its opposition to the ratio. Having consistently maintained that Congress should eliminate the penalty scheme

discriminatory.”). The National District Attorneys Association has recognized that the one-hundred-to-one ratio may be excessively stratified but does not support a reduction to a one-to-one ratio. See Rhonda McMillion, *Room on the Front Burner: Congress Gives Prime Spot on Its Agenda to Key Criminal Justice Issues*, A.B.A. J., Aug. 2009, at 67 (“The disparity ‘has resulted in penalties that sweep too broadly[,] . . . overstate the seriousness of offenses, and produce a large racial disparity in sentencing.’”).

168. See *id.*

169. See Pub. L. No. 98-473, 98 Stat. 2017 (codified as amended at 28 U.S.C. §§ 991–998 (2006)).

170. See AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2009), available at http://www.ussc.gov/general/USSC_Overview_200906.pdf.

171. See Daniel M. Levy, Note, *Defending Demaree: The Ex Post Facto Clause’s Lack of Control over the Federal Sentencing Guidelines After Booker*, 77 FORDHAM L. REV. 2623, 2631 (2009).

172. See U.S. SENTENCING COMM’N, RULES OF PRACTICE AND PROCEDURE, available at http://www.ussc.gov/general/RULES11_01.pdf.

173. See AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION, *supra* note 170, at 1.

174. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, at 144 (2007) (“‘Cocaine base,’ for the purposes of this guideline, means ‘crack.’ ‘Crack’ is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.”).

advanced in the Act, the Commission has described the problem of disparate sentencing created by the Act as “urgent and compelling.”¹⁷⁵

Despite disagreement with the ratio, the Sentencing Guidelines set forth by the Commission mirrored those included in the Act until 2007. As early as 1995, however, the Sentencing Commission called attention to the unfairness in crack cocaine sentencing, reaching the conclusion that the one-hundred-to-one ratio was unjustified and caused an unnecessary disparity in prison terms.¹⁷⁶ In a special report to Congress, the Commission recommended that the penalties for powder cocaine and crack cocaine be equalized and that sentencing enhancements should be triggered when violence or other harms occur in connection with dealing either powder cocaine or crack cocaine.¹⁷⁷ Congress explicitly rejected these recommendations, signifying the first time Congress ever rejected an amendment suggested by the Sentencing Commission.¹⁷⁸

In 2002, the Sentencing Commission once again informed Congress that the sentences for crack cocaine are unjustified and called for the Act to be amended.¹⁷⁹ Congress’s determination that crack cocaine was more harmful than powder cocaine and therefore required a harsher sentence was called into question.¹⁸⁰ The Commission found that the ratio was created based upon a misperception of the dangers of crack cocaine, which had since been proven to have a less drastic effect than previously thought.¹⁸¹

The Commission contended that quantity ratios should not be the basis for penalties; rather, sentencing schemes should focus on punishing high-level cocaine traffickers.¹⁸² It perceived that Congress was in favor of maintaining some sort of ratio, however, so the Commission attempted to strike a compromise, recommending a decrease in the ratio from one-hundred-to-one to twenty-to-one. Under this new ratio, the amount of crack cocaine needed to trigger the five-year mandatory minimum would be 25 grams, and 250 grams would warrant the ten-year minimum. Congress again rejected this proposal.¹⁸³

175. See News Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes To Amend Guidelines for Terrorism, Sex Offenses, Intellectual Property Offenses, and Crack Cocaine Offenses (Apr. 27, 2007), <http://www.ussc.gov/PRESS/rel0407.htm>.

176. See 2002 REPORT, *supra* note 160, at 12.

177. See *id.*

178. See Vagins & McCurdy, *supra* note 129, at 6 (noting that Congress found that “the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine”).

179. See 2002 REPORT, *supra* note 160, at 91 (“[T]he Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified.”).

180. See U.S. SENTENCING COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (2007) [hereinafter 2007 REPORT], available at http://www.ussc.gov/r_congress/cocaine2007.pdf (noting that the 1986 Act was based on information about “the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support”).

181. See *id.*

182. See 2002 REPORT, *supra* note 160, at viii–ix.

183. See Vagins & McCurdy, *supra* note 129, at 6.

In the absence of congressional action by 2007, the Sentencing Commission amended its own Sentencing Guidelines for crack cocaine offenders, lowering the recommended sentence for most crack cocaine offenses.¹⁸⁴ Sentencing ranges for first-time offenses involving five grams or more of crack cocaine were lowered from 62 to 78 months, to 51 to 63 months; first-time offenses involving fifty grams or more of crack cocaine were subject to 97 to 121 months, lowered from 121 to 151 months, before accounting for other relevant factors under the Guidelines.¹⁸⁵ In ratifying this amendment, the Commission intended to provide “relief to crack cocaine offenders impacted by the disparity created by federal cocaine sentencing policy.”¹⁸⁶ Although these ranges became advisory in 2005,¹⁸⁷ judges tend to follow the Guidelines when issuing sentences.

The U.S. Supreme Court has addressed the constitutionality of the Sentencing Commission, modifying its power so that it conforms to Sixth Amendment requirements.¹⁸⁸ As a result, while the Sentencing Commission has implored Congress to take action, courts have been afforded more discretion in sentencing. A prominent circuit split has developed regarding the meaning of “cocaine base” for the purpose of the Act, and intense public debate over the policy behind the crack cocaine sentencing ratio has also emerged. Despite opportunities, the Supreme Court has not provided a resolution to these issues but rather has granted expanded discretion to lower courts, perpetuating inconsistent narcotics sentencing policy.

E. Supreme Court Precedent Gives Additional Power to Courts Without Resolving Ambiguity

The Supreme Court has not explicitly acknowledged that the one-hundred-to-one ratio contributes to a racial disparity in sentencing, nor has the Court resolved the circuit split regarding the meaning of “cocaine base.” Instead, the Supreme Court has left circuit courts to address the perceived unfairness inherent in the one-hundred-to-one ratio. Through a series of cases, the Court has given flexibility to sentencing courts, allowing them to consider the racial implications of the one-hundred-to-one ratio.

The Court considered the one-hundred-to-one ratio set forth in the Act in *Kimbrough v. United States*.¹⁸⁹ Kimbrough faced a statutory minimum sentence of fifteen years after pleading guilty to possession with intent to distribute more than fifty grams of crack cocaine, among other charges.¹⁹⁰

184. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, at 140 (2007).

185. See News Release, U.S. Sentencing Comm’n, *supra* note 175; see also Levy, *supra* note 171, at 2631–32 (describing the other factors taken into account by sentencing courts, including the circumstances of the offense and the character of the defendant).

186. See News Release, U.S. Sentencing Comm’n, *supra* note 175.

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

188. See *infra* Part I.E.

189. 552 U.S. 85 (2007).

190. See *id.*

Under the Federal Sentencing Guidelines,¹⁹¹ which had not yet rejected the one-hundred-to-one ratio, Kimbrough was subject to a minimum of nineteen years.¹⁹² At sentencing, the lower court chose to disregard the Sentencing Guidelines based on its opposition to the one-hundred-to-one ratio and the racial disparity it promulgates.¹⁹³ In departing from the Guidelines, the court cited *United States v. Booker*,¹⁹⁴ asserting that the Supreme Court permitted courts to disregard sentencing ranges based upon policy disagreements.¹⁹⁵ The U.S. Court of Appeals for the Fourth Circuit vacated the sentence and held that any prison term “outside the guidelines ranges is per se unreasonable when it is based” solely on policy disagreements, such as “the sentencing disparity for crack and powder cocaine offenses.”¹⁹⁶

The Supreme Court reversed the Fourth Circuit.¹⁹⁷ In doing so, it resolved a circuit split as to whether courts may take the disparity promulgated by the one-hundred-to-one ratio into account when meting out sentences.¹⁹⁸ The Court held that a sentencing judge must assess the Guidelines in its consideration of a sentence, but may choose to disregard the Guidelines based upon an ideological disagreement with the crack cocaine and powder cocaine disparity.¹⁹⁹ An appellate court is not entitled to disturb the lower court’s sentence unless it is unreasonable; the Court found policy concerns to be reasonable grounds to disregard Sentencing Guidelines.²⁰⁰

In its decision, the *Kimbrough* Court undertook an extensive historical analysis of the 1986 Act and surveyed the Sentencing Commission’s continual objections. The Court accepted that crack cocaine and powder cocaine are “chemically similar,” sympathizing with the many attempts by

191. See *supra* Part I.D.

192. See *Kimbrough*, 552 U.S. at 86.

193. See *id.* at 93 (criticizing the “disproportionate and unjust effect that crack cocaine guidelines have in sentencing”).

194. 543 U.S. 220 (2005).

195. See *Kimbrough*, 552 U.S. at 90.

196. See *United States v. Kimbrough*, 174 F. App’x 798, 799 (4th Cir. 2006) (*per curiam*).

197. See *Kimbrough*, 552 U.S. at 111–12.

198. At the time *Kimbrough v. United States* was decided, the U.S. Courts of Appeals for the D.C. and Third Circuits maintained that a district court may take the sentencing disparity into account when imposing a sentence. See, e.g., *United States v. Pickett*, 475 F.3d 1347 (D.C. Cir. 2007); *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006). The U.S. Courts of Appeals for the First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits held that a sentencing court may not stray from Sentencing Guidelines based on its disapproval of the disparity. See, e.g., *United States v. Leatch*, 482 F.3d 790 (5th Cir. 2007); *United States v. Johnson*, 474 F.3d 515 (8th Cir. 2007); *United States v. Castillo*, 460 F.3d 337 (2d Cir. 2006); *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006); *United States v. Miller*, 450 F.3d 270 (7th Cir. 2006); *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006); *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006). The circuit split identified by the U.S. Supreme Court in *Kimbrough* does not bear any relation to the circuit split regarding the meaning of “cocaine base.”

199. See *Kimbrough*, 552 U.S. at 91.

200. See *id.* at 111.

the Sentencing Commission to induce Congress to repeal the one-hundred-to-one ratio.²⁰¹ In addition, the Court suggested that Congress was not well versed in the dangers of crack cocaine at the time the Act was signed because crack cocaine was a “relatively new drug” that had quickly become “a matter of great public concern.”²⁰²

In *Spears v. United States*,²⁰³ the Supreme Court considered whether sentencing courts may adopt their own ratios of cocaine base to powder cocaine.²⁰⁴ In *Spears*, the lower court articulated its own twenty-to-one ratio of cocaine to cocaine base on the grounds that the one-hundred-to-one ratio had no penological justification. In a per curiam decision relying almost solely on *Kimbrough*, the Court held that sentencing courts are permitted to institute their own ratios.²⁰⁵ The Court found that *Kimbrough* expanded the discretion of courts to disregard the Sentencing Guidelines, a necessary byproduct of which includes the imposition of a court-determined ratio.²⁰⁶

With each Supreme Court term that concludes without providing a workable solution for crack cocaine and powder cocaine sentencing, the injustice of the circuit split persists: the sentence for the same crime can be dramatically different depending upon where the crime occurred.²⁰⁷ The Obama Administration has recognized the disproportionate effect the ratio has on African American defendants, inciting renewed efforts to change the ratio and counteract the racial disparity caused by the sentencing structure.

F. Current Movements Toward Reform

Over the last year, the Obama Administration, legislators, and judges have all voiced opposition to the current one-hundred-to-one ratio and the resulting racial disparity, initiating a groundswell of support to eradicate the ratio. While all three branches agree that the ratio is unfounded, a solution has been elusive.

201. *See id.* at 94.

202. *See id.* at 95.

203. 129 S. Ct. 840 (2009) (per curiam).

204. *See id.* at 842.

205. *See id.* at 843 (“A sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity.”).

206. *See id.* (holding that *Kimbrough* recognized “district courts’ authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them”).

207. Defendants have also unsuccessfully challenged their convictions and sentences on the grounds that the Act’s punishment scheme violates Equal Protection principles. In *United States v. Easter*, 981 F.2d 1549 (10th Cir. 1992), the defendant argued that the Act was unconstitutional because African Americans are more likely than Caucasians to be in possession of crack cocaine. The Court held the statute constitutional under the Equal Protection Clause, noting that the legislation was not passed for a racially discriminatory purpose. *See id.* at 1559. Every federal court that has heard a disparate impact or equal protection claim against the Act has also upheld the statute. *See, e.g.*, *United States v. Butler*, 41 F.3d 1435, 1442 (11th Cir. 1995); *United States v. Singleterry*, 29 F.3d 733, 739–41 (1st Cir. 1994); *United States v. Frazier*, 981 F.2d 92, 95–96 (3d Cir. 1992).

1. Executive Opposition to the Sentencing Ratio

Key figures in the Obama Administration are especially outspoken in advocating for amendments to federal cocaine laws. Attorney General Eric Holder recently commented on the racial implications of the sentencing disparity, urging that the sentencing gap be closed.²⁰⁸

Drug czar Gil Kerlikowske, an Obama appointee, has stated that most elements of the “War on Drugs” are relics that should be replaced with rational alternatives, including eradication of the one-hundred-to-one ratio.²⁰⁹ Vice President Joe Biden, who was an enthusiastic supporter of the Anti-Drug Abuse Act as a senator, now calls the sentencing ratio a mistake. While Biden maintains that the bill was created with good intentions, its unacceptable effects include racial stratification in sentencing and unnecessarily severe penalties for low-level drug dealers.²¹⁰

2. Concern from the Bench

Members of the judiciary have also criticized the sentencing disparity. Justice Ruth Bader Ginsburg has labeled the ratio misguided, in that it targets crack dealers and sentences them more harshly than cocaine distributors, who pose a greater threat to the spread of drugs.²¹¹ Judge Robert Sweet of the U.S. District Court for the Southern District of New York also opposes the ratio, condemning it as “Jim Crow justice.”²¹² Judge Paul Cassell, a George W. Bush appointee formerly in the U.S. District Court for the District of Utah, has derided the sentencing disparity for meting out unequal justice to crack cocaine defendants.²¹³ A general consensus has emerged among members of the judiciary: in 1997, twenty-seven federal judges signed a letter to the House Judiciary Committee urging both the House and Senate to revisit and eradicate the ratio.²¹⁴

3. Legislators Call for Change

Congress has been criticized for failing to rectify the Act’s sentencing scheme almost since its enactment but did not take significant corrective action until a special hearing on May 21, 2009.²¹⁵ Major League Baseball

208. See Del Quentin Wilber, *Two Judges Target Cocaine Penalties: Disparity for Crack Crimes Criticized*, WASH. POST, June 29, 2009, at B2.

209. See Gary Fields, *White House Czar Calls for End to ‘War on Drugs’: Kerlikowske Says Analogy Is Counterproductive; Shift Aligns with Administration Preference for Treatment over Incarceration*, WALL ST. J., May 14, 2009, at A3.

210. See Cose, *supra* note 18.

211. See *id.*

212. See Vagins & McCurdy, *supra* note 129, at 4.

213. See *id.*

214. See *id.* (“[I]t is our strongly held view that the current disparity between powder cocaine and crack cocaine, in both mandatory minimum statutes and the guidelines, cannot be justified and results in sentences that are unjust and do not serve society’s interest.”).

215. See *Unfairness in Federal Cocaine Sentencing: Is It Time To Crack the 100 to 1 Disparity?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of*

star Willie Mays Aikens, who was just released from a twenty-year sentence for crack cocaine distribution, bribery, and gun charges, was a witness at the hearing. He testified that had he been arrested with powder cocaine instead of crack cocaine he would have served no more than twenty-seven months under the Act's sentencing structure.²¹⁶ Contrary to suggestions from social justice groups and the Sentencing Commission, Congress initially considered increasing powder cocaine sentences instead of decreasing sentences for crack cocaine, concerned that eradicating jail time would have the adverse effect of spurring resurgence in crack dealing.²¹⁷

Heightened awareness among legislators about the current state of crack cocaine sentencing has led to the introduction of a potentially monumental amendment. Representative Maxine Waters introduced the "Major Drug Traffickers Prosecution Act of 2009,"²¹⁸ which would eliminate the one-hundred-to-one ratio of powder cocaine to crack cocaine and attempt to curb prosecution of low-level crack offenders.²¹⁹ The bill would also allow judges discretion to determine whether probation rather than jail time is the appropriate punishment.²²⁰

Actions in the Senate have mirrored those taken by the House. Senator Dick Durbin of Illinois has enlisted four other senators, one of whom voted in favor of the Act in 1986,²²¹ in cosponsoring the Fair Sentencing Act of 2009,²²² which institutes a one-to-one ratio for crack and powder cocaine sentencing. Under this new act, the amount of cocaine base needed to trigger the five-year sentence would be increased to five hundred grams, or the same quantity as powder cocaine.²²³ Similarly, possession of five thousand grams of crack cocaine or powder cocaine would trigger a ten-year sentence.²²⁴ The bill would also direct federal resources to prevent

the H. Comm. on the Judiciary on H.R. 1459, H.R. 1466, H.R. 265, H.R. 2718, and H.R. 18, 111th Cong. (2009) [hereinafter House Hearing], available at http://judiciary.house.gov/hearings/printers/111th/111-27_49783.PDF.

216. See Michael O'Keeffe, *Aikens Pressing To Fix Coke Laws*, N.Y. DAILY NEWS, May 21, 2009, at 68.

217. See House Hearing, *supra* note 215 at 6.

218. See H.R. 1466, 111th Cong. (1st Sess. 2009).

219. See *id.* § 4(b).

220. See *id.*

221. Five of twelve cosponsors of the bill, Senators Patrick Leahy of Vermont, Christopher Dodd of Connecticut, Carl Levin of Michigan, Thomas Harkin of Iowa, and John Kerry of Massachusetts, voted in favor of the Act in 1986. Senators Russell Feingold of Wisconsin, Benjamin Cardin of Maryland, Alan Franken of Minnesota, Bernard Sanders of Vermont, Edward Kaufman of Delaware, Sherrod Brown of Ohio, and Roland Burris of Illinois were not in office for the enactment of the Act, but are now sponsors of the Fair Sentencing Act. Dick Durbin of Illinois, who also was not in office when the 1986 Act was adopted, introduced the bill. See Carrie Johnson, *Bill Targets Sentencing Rules for Crack and Powder Cocaine*, WASH. POST, Oct. 16, 2009, at A6; S. 1789: Fair Sentencing Act of 2009, Govtrack.us, <http://www.govtrack.us/congress/bill.xpd?bill=s111-1789> (last visited Mar. 15, 2010).

222. S. 1789, 111th Cong. (2009).

223. See *id.* § 2(a)(2).

224. See *id.* § 2(a)(1).

large-scale drug trafficking and increase the number of aggravating factors that can be considered as warranting a higher penalty.²²⁵

Drug addiction in the United States has ebbed and flowed in the last century, reaching its apex during the mid-1980s.²²⁶ Attempts to regulate cocaine gained traction in the early 1900s through “scare politics” advanced by Southern Democrats.²²⁷ Regulation efforts intensified in the 1950s, yet the drug was never eradicated.²²⁸ Rather, cocaine usage increased consistently during the second half of the nineteenth century until in the early 1980s, when crack cocaine was created and replaced other forms of cocaine, primarily in inner cities.²²⁹ At the time Congress began drafting the Act, Americans understood the dangerous repercussions of cocaine addiction, but knew relatively little about crack cocaine.²³⁰

Congress’s response to the emerging epidemic in 1986 seemed proportional but was grounded in insufficient research and truncated floor debates, similar to the process by which the Harrison Act was passed in 1914.²³¹ Since the Act’s passage, two decades of conflicting messages from Congress, the Sentencing Commission, and the Supreme Court have magnified the issues surrounding the interpretation of the Act and the consequences of the one-hundred-to-one ratio. Part II discusses how courts have grappled with issuing appropriate sentences in light of their concern about propagating the widely criticized racial disparity.

II. “COCAINE BASE” CIRCUIT SPLIT DEEPENS, MAGNIFYING POLICY CONCERNS OVER SENTENCING DISPARITY

In a struggle to harmonize disapproval of crack cocaine sentencing schemes with meting out appropriate punishment, courts have explored many avenues, scrutinizing the meaning of every term of the Act, particularly the penalty section. In recent years, the circuit split regarding the meaning of the term “cocaine base” in the sentencing scheme has only deepened.²³² Some courts interpret the Act to refer to all forms of cocaine base, while others look at the legislative intent to discern another definition. Invariably, these decisions include policy discussions, as courts are concerned about the racial disparity the sentencing scheme propagates. More recently, many sentencing courts have usurped Congress’s role and instituted their own ratios of crack cocaine to powder cocaine.

225. *See id.* § 6.

226. *See generally* Kerr, *supra* note 50.

227. *See supra* Part I.A.1.

228. *See supra* Part I.A.1, B.1.

229. *See supra* Part I.A.

230. *See supra* Part I.C.

231. *See supra* Part I.A.1, C.1.

232. The Sixth Circuit recently decided a case that added to the circuit split. *See United States v. Higgins*, 557 F.3d 381 (6th Cir. 2009).

A. *Courts' Diverging Responses to the Act's Language: Cocaine Base or Crack Cocaine?*

The U.S. courts of appeals exhibit substantial divergence regarding the interpretation of the statutory sentences for drug related offenses. Some have equated "cocaine base" with "crack cocaine." In those jurisdictions, only defendants convicted of crack cocaine offenses receive the heightened penalty.²³³ Other circuits have held that any form of cocaine base qualifies for the heightened sentence, meaning that an individual convicted of possessing five grams of the unusable form of cocaine base, smokeable cocaine base, or crack cocaine would be subject to a prison term of five years.²³⁴ One circuit holds that any smokeable form of cocaine base, including, but not limited to, crack cocaine, is subject to the harsher sentence.²³⁵

1. Only Crack Cocaine Receives Heightened Sentences

The U.S. Courts of Appeals for the Sixth, Seventh, Ninth, and Eleventh Circuits subject defendants found in possession of crack cocaine to harsh punishments. Possession of all other forms of cocaine base, including cocaine paste and freebase cocaine, along with powder cocaine and untreated cocaine, are sentenced less severely.²³⁶

a. *Eleventh Circuit*

In *United States v. Munoz-Realpe*,²³⁷ the Eleventh Circuit limited the "cocaine base" substances that receive a heightened sentence to crack cocaine.²³⁸ The defendant was arrested for possession of six liquor bottles containing a liquid that tested positive for cocaine base, but the substance had not yet been converted into crack cocaine.²³⁹ At sentencing, Munoz-Realpe argued that liquid cocaine base could not be used without further processing and should not receive the harsher penalty.²⁴⁰

Rather than follow its own precedent that cocaine base comprises more than crack cocaine,²⁴¹ the Eleventh Circuit departed from this standard, looking to the U.S. District Court for the Southern District of Florida,²⁴²

233. See *infra* Part II.A.1.

234. See *infra* Part II.A.3.

235. See *infra* Part II.A.2.

236. See *supra* Part I.A.3.

237. 21 F.3d 375 (11th Cir. 1994).

238. See *id.*

239. See *id.* at 376.

240. See *id.* During its conversion into crack cocaine, powder cocaine is mixed with baking soda and heated into a liquid. The drug is not usable until it hardens into "rocks." See *supra* Part I.A.3.

241. See *Munoz-Realpe*, 21 F.3d at 377 (citing *United States v. Rodriguez*, 980 F.2d 1375 (11th Cir. 1992)).

242. See *id.* at 376 (citing *United States v. Vistoli-Ferroni*, 783 F. Supp. 1366 (S.D. Fla. 1991)).

which found that Congress did not intend for the severe penalties for crack cocaine to be applied to any form of cocaine base other than crack cocaine.²⁴³ The Eleventh Circuit in *Munoz-Realpe* ultimately decreased the defendant's sentence based on the premise that the substance he possessed was to be treated as cocaine hydrochloride rather than cocaine base.²⁴⁴

The Eleventh Circuit was further persuaded by the proposed amendment from the Sentencing Commission in 1993²⁴⁵ that specified that cocaine base meant crack cocaine.²⁴⁶ The court found that Congress had given its tacit approval of the definition of cocaine base as crack cocaine by taking no action against the Sentencing Commission's amendment.²⁴⁷ Thus, based on legislative intent and precedent from other jurisdictions, the *Munoz-Realpe* court set new Eleventh Circuit precedent that only crack cocaine merits a heightened sentence.²⁴⁸

b. Seventh Circuit

The Seventh Circuit considered the issue of whether cocaine base refers to substances other than crack cocaine in *United States v. Edwards*.²⁴⁹ Edwards was convicted of possessing more than fifty grams of cocaine base that was not crack cocaine and was sentenced to the statutory minimum of ten years.²⁵⁰ In reversing Edwards's sentence,²⁵¹ the court determined that because cocaine base can be converted into powder cocaine and the process is just as easily reversed, the substances are basically identical.²⁵² The court declined to void the statute for vagueness, however, because legislative intent was clear: "the overriding Congressional concern behind the stiffer penalties for cocaine base was the alarming rise in the use of crack."²⁵³ The opinion ended with a plea to the Supreme Court or Congress to resolve the circuit split.²⁵⁴

243. See *id.* at 376 n.2.

244. See *id.* at 377–79.

245. See *id.* at 377. The amendment took effect November 1, 1993. See *supra* Part I.D.

246. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(D), at 144 (2002). This case preceded the *United States v. Booker* decision; thus the Guidelines were still binding upon sentencing courts.

247. See *Munoz-Realpe*, 21 F.3d at 377–78. When the Sentencing Commission proposes an amendment to the Guidelines, such amendment is submitted to Congress. If Congress takes no action, the amendment takes effect in 180 days. See 28 U.S.C. § 994 (2006).

248. See *Munoz-Realpe*, 21 F.3d at 378–79.

249. 397 F.3d 570 (7th Cir. 2005).

250. See *id.* at 572–73.

251. See *id.* at 577.

252. See *id.* at 574.

253. *Id.*

254. See *id.* at 577 ("A lingering and stratified circuit split on a matter of such importance to the administration of criminal justice surely warrants the attention of Congress or resolution by the Supreme Court.").

c. Ninth Circuit

In *United States v. Hollis*,²⁵⁵ the Ninth Circuit found that “cocaine base” reasonably means crack cocaine.²⁵⁶ Hollis was convicted of distributing fifty grams of cocaine base and sentenced under the Act to twenty years in prison, which was also based on the fact that he had a prior conviction.²⁵⁷ On appeal, Hollis argued that because crack cocaine was not charged in the indictment or found by a jury, the heightened sentence should not apply.²⁵⁸

In its decision, the court entered into a chemical analysis of the forms of cocaine base and concluded that because crack cocaine is the most dangerous, Congress intended for harsher penalties to apply only to crack cocaine.²⁵⁹ Moreover, according to the court, Congress was reacting to a crack epidemic in the United States in 1986 and likely sought to target crack cocaine offenders.²⁶⁰ As a result, the court found that the government must charge and the jury must find that the defendant distributed crack cocaine; securing a conviction for mere cocaine base is insufficient to warrant imposition of a heightened sentence.²⁶¹

d. Sixth Circuit

In 2009, the Sixth Circuit joined the conversation on the meaning of cocaine base, deepening the circuit split.²⁶² The court looked to expert testimony equating cocaine base and crack cocaine, legislative intent, and the Sentencing Guidelines to set new precedent that a defendant can only be subject to the heightened sentence for crack cocaine.²⁶³ The Sixth Circuit was persuaded that the terms “crack cocaine” and “cocaine base” were used interchangeably at trial.²⁶⁴ Similarly, although the verdict form mentioned only cocaine base, the judge clarified in the jury charge that cocaine base means crack cocaine.²⁶⁵ The court noted that this definition “create[s] consistency between the Guidelines and the statute.”²⁶⁶

The Sixth, Seventh, Ninth, and Eleventh Circuits rely mostly on legislative intent and the Sentencing Guidelines in drawing a bright line at crack cocaine. The U.S. Court of Appeals for the D.C. Circuit has attempted to honor both the plain language of “cocaine base” and legislative intent by recalling the practice of “freebasing,” which refers to smokeable

255. 490 F.3d 1149 (9th Cir. 2007).

256. *See id.* at 1156.

257. *See id.* at 1152 (noting that drug type and quantity, coupled with a defendant’s prior history, can increase the maximum sentence).

258. *See id.* at 1155.

259. *See id.* at 1156; *see also supra* tbl.1.

260. *See Hollis*, 490 F.3d at 1156.

261. *See id.*

262. *See United States v. Higgins*, 557 F.3d 381 (6th Cir. 2009).

263. *See id.* at 395–96.

264. *See id.* at 387.

265. *See id.*

266. *Id.* at 395.

forms of cocaine.²⁶⁷ The next section discusses this opinion, currently embraced by only one circuit.

2. Cocaine Base Is Equivalent to Smokeable Forms of Cocaine

In 2004, the D.C. Circuit considered enhanced sentencing for cocaine base offenses in *United States v. Brisbane*.²⁶⁸ Brisbane was convicted of distributing five or more grams of cocaine base.²⁶⁹ The circuit court discussed the differences between powder cocaine and cocaine base, specifically noting the ingestion methods: smoking and snorting.²⁷⁰ The court found that Congress perceived smokeable forms of cocaine to be the most dangerous and imposed stricter sentences for those substances in the 1986 Act.²⁷¹ Thus, the court defined “cocaine base” as any form of cocaine that is smokeable.

The D.C. Circuit requires the prosecution to demonstrate, through chemical evidence, that the substance recovered from the defendant could have been smoked. In *Brisbane*, the court found that the government failed to prove that the substance distributed by Brisbane was smokeable.²⁷² The D.C. Circuit vacated Brisbane’s conviction for distributing cocaine base and remanded the case for a judgment of conviction for distributing powder cocaine and to sentence accordingly.²⁷³

The D.C. Circuit stands alone in its contention that the term “cocaine base” means smokeable forms of cocaine. The remainder of the circuits that have considered the issue take the plain meaning approach to an extreme, holding that cocaine base applies to a host of cocaine compositions, including those forms that are unusable.²⁷⁴

3. Cocaine Base Equals Crack Cocaine, Smokeable Cocaine, and Untreated Cocaine Base

The U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, and Tenth Circuits subject defendants found in possession of crack cocaine, cocaine paste, smokeable cocaine, and untreated cocaine to the heightened

267. See *supra* Part I.A.2–3, tbl.1.

268. 367 F.3d 910 (D.C. Cir. 2004).

269. See *id.* at 910–11.

270. See *id.* at 911.

271. See *id.* at 912. In fact, during congressional debates, lawmakers apparently believed that smokeable forms of cocaine were colloquially called crack. See 132 CONG. REC. 17,919 (1986) (statement of Sen. Specter) (“The greatest current attention is on the smokeable freebase cocaine known as crack . . .”). Indeed, in designating October 1986 as Crack/Cocaine Awareness Month, the Senate corroborated this perception. See *id.* at 20,559 (statement of Sen. Roth) (“[I]n a hearing last month, the Permanent Subcommittee on Investigations learned about the dangers of crack, the smokable form of cocaine.”); see also *supra* Part I.C; *infra* Part III.

272. See *Brisbane*, 367 F.3d at 914; see also *supra* tbl.1.

273. See *Brisbane*, 367 F.3d at 915.

274. The Eighth Circuit is the only court of appeals that has not considered the meaning of “cocaine base.” See *United States v. Higgins*, 557 F.3d 381, 395 n.3 (6th Cir. 2009).

punishments described above.²⁷⁵ These circuits follow the plain meaning of the statute, holding that because cocaine base actually encompasses more than just crack cocaine, any drug that takes the chemical form of cocaine base should be punished as such.

a. *Second Circuit*

The U.S. Court of Appeals for the Second Circuit followed the plain meaning of the text of the statute in *United States v. Jackson*.²⁷⁶ Jackson pled guilty to possession with intent to distribute three hundred grams of cocaine base.²⁷⁷ At sentencing, he argued that because cocaine base is not properly defined in the statute, the statute fails as impermissibly vague.²⁷⁸ The district court agreed, noting that courts of appeals have failed to agree about the meaning of cocaine base.²⁷⁹

The Second Circuit reversed the district court's imposition of a lesser sentence, declining to use the circuit split as grounds for finding the statute void for vagueness.²⁸⁰ The court reasoned that because cocaine base can be scientifically differentiated from powder cocaine, sentencing courts have sufficient information from which they determine an appropriate sentence.²⁸¹

In *United States v. Fields*,²⁸² the Second Circuit reaffirmed *Jackson*, upholding enhanced sentencing for possession of cocaine base.²⁸³ The district court had asserted that the rule of lenity requires a sentencing court to select the lesser penalty when faced with ambiguity in a statute.²⁸⁴ The court reasoned that while it is clear that Congress likely meant for the higher penalties to apply to crack cocaine, given the language of the Act, the court was entitled to determine that cocaine base encompassed more than the term crack cocaine.²⁸⁵

b. *Tenth Circuit*

In *United States v. Easter*,²⁸⁶ the U.S. Court of Appeals for the Tenth Circuit considered whether the language of the Act provided insufficient guidance to lower courts.²⁸⁷ A jury convicted Easter of conspiracy to

275. For more information on the chemical properties and forms of cocaine, see *supra* tbl.1.

276. 968 F.2d 158 (2d Cir. 1992).

277. *Id.* at 159.

278. *Id.* at 160.

279. *Id.*

280. *Id.* at 163–64.

281. *See id.* at 163.

282. 113 F.3d 313 (2d Cir. 1997).

283. *See id.*

284. *See id.* at 325.

285. *Id.*

286. 981 F.2d 1549 (10th Cir. 1992).

287. *See id.*

possess and distribute cocaine base, and he was subject to the heightened penalty.²⁸⁸ On appeal, Easter argued that the Act leads to arbitrary enforcement of the enhanced penalties because courts are not given clear direction as to whether a substance is cocaine base.²⁸⁹ In response, the Tenth Circuit considered the plain language of the statute and held that cocaine base is sufficiently defined and clearly encompasses more than crack cocaine.²⁹⁰ In its analysis, the court found it persuasive that Easter did not present any evidence or testimony to refute the chemist's conclusion that Easter possessed cocaine base.²⁹¹

c. Fifth Circuit

In *United States v. Butler*,²⁹² the Fifth Circuit ruled that a defendant could be subject to a heightened sentence for possession of cocaine base, even though it was in an unusable form upon confiscation.²⁹³ Butler attempted to convince the court that because the government did not produce any evidence that the substance he possessed was smokeable, it was not cocaine base within the meaning of the statute.²⁹⁴ The court rejected this contention, noting that although crack cocaine and cocaine base are commonly used interchangeably, courts are entitled to sentence all forms of cocaine base stringently.²⁹⁵

d. Third Circuit

In 2001, the Third Circuit attempted to harmonize the Sentencing Commission's stated definition of cocaine base with the plain language of the statute, reaching a contrary conclusion²⁹⁶ to what the Eleventh Circuit adopted.²⁹⁷ The defendant swallowed cocaine base for smuggling, believing it to be heroin.²⁹⁸ This mistake of fact notwithstanding, the defendant was convicted of possession with intent to distribute more than fifty grams of cocaine base.²⁹⁹ On appeal, the defendant cited the Sentencing Commission's 1993 amendment defining cocaine base as crack cocaine to argue that he was unfairly subjected to a more stringent sentence.³⁰⁰ The court upheld the conviction and sentence, finding that the

288. *See id.* at 1552.

289. *Id.* at 1557–58.

290. *Id.* at 1558.

291. *Id.*

292. 988 F.2d 537 (5th Cir. 1993).

293. *Id.* at 542–43.

294. *Id.*

295. *Id.*; *see infra* Part II.A.3.v.

296. *See United States v. Barbosa*, 271 F.3d 438 (3d Cir. 2001).

297. *See supra* Part I.A.1.i.

298. *Barbosa*, 271 F.3d at 448.

299. *Id.* at 447–48.

300. *Id.* at 449.

Sentencing Commission's amendment "could not override" the words of the statute.³⁰¹

e. *First Circuit*

In *United States v. Medina*,³⁰² the First Circuit held that the harsher sentence applies to possession of any form of cocaine base.³⁰³ Medina was convicted of possession with intent to distribute cocaine base, heroin, and marijuana and received the heightened sentence.³⁰⁴ On appeal, Medina argued that the jury instructions were deficient because they did not ask the jury to determine whether the substance was crack cocaine; rather, the trial judge instructed the jury that the government must prove, *inter alia*, "that the controlled substance involved here was cocaine base."³⁰⁵ The First Circuit held that the possession of any form of cocaine base, including crack cocaine, is among the substances that merit the higher sentence.³⁰⁶

f. *Fourth Circuit*

In *United States v. Ramos*,³⁰⁷ the Fourth Circuit joined the group of circuits that adhere to the plain-meaning rule in defining cocaine base.³⁰⁸ The defendant was found guilty of distributing crack cocaine and subjected to the heightened sentence.³⁰⁹ On appeal, Ramos argued that the trial judge erred by failing to instruct the jury that it was required to make a specific finding that the substance was crack cocaine rather than cocaine base.³¹⁰ In rejecting Ramos's argument, the court stated that a judge may rely on nothing more than the statutory text in issuing jury instructions.³¹¹ The court found that the statutory language allows courts to sentence all forms of cocaine base equally.³¹²

In deciding the meaning of "cocaine base," nearly every circuit court has grappled with issues of legislative intent and chemical composition. Another central aspect of a court's inquiry into the meaning of cocaine base is a policy discussion about the disparity caused by the Act's one-hundred-to-one ratio. Courts have signaled concern that their decisions may exacerbate disproportionate sentences. Without Supreme Court precedent

301. *Id.* at 463 (recognizing that Congress enacted the sentencing scheme to respond to the crack cocaine epidemic, but that "Congress has not seen fit to adopt any definition or similar delineation of 'cocaine base,' contrary or otherwise").

302. 427 F.3d 88 (1st Cir. 2005).

303. *See id.* at 92.

304. *See id.* at 90, 92–93.

305. *Id.* at 92 (internal quotation marks omitted).

306. *Id.*

307. 462 F.3d 329 (4th Cir. 2006).

308. *Id.* at 333–34.

309. *Id.* at 331, 333.

310. *Id.* at 333–34.

311. *Id.*

312. *Id.*

resolving this split, courts have looked to other decisions, including *Kimbrough v. United States*³¹³ and *Spears v. United States*,³¹⁴ to rationalize the imposition of different ratios.

B. Courts Institute Their Own Ratios

When the Supreme Court granted sentencing courts the option to replace the statutory one-hundred-to-one ratio with their own judicially created penalty schemes in *Spears*,³¹⁵ many lower courts changed their approach to sentencing cocaine offenses almost immediately. Under *Spears*, a sentencing judge who disagrees with the applicable Sentencing Guidelines range may depart from that range based purely on policy concerns, rather than traditional mitigating factors set forth in the Sentencing Guidelines.³¹⁶

In 2009, the U.S. District Court for the Western District of Pennsylvania relied on *Spears* and *Kimbrough* to institute a one-to-one ratio of crack cocaine to powder cocaine.³¹⁷ Citing remarks made by Attorney General Eric Holder³¹⁸ and a recent study by the Sentencing Commission,³¹⁹ the court declared that current shifts in public policy rendered the one-hundred-to-one ratio “a ‘remarkably blunt instrument,’” especially where crack cocaine has not been proven quantitatively more dangerous than powder cocaine.³²⁰ The Western District of Pennsylvania followed its decision with a memorandum mandating that all future cocaine sentences follow this one-to-one ratio.³²¹ The U.S. District Courts for the Western District of Virginia and the District of Columbia have also adopted a one-to-one ratio,³²² based upon policy disagreements with the Act’s one-hundred-to-one ratio, as well as the racial disparity caused by the Act.³²³

Following the U.S. District Court for the Northern District of Iowa’s example,³²⁴ which was sanctioned by the Supreme Court in *Spears*,³²⁵ the

313. 552 U.S. 85 (2007).

314. 129 S. Ct. 840 (2009) (per curiam).

315. See *supra* notes 195–98 and accompanying text.

316. See *Spears*, 129 S. Ct. at 842. Traditional mitigating factors that courts may consider when meting out a sentence include the nature of the offense; the defendant’s criminal history; the possibility of rehabilitation; the need for incapacitation and retribution; and the possibility of deterrence. See Levy, *supra* note 171, at 2631.

317. See *United States v. Russell*, No. 06-72 Erie, 2009 WL 2485734, at *1 (W.D. Pa. Aug. 12, 2009) (“I have concluded that there are sound policy reasons for adopting a 1-to-1 crack to powder ratio for all crack cocaine sentences.”).

318. See *id.* at *1.

319. See *id.* at *2.

320. *Id.* at *3 (quoting *United States v. Gully*, 619 F. Supp. 2d 633, 641 (N.D. Iowa 2009)).

321. See *United States v. Knight*, No. 98-03 Erie, 2009 U.S. Dist. LEXIS 91556, at *3–4 (W.D. Pa. Sept. 29, 2009) (noting that the ratio should not be applied retroactively, absent a statutory change).

322. See, e.g., *United States v. Luck*, No. 3:04-CR-00047-006, 2009 WL 2462192 (W.D. Va. Aug. 10, 2009); *United States v. Lewis*, 623 F. Supp. 2d 42 (D.D.C. 2009).

323. See *Luck*, 2009 WL 2462192, at *2; *Lewis*, 623 F. Supp. 2d at 44.

324. See *United States v. Gully*, 619 F. Supp. 2d 633, 641 (N.D. Iowa 2009).

325. See *Spears v. United States*, 129 S. Ct. 842 (2009) (per curiam); *supra* Part I.E.

Southern District of New York instated a twenty-to-one ratio of powder cocaine to crack cocaine.³²⁶ Taking issue with the racial disparity caused by the Act, the Southern District of New York relied on *Kimbrough* and *Spears* to institute its own ratio.³²⁷ Instead of following the Sentencing Guidelines, the court considered the defendant's youth and the fact that he was enrolled in school in sentencing the defendant to the statutory minimum.³²⁸ District courts in Rhode Island and Wisconsin have also adopted a twenty-to-one ratio based upon policy considerations.³²⁹ These courts deride the one-hundred-to-one ratio as illogical, but assert that possession of crack cocaine is a more serious offense than having powder cocaine, rendering the twenty-to-one ratio proportionate.³³⁰

Having explored the deepening circuit split caused by the ambiguous wording in the Act and the newly emerging phenomenon of court-created ratios, it is evident that a judicial remedy to the racial disparity will not achieve consistent federal sentencing policy. Left to their own devices in determining what punishment is appropriate, some courts have expanded the kind of cocaine base needed to trigger a heightened sentence, while other courts have determined that *Kimbrough* permits them to institute their own ratio of crack cocaine to powder cocaine.³³¹ Circuit courts have continually asked for guidance from the Supreme Court and the legislature,³³² but their pleas have gone unanswered.³³³ Part III of this Note argues that divergent approaches across jurisdictions warrant a joint effort by both Congress and the courts to eliminate the disparity.

III. ELIMINATING THE DISPARITY THROUGH A LEGISLATIVE AND JUDICIAL SOLUTION

Part II of this Note detailed the circuit split regarding the meaning of "cocaine base" and the new trend of judicially created ratios of crack cocaine to powder cocaine, both of which severely impede the creation of a consistent federal drug policy. The sentence for possession of cocaine base

326. See *United States v. Dozier*, No. S1 08 Cr. 08-02(RWS), 2009 WL 1286486 (S.D.N.Y. May 8, 2009); see also *United States v. Perry*, 389 F. Supp. 2d 278, 304, 307 (D.R.I. 2005) (instituting a twenty-to-one ratio, and noting that "when a Guideline sentence involves a nearly impossible-to-justify disparity such as this [ratio], the sentence neither accurately reflects the seriousness of the offense, nor promotes general respect for the criminal justice system").

327. See *Dozier*, 2009 WL 1286486, at *3, *6 ("Use of this 20:1 in the present case will mitigate the disparity between this sentence and one imposed on a defendant who engaged in substantially similar conduct that involved powder cocaine . . .").

328. See *id.* at *7.

329. See, e.g., *Perry*, 389 F. Supp. 2d at 307–08; *United States v. Smith*, 359 F. Supp. 2d 771, 781–82 (E.D. Wis. 2005).

330. See *id.*

331. See *supra* notes 180–202 and accompanying text.

332. See, e.g., *United States v. Edwards*, 397 F.3d 570, 577 (7th Cir. 2005) ("A lingering and stratified circuit split on a matter of such importance to the administration of criminal justice surely warrants the attention of Congress or resolution by the Supreme Court.").

333. See *supra* Part I.E.

in one circuit court may be vastly different from that of a neighboring circuit.³³⁴ Moreover, the *Kimbrough* decision has prompted lower courts to derive their own sentencing ratios from policy considerations, further exacerbating sentencing disparities.³³⁵ Resolution of these issues requires action by both Congress and the judiciary. This part begins with an exploration of the legislative history of the Act, proposing that Congress intended to target crack cocaine, not all forms of cocaine base. It then addresses the failure of the judicially created remedies to mitigate the Act's racial disparity properly. This Note concludes by evaluating the 1986 Act and the Fair Sentencing Act of 2009, advocating for collaboration between the legislature and judiciary to eradicate the racial disparity the one-hundred-to-one ratio has caused.

A. Legislative Intent Is Unambiguous: Cocaine Base Means Crack Cocaine

Although the legislative history of the Act is somewhat abridged,³³⁶ Congress was deliberate in targeting crack cocaine. Statements made by legislators and President Reagan prior to the Act's passage, along with subsequent reports from the media and the Sentencing Commission, indicate that the drafters intended to impose a higher sentence for crimes involving crack cocaine only, and not any other form of cocaine base.³³⁷ A majority of floor discussions and media statements by Senators and Representatives centered around dangers specific to crack cocaine.³³⁸ Similarly, the surge in President Reagan's War on Drugs paralleled the emergence of the crack cocaine epidemic.³³⁹ Finally, both the media and the Sentencing Commission understood the Act to create harsher sentences specifically for crack cocaine.³⁴⁰

The legislative history of the Act demonstrates that Congress's objective was to combat the crack cocaine epidemic and distinguish crack cocaine from all other forms of cocaine. During congressional debates prior to the Act's adoption, speakers did not use the term "cocaine base."³⁴¹ In fact, the drafters relegated crack cocaine to its own unique category, apart from other forms of cocaine.³⁴² During a speech expressing his support of harsher sentences for crack cocaine dealers, Senator Chiles, an especially vocal supporter of the Act, explicitly recognized "crack as a distinct and separate drug."³⁴³

334. See *supra* Part I.E.

335. See *supra* Part II.B.

336. See *supra* Part I.C.1.

337. See *supra* Part I.C–D.

338. See *supra* Part I.C.

339. See *supra* Part I.B.2.

340. See *supra* Part I.B, D.

341. See *supra* Part I.C.

342. See *supra* Part I.C.

343. See 132 CONG. REC. 27,190 (1986) (statement of Sen. Chiles); *supra* Part I.C.

The Act's sentencing scheme was meant to reflect Congress's perception of crack cocaine as the most dangerous form of cocaine.³⁴⁴ In justifying the imposition of a statutory minimum for possession of five grams of cocaine base, legislators pointed to the imminent threat of crack cocaine without mentioning risks inherent in other forms of cocaine.³⁴⁵ Congress focused almost exclusively on the addictive quality and low cost of crack cocaine, and it is unlikely that Congress believed other forms of cocaine base warranted such stringent sentences.³⁴⁶

Executive policy was similarly unequivocal: Reagan's War on Drugs targeted crack cocaine.³⁴⁷ Efforts by the Reagan Administration to combat drug abuse also recognized that crack cocaine posed a special threat to public health.³⁴⁸ Crack cocaine was the centerpiece of the War on Drugs, as demonstrated through presidential addresses and public service announcements.³⁴⁹ Concurrent with the passage of the Act, Reagan hailed a "national crusade against drugs," promising fervent efforts to eradicate lethal drugs, especially crack cocaine.³⁵⁰

Third-party interpretation also demonstrates that cocaine base was intended to mean crack cocaine, as the media and Sentencing Commission perceived the Act as targeting crack cocaine. Media coverage, which was a major impetus for the Act,³⁵¹ sensationalized a crack cocaine epidemic, not a cocaine base epidemic.³⁵² News reports consistently linked high-profile drug overdoses to crack cocaine. A series of front page stories in major newspapers attributed the death of Len Bias to crack cocaine, prompting nationwide panic about the new drug.³⁵³ In fact, the media frenzy was based on unfounded rumors; three years after Bias's death, it was revealed that the cause of Bias's death was powder cocaine.³⁵⁴ From investigative television programs to *The New York Times*, a deluge of media reports, devoted solely to crack cocaine, ensued.³⁵⁵ Subsequent to the Act's

344. See *supra* Part I.C.

345. See *supra* Part I.C.

346. See *supra* Part I.A.3, tbl.1.

347. See *supra* Part I.A.3.

348. See Address to the Nation on the Campaign Against Drug Abuse, *supra* note 116 ("Today there's a new epidemic: smokeable cocaine, otherwise known as crack. It is an explosively destructive and often lethal substance which is crushing its users. It is an uncontrolled fire.").

349. See *supra* Part I.B.2.

350. See Bernard Weinraub, *The Matter of Money and Fighting Drugs*, N.Y. TIMES, Feb. 9, 1987, at B6 (reporting President Reagan's statement at the signing ceremony: "The American people want their government to get tough and to go on the offensive and that's what we intend with more ferocity than ever before.").

351. See *supra* Part I.A.2, C.

352. See *supra* Part I.A.2.

353. See *supra* Part I.A.2. Three years after Bias's death, the misperception was corrected, and it was revealed that the cause of Bias's death was powder cocaine. See *Examiner Confirms Cocaine Killed Bias*, *supra* note 70.

354. See *Examiner Confirms Cocaine Killed Bias*, *supra* note 70.

355. For a discussion of media coverage at the time of the Act's passage, see *supra* notes 67-73 and accompanying text.

passage, the media still did not use the term “cocaine base,” but only recognized that stricter sentences had been implemented for crack cocaine.³⁵⁶

The Sentencing Commission’s interpretation of the Act, released in 1993, followed by Congress’s tacit approval of this interpretation, also sheds light on the intended meaning of “cocaine base.”³⁵⁷ Seven years after the 1986 Act was passed, the Sentencing Commission submitted an amendment to its Guidelines, defining “cocaine base” as crack cocaine.³⁵⁸ Congress did not vote on the 1993 amendment; thus, for the purposes of the Sentencing Guidelines, cocaine base referred to crack cocaine, rather than other untreated forms of cocaine.³⁵⁹ By 1993, if lower courts harbored any reservations that the Act’s sentence for cocaine base referred to crack cocaine, Congress’s failure to disapprove of the Sentencing Commission’s definition should have resolved any concerns.

The prevailing argument proffered by those who continue to find ambiguity in the Act is that if Congress had meant to target only crack cocaine, its drafters would not have used the term “cocaine base.”³⁶⁰ However, this contention fails to recognize the atmosphere at the time of the Act. In 1986, Congress’s knowledge of the many forms of cocaine was cursory and lawmakers likely did not know that other forms of cocaine base even existed.³⁶¹ Washington D.C. prosecutors called upon “experts” such as Johnny St. Valentine Brown³⁶² for the same reason Congress did: both jurors and members of Congress were not well versed in the narcotics lexicon.³⁶³

Statements by members of Congress, President Reagan, the media, and the Sentencing Commission demonstrate that the legislature did not intend to create ambiguity regarding the meaning of cocaine base. The penalty scheme set forth in the Act mandated a one-hundred-to-one ratio of powder cocaine to crack cocaine. The circuit split persists, however, as some courts are unable to ignore the racial disparity the one-hundred-to-one ratio has created.³⁶⁴

B. *Legislative Inaction Begets Unsatisfactory Judicial Remedies*

Despite the predominant public perception that crack cocaine sentencing policies were unfair, Congress remained silent for over two decades, leaving courts to note the irrational disparity the Act has created. From

356. See Kerr, *supra* note 50, at 36.

357. See *supra* Part I.D.

358. See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 174, § 2D1.1(c)(D), at 144.

359. See *supra* Part I.D. When the Sentencing Commission proposes an amendment to the Guidelines, the amendment is submitted to Congress; if Congress takes no action, the amendment takes effect in 180 days. See 28 U.S.C. § 994(p) (2006).

360. See *supra* Part II.A.3.

361. See *supra* Part I.B.

362. See *supra* notes 1–14 and accompanying text.

363. See *supra* Part I.B.1, C.1.

364. See *supra* Part II.

sentencing courts to the Supreme Court, judges have attempted to find solutions to the Act's ambiguity and racial disparity but managed only to confuse federal sentencing policy further.

Rather than resolving a pressing circuit split as to the meaning of the Act, the Supreme Court in *Kimbrough* and *Spears* shifted the burden to lower courts, permitting judges to weigh public policy over statutory guidelines in determining what sentencing scheme is appropriate. Some judges have responded by creating their own ratios, which range from one-hundred-to-one to one-to-one.³⁶⁵

Despite incontrovertible evidence of legislative intent, the First, Second, Third, Fourth, Fifth, and Tenth Circuits have expanded the meaning of "cocaine base" to encompass more than crack cocaine, including coca paste and cocaine freebase.³⁶⁶ These courts have likely reached this position in an attempt to mitigate the racial disparity that has resulted from the one-hundred-to-one ratio of powder cocaine to crack cocaine.³⁶⁷ Because crimes involving all forms of cocaine base are not committed disproportionately by African American defendants, punishing all forms of cocaine base equally diminishes the discriminatory effect.³⁶⁸

As appellate courts continue to issue divergent opinions about the meaning of "cocaine base," sentencing courts further confuse the circuit split by imposing their own ratios of powder cocaine to crack cocaine.³⁶⁹ These dueling judicial efforts inhibit uniformity in federal drug sentencing. Although judicial remedies such as modifying the Act's meaning and creating lower ratios increase haphazardness in sentencing, the alternative—following the language of the Act and sentencing crack cocaine users one hundred times more severely—is also unsatisfactory because the Act itself is flawed.

C. *Justifications for the Act Do Not Warrant a One-Hundred-to-One Ratio of Powder Cocaine to Crack Cocaine*

Upon adopting the 1986 Act, Congress justified sentencing crack cocaine offenders more severely because it was more addictive, linked with violent crime, prevalent among youth, inexpensive, and posed prenatal threats to children.³⁷⁰ In light of research conducted over the past twenty years, these concerns do not merit the one-hundred-to-one ratio.

365. See *supra* Part II.B.

366. See *supra* Part II.A.3.

367. See *supra* Part II.B.

368. See Vagins & McCurdy, *supra* note 129, at 6.

369. See *supra* Part II.B.

370. See *supra* note 129 and accompanying text.

1. Crack Cocaine Is Not More Addictive than Powder Cocaine

Crack cocaine is not unilaterally more addictive than powder cocaine simply because it enters the bloodstream faster.³⁷¹ Ingestion method is only one element in determining one's propensity for dependence; because all drugs have the potential to be extremely addictive, psychological factors and frequency of use must be considered before finding that one drug is more addictive than another.³⁷² If a powder cocaine user has a psychological predisposition to addiction, he is more likely to become addicted to powder cocaine than a crack cocaine user without such a predisposition.

2. Association of Violent Crime and Crack Cocaine Is Misguided

Violent crime is not confined to the distribution of crack cocaine, but rather to dealing high volumes of any street drug. As early as 1988, of 414 homicides committed in New York City, only three were definitively related to crack cocaine.³⁷³ Currently, over seventy-five percent of crack cocaine users are not involved in gun-related crime.³⁷⁴ While "turf-wars" and crime among drug dealers are tragic byproducts of the prevalence of drugs in inner cities, if there were no crack cocaine, it is not likely that such violence would significantly decrease.³⁷⁵

3. Crack Cocaine Use Among Pregnant Women Does Not Warrant a One-Hundred-to-One Ratio for All Offenders

While the prenatal dangers of crack cocaine use may have justified the Act's devotion of money for drug prevention, treatment, and education, this consideration should not have dictated the sentencing scheme. Grounding a disproportionate ratio in the effect of the drug on pregnant women does not comport with the demographic most often arrested for the use and distribution of crack cocaine. Ninety percent of the prison population currently serving enhanced sentences for crack-cocaine-related crimes is male.³⁷⁶ Thus, attempting to deter crack cocaine abuse among a small subset of users—pregnant women—does not warrant the institution of such a draconian ratio.

371. See 2002 REPORT, *supra* note 160, at 18–19; *supra* Part I.A.3, tbl.1.

372. See Vagins & McCurdy, *supra* note 129, at 5. Scientific reports have demonstrated that all forms of cocaine are potent stimulants of the central nervous system and therefore "powder and crack [cocaine] produce the same physiological and psychotropic effects on the human brain." *Id.*

373. See *id.*

374. See *id.*

375. See *id.*

376. See 2002 REPORT, *supra* note 160, at 63 tbl.3.

4. Statistics About Crack Cocaine Use Among Youth Do Not Suggest the Need for a Ratio

The notion that young people are prone to abuse crack cocaine more than any other form of cocaine is not grounded in statistics, even at the time the Act was adopted. In 1988, the rate of powder cocaine usage among eighteen to twenty-five year olds was seven times higher than that of crack cocaine.³⁷⁷ According to the Sentencing Commission, eighteen to twenty-five year olds do not abuse the drug more than any other age group.³⁷⁸ Congress's concern for young people at the time of the Act's inception was likely caused by media coverage that overstated minors' involvement in drug trafficking.³⁷⁹

5. The Cost of Crack Cocaine Does Not Suggest a Need for Heightened Sentences

Regulating a drug based on its cost is a patently misguided approach. Were Congress to regulate all drugs based on price, drug laws would be eminently disproportionate. In 1990, five hundred grams of powder cocaine had a street value of approximately \$50,000, while five grams of crack cocaine was worth about \$750.³⁸⁰ Under the Act, a defendant convicted of trafficking \$50,000 in powder cocaine would receive the same sentence as a defendant guilty of dealing only \$750 in crack cocaine.³⁸¹ Instead of targeting low-level crack cocaine dealers, a sentencing scheme involving an assessment of both cost and quantity would appropriately target criminals trafficking high volumes of drugs.

Even though the Act's stated justifications are plainly invalid, the racial disparity continues, and the Act's ratio is still in effect. Lower courts have implored the Supreme Court to resolve the split, but the burden should be placed on Congress to determine not only the meaning of "cocaine base," but also whether the one-hundred-to-one ratio is appropriate.

D. *The Fair Sentencing Act*

The hasty drafting of the 1986 Act triggered a disturbing racial disparity that has persisted for two decades.³⁸² Although Vice President Biden, who was a senator and ardent supporter of the Act in 1986, has insisted that Congress did not have discriminatory intent in creating the Act, he concedes that the drafters did not have a grasp of crack cocaine or its chemical properties.³⁸³

377. *See id.* at 96.

378. *See id.* ("[T]he National Household Survey on Drug Abuse reports that crack cocaine use among 18- to 25-year old adults historically has been low.").

379. *See supra* Part I.A.2.

380. *See* 2002 REPORT, *supra* note 160, at 112.

381. *See id.* at iv, 4.

382. *See supra* Parts I.C.2, I.D, II.

383. *See* Cose, *supra* note 18, at 25.

Congress, the Supreme Court, and lower courts have magnified the problems associated with the Act's sentencing disparity. During the 1980s, Congress allowed intense media coverage of crack cocaine, similar to the atmosphere created during the adoption of the Harrison Act in 1914,³⁸⁴ to influence the Act's one-hundred-to-one ratio.³⁸⁵ The Supreme Court had the opportunity to resolve the circuit split in *Kimbrough*, but instead prompted sentencing courts to create their own sentencing policy.³⁸⁶ Appellate courts continue to express opposition to the one-hundred-to-one ratio by adding ambiguity to the statutory meaning of cocaine base.³⁸⁷ Lower courts have relied on *Kimbrough* to voice disagreement with the Act's sentencing scheme.³⁸⁸

With the Obama Administration came renewed efforts to change crack cocaine sentencing policy. Congressional hearings put a spotlight on the practical implications of the one-hundred-to-one ratio, finally provoking a response. After permitting the sentencing disparity to plague narcotics policy for over twenty years, Congress has taken steps towards eradicating the one-hundred-to-one ratio with the introduction of the Fair Sentencing Act of 2009.³⁸⁹ Because the justifications for the ratio set forth in the 1986 Act are no longer persuasive, eliminating the ratio is an appropriate first step in addressing the unfair sentencing disparity.

The adoption of the Fair Sentencing Act alone will not resolve the unfairness in crack cocaine policy; the judiciary must also contribute to correcting two decades of disproportionate narcotics sentencing. Judges should refrain from imposing their own ratios and heed the legislative intent of the Fair Sentencing Act: to ensure that sentencing schemes include harsher punishments for high-volume drug traffickers and recidivists.³⁹⁰ Courts should make sentencing decisions on a case-by-case basis, considering the totality of the circumstances. Subsequent to *Kimbrough*, judges have become preoccupied by policy concerns, allowing their opinions on the 1986 Act to dictate their sentencing decisions. This result not only subverts the individual analysis defendants deserve, but also fails to achieve a coherent federal sentencing policy.

While the Fair Sentencing Act will not be retroactive and thus will not change the sentences for offenders who were victims of the unsubstantiated ratio, it is significant that Congress has recognized the need to repeal the ratio. If the Fair Sentencing Act is passed, courts must contribute to the transformation of federal drug sentencing by adhering to the letter of the law. Although courts are still entitled to consider policy goals in issuing sentences under *Kimbrough* and *Spears*, judges should refrain from

384. See *supra* Part I.A.

385. See *supra* Part I.B, C.

386. See *supra* Part I.E.

387. See *supra* Part II.A.

388. See *supra* Part II.B.

389. See *supra* Part I.F.3.

390. See *supra* Part I.F.3.

perpetuating arbitrary federal sentencing by adhering to statutory guidelines.

CONCLUSION

The rise and fall of Bobby St. Valentine Brown is indicative of congressional action in response to the growing drug problem in the United States: initially triumphant but ultimately discredited.³⁹¹ Media coverage and social stigmas in 1986 provoked Congress to act quickly and draft legislation that disproportionately targeted crack cocaine.³⁹² Fueled by uncorroborated testimony and intense press reports, Congress attempted to target various drugs proportionately to the danger they posed.

Although the decision was misguided, Congress meant for the harsher penalty to apply to crack cocaine offenses only.³⁹³ With an incomplete understanding of crack cocaine, the legislature used the term “cocaine base” in § 841(b), causing ambiguity that has beleaguered sentencing courts for over two decades. Countless appeals based upon semantics and chemical analyses have clogged the judicial system.³⁹⁴

The dangers of crack cocaine are not one hundred times worse than those of powder cocaine or any other form of cocaine, rendering the sentencing scheme unsound.³⁹⁵ Instead of accurately targeting dangerous, high-volume drug dealers, the 1986 Act has promulgated a troubling racial disparity, with African Americans sentenced to jail more frequently than Caucasians.³⁹⁶

Judges have altered their interpretations of the Act in an effort to counteract the racial disparity.³⁹⁷ The *Kimbrough* decision then validated a judicial movement embraced by sentencing courts, which now take the negative policy implications of the one-hundred-to-one ratio into account before meting out punishment.³⁹⁸ In *Kimbrough* and *Spears*, the Court sanctioned lower courts’ sua sponte imposition of their own ratios.³⁹⁹ Such an unsettling court-imposed remedy merely hampers justice by propagating inconsistent sentencing across jurisdictions.

Legislative inaction in remedying the Act’s ambiguity and the judiciary’s overactive discourse on the Act’s penalty scheme sends a clear message to cocaine dealers: possess and distribute in those areas where the courts either interpret “cocaine base” narrowly or are politically opposed to the statutory sentencing scheme. As courts’ discretion in sentencing narcotics

391. See *supra* Introduction.

392. See *supra* Part I.B–C.

393. See *supra* Part III.A.

394. See *supra* Part II.

395. See *supra* Part III.B.

396. See *supra* Part I.C.2.

397. See *supra* Part II.B.

398. See *supra* Part I.E.

399. See *supra* Part II.B.

defendants broadens, more judges will likely institute their own ratios of powder cocaine to crack cocaine.

Consistent federal drug sentencing policy has been as elusive as a victory in the War on Drugs. The United States' addiction to illegal narcotics has plagued the country for decades as efforts to curb drug abuse continually fail. Enacting the Fair Sentencing Act is a long-overdue and necessary step in overhauling a flawed drug policy. Sentencing courts must contribute to the streamlining of federal drug policy by adhering to statutory guidelines rather than imposing their own ratios. A joint effort by courts and Congress to change the approach to cocaine regulation and sentencing will help ensure consistent legislation and jurisprudence, thereby strengthening, rather than hindering, enforcement of drug laws.