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## SMOKED NOT SNORTED: IS RACISM INHERENT IN OUR CRACK COCAINE LAWS?

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There comes a time when we cannot and must not close our eyes when presented with evidence that certain laws, regardless of the purpose for which they were enacted, discriminate unfairly on the basis of race, e.g., that for the murder of a white person in Georgia, a black person is more than twice as likely as a white person to be sentenced to death; that, in Minnesota, the predominantly black possessors of three grams of crack cocaine face a long term of imprisonment with presumptive execution of sentence while the predominantly white possessors of three grams of powder cocaine face a lesser term of imprisonment with presumptive probation and stay of sentence.

—The Minnesota Supreme Court in *State v. Russell*<sup>1</sup>

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1. 477 N.W.2d 886, 888 n.2 (Minn. 1991) (citation omitted).

## INTRODUCTION

Inspired by the early hysteria over the crack epidemic in the mid-1980s,<sup>2</sup> Congress passed the Anti-Drug Abuse Act of 1986<sup>3</sup> to provide harsh new penalties for violations involving cocaine base, otherwise known as crack cocaine or "crack."<sup>4</sup> Two facets of this law and its subsequent amendments combine to create a potential constitutional violation with dramatic consequences. First, the federal Code<sup>5</sup> and United States Sentencing Guidelines<sup>6</sup> adopted a 100 to 1 ratio, treating 1 gram of crack as equivalent to 100 grams of powder cocaine for sentencing purposes. Second, harsh new mandatory minimum sentences were adopted for drug violations involving crack and powder cocaine.<sup>7</sup> Under these new federal laws — and under several similar state laws that followed<sup>8</sup> — people convicted of crimes involving even small amounts of crack are required to serve mandatory minimum sentences without the possibility of parole.<sup>9</sup> Those convicted of crimes involving substantially greater amounts of powder cocaine, however, are not subject to mandatory minimum sentences.<sup>10</sup>

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2. See generally Craig Reinerman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, 16 CONTEMP. DRUG PROBS. 535, 539-43 (1989) (documenting early media attention on crack cocaine).

3. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of 21 U.S.C. §§ 801-970).

4. Throughout this Article, the term "crack" is used synonymously with what federal and state statutes refer to as "cocaine base."

5. 21 U.S.C. § 841(b)(1)(A), (B) (1988).

6. United States Sentencing Guidelines, 18 U.S.C.S. app. § 2D1.1 (Law. Co-op. 1993).

7. See *infra* notes 110-31 and accompanying text discussing the 1986 statutory sentencing revisions. See also Dan J. DeBenedictis, *How Long is Too Long?*, A.B.A. J., Oct. 1993, at 74 (suggesting that Congress may soon eliminate mandatory minimum sentences and discussing several criticisms of mandatory sentences, including racial disparity).

The federal mandatory minimum sentences often result in prison sentences for distribution of crack that are "incomprehensibly severe." Richard Leiby, *A Crack in the System*, WASH. POST, Feb. 20, 1994, at F1. For example, petty crack dealers in America may serve sentences three times those served by most murders, four times those of most kidnappers, and five times those of most rapists. *Id.* at F4.

8. See *infra* notes 135-49 for a discussion of state laws regarding cocaine and crack penalties. See also Appendix for an inventory of the state laws governing cocaine and crack penalties.

9. See *infra* notes 121-49 and accompanying text.

10. See *infra* notes 121-49 and accompanying text.

The constitutional guarantee of equal protection is implicated because there is a statistically relevant correlation between ethnicity and the preference for crack over powder cocaine.<sup>11</sup> Because Black and Latino cocaine users are more likely to use cocaine in the crack form than are White cocaine-users,<sup>12</sup> they are more likely to be subjected to the stricter penalties. The disparity in sentencing for possession, use, or trafficking of pharmacologically identical substances suggests an equal protection violation.

The crack/powder cocaine penalty dichotomy is yet another significant example of the heavier burden that people of color have carried during the last decade's war on drugs.<sup>13</sup> The existence of this burden is borne out by the government's own statistics: although African-Americans represent only 12% of the illegal drug users in this country — almost equal to their percentage of the population — they comprise 44% of all drug arrests.<sup>14</sup>

Meanwhile, the same drug war hysteria that inspired enhanced crack penalties effectively precludes a legislative solution to racially discriminatory drug laws and policies. Despite government statistics documenting the racial injustices caused by our nation's drug policies, only a handful of elected officials have shown the courage to oppose these policies.<sup>15</sup> Most politicians remain silent for fear of

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11. See *infra* notes 150-55 and accompanying text; see also *Washington v. Davis*, 426 U.S. 229 (1976) (holding that if a statute has a discriminatory impact on members of a minority group, such impact is one permissible factor in determining an equal protection violation, and can be shown by demonstrating that the impact is statistically relevant).

12. Statistics indicate that 92% of all persons convicted of federal crack violations are Black. Leiby, *supra* note 7, at F5. See also *infra* notes 118-19, 150-55, and accompanying text for a further discussion of the ethnography of cocaine users.

13. See generally John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991).

While the war against drugs potentially compromises the rights of all Americans, it has a particularly devastating impact upon the recently gained rights of minorities. In fact, the war on drugs could more aptly be called a war on the minority populations.

*Id.* at 559.

14. Allan Ellis, *Of Race and Incarceration*, RECORDER, Dec. 5, 1991, at 6.

15. See Reinerman & Levine, *supra* note 2, at 559-66 (illustrating how both Republicans and Democrats derived political utility from endorsing the war on drugs).

One politician to argue in favor of drug decriminalization was the mayor of Baltimore, Maryland. See Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501 (1990) (testifying before the U.S. House of Representa-

being labeled "soft on crime," a dangerous proposition given the popularity of the "get tough" anti-drug agenda.<sup>16</sup> Our system of constitutional rights and judicial review acknowledges that representative bodies are often incapable of protecting the rights of minorities against popular campaigns such as the war on drugs.<sup>17</sup> It is therefore not surprising that the only significant challenges to enhanced crack penalties are constitutional challenges by criminal defendants charged under these crack statutes.<sup>18</sup>

Criminal defendants argue that enhanced crack penalties violate the federal constitutional guarantee of equal protection by meting out harsher penalties for crack, which is more strongly favored among Black and Latino cocaine users than White cocaine users.<sup>19</sup> Unfortunately, constitutional precedent requires judges to be highly deferential to the legislature regarding criminal laws.<sup>20</sup> In order to strike down a statute for violating equal protection due to an impermissible racial classification, a defendant must prove that the law was passed with the purpose of racial discrimination.<sup>21</sup> Especially in the context of criminal statutes, the defendant's burden of proof is almost impossible to satisfy.

Absent a showing of discriminatory intent, federal courts must uphold the laws if they are shown to be "rationally related" to a "legitimate" government objective.<sup>22</sup> If such a "rational basis" is shown, the challenged law is constitutional despite the fact that it

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tives that drug abuse should be viewed as a health problem, not a criminal justice problem).

16. Reinerman & Levine, *supra* note 2, at 563. Another commentator noted: "In the nation's increasing anti-crime climate, championing lower sentences for crack dealers is as politically astute as endorsing hollow-point ammunition sales in school yards." Leiby, *supra* note 7, at F5.

17. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 5, 15, 62 (2d ed. 1988); *THE FEDERALIST* No. 51 (James Madison) (addressing oppression of weaker minority groups by the majority).

18. See *infra* notes 190-225 and accompanying text.

19. See *infra* notes 150-55 and accompanying text.

20. At the federal level, virtually every court of appeals has considered and rejected criminal defendants' arguments that the discrepancy between sentences for crimes which involve crack and those which involve powder cocaine rise to the level of an equal protection or a due process violation. See *infra* notes 202-11 and accompanying text.

21. See *infra* notes 192-201 and accompanying text.

22. See *infra* notes 199-201 and accompanying text.

has a racially discriminatory impact.<sup>23</sup> Application of the rational basis test assures that federal equal protection challenges to enhanced crack penalties are universally rejected.<sup>24</sup> In other words, the deference inherent in the rational basis test fosters judicial myopia, preventing the federal courts from recognizing what is arguably the most serious modern form of racial injustice: the over-incarceration of Blacks and Latinos through the war on drugs.<sup>25</sup>

A 1991 Minnesota Supreme Court case, *State v. Russell*,<sup>26</sup> revives the possibility of a successful equal protection challenge to enhanced crack penalties. The court in *Russell* held that although enhanced crack penalties may not violate federal equal protection guarantees, they do violate equal protection under the more protective and less deferential Minnesota Constitution.<sup>27</sup>

This Article uses *Russell* as a vehicle to critically evaluate the racially discriminatory impact of the war on drugs in general, and federal and state enhanced crack penalties in particular. Part I of this Article surveys what is arguably the most severe indictment of the war on drugs: the over-incarceration of Blacks and Latinos. Part II discusses the potential for bias and discrimination in drug scheduling and penalty setting because it is impossible to base drug laws on objective criteria.

Part III focuses on crack cocaine. The discussion begins with a survey of various federal and state crack laws, highlighting the harsher sentences given to violations involving crack than to those involving powder cocaine (cocaine hydrochloride). Next, the correlation between the ethnography of cocaine users and preference for crack over powder cocaine will be demonstrated by government statistics, revealing the predictability and severity of the racially disparate impact of enhanced crack penalties. Part III also attempts to identify a rational basis with which to justify the harsher penalties given to crack violations, concluding that such a justification does not exist.

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23. See *infra* notes 199-201 and accompanying text.

24. See *infra* notes 199-205 and accompanying text discussing the application of the federal rational basis test.

25. See *infra* notes 43-75 and accompanying text, which detail minority over-incarceration statistics.

26. 477 N.W.2d 886 (Minn. 1991). See *infra* notes 229-57 and accompanying text for a discussion of the *Russell* opinion.

27. *Id.* at 889.

Finally, Part IV explores the possibility of pursuing an equal protection challenge to enhanced crack penalties, beginning with a review of the federal equal protection doctrine's failure in this area. This Article ultimately argues that state supreme courts should scrutinize enhanced crack penalties under state equal protection doctrines that are or can be more protective than the federal equal protection doctrine, thereby following the successful example of the Minnesota Supreme Court in *Russell*.

In light of political inertia and lack of federal judicial activism, it may be that expansion of state equal protection guarantees and successful challenges to enhanced crack penalties are mutually dependent. This is because state equal protection challenges are one of the few remaining hopes for challenging discriminatory state drug statutes. Similarly, state courts will only expand their equal protection guarantees when faced with a policy argument sufficiently compelling to justify abandoning the deferential federal standard. The discriminatory effects of the war on drugs in general, and crack penalties in particular, present precisely such an argument.

## I: THE WAR ON DRUGS AND THE CRIME OF BLACK IMPRISONMENT

### A. *General Population*

The United States leads the world with the highest rates of incarceration.<sup>28</sup> The cost of incarcerating the 1.1 million Americans currently behind bars is equally staggering, estimated at over \$20.3

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28. MARC MAUER, *AMERICA BEHIND BARS: ONE YEAR LATER 1* (1992). This statistic represents a continuous and steepening increase in U.S. incarceration rates. "Between 1980 and 1988, the combined federal and state prison populations increased by 90%." *Id.* at 7. The U.S. prison population has tripled since 1970, and doubled since 1980. Fox Butterfield, *U.S. Expands Its Lead in the Rate of Imprisonment*, N.Y. TIMES, Feb. 11, 1992, at A16.

While U.S. rates of incarceration increased, the South African government took effective steps to decrease its prison population. Between 1989 and 1990,

The U.S. incarceration rate increased by 6.8 percent to 455 per 100,000, while the South African rate declined by 6.6 percent, [to] 311 per 100,000 . . . . In 1991, the Conservative British government and the apartheid government of South Africa developed policies committed to reducing their respective prison populations, in contrast to continued efforts of the federal government in the U.S. to promote harsher sentencing and increased prison populations.

MAUER, *supra*, at 1.

billion a year.<sup>29</sup> Costs are expected to rise due to the construction of additional prisons<sup>30</sup> and the increasing costs of maintaining prisoners.<sup>31</sup> It is likely that prison populations will also continue to rise: federal and state correction officials predict a 30% increase by 1995.<sup>32</sup>

The most important factors contributing to this expanding criminal justice system are the policies adopted as part of the war on drugs. The raw numbers of arrests and convictions for drug violations steadily increase.<sup>33</sup> Additionally, the length of sentences

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29. *Id.* Expenditures for corrections are expected to continue rising. Between 1979 and 1990, all government expenditures for "corrections" increased by over 313%, compared to a 185% increase for the criminal justice system as a whole. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 3, at tbl. 1.3 (Timothy J. Flanagan & Kathleen McGuire eds., 1991) [hereinafter SOURCEBOOK].

30. Correctional systems in the United States were predicted to spend "more than \$6.7 billion on new prison construction during 1989 and 1990, up almost 73% from 1987 to 1988." Rex Smith, *New York's Prison Boom: Spending for Jails Has More Than Tripled Under Cuomo*, NEWSDAY, Oct. 8, 1990, at 5.

31. The federal government currently spends at least \$20,000 per prisoner annually. *The World's Top Jailer*, USA TODAY, Feb. 12, 1992, at 6A. New York spends approximately \$30,000 per prisoner annually. Smith, *supra* note 30, at 5.

32. MAUER, *supra* note 28, at 2 (citing DOC's *Project Future Prison Populations*, CORRECTIONS COMPENDIUM (Nov. 1991)). See also UNITED STATES SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 116, fig. 2 (Aug. 1991) (finding new sentencing guidelines and tougher penalties for drug violations may result in a 119% increase in the federal prison population between 1987 and 1997) [hereinafter MANDATORY MINIMUM PENALTIES].

33. The number of drug offenders in federal prisons has more than doubled since 1981. Currently, drug offenders comprise 53% of the inmate population, and that figure is expected to increase to 69% by 1995. MAUER, *supra* note 28, at 7. The total number of annual drug convictions in United States district courts tripled during the years 1980-89, from 5,135 to 15,799. SOURCEBOOK, *supra* note 29, at 501, tbl. 5.16.

In local jails, the proportion of inmates charged with drug offenses increased from 9 percent to 23 percent from 1983 to 1989, with drug offenders accounting for 40 percent of the increase in jail populations during this period. Although the most recent available data on state inmate populations are for 1986, when drug offenders made up 8.6 percent of the inmates, all indications are that the proportion has risen considerably in the past several years. In Florida, prison admissions for drug crimes climbed 1,825 percent from 1980 to 1989, compared to an increase of 381 percent of all crimes in that period.

MAUER, *supra* note 28, at 7-9 (citations omitted).

Since 1980, the number of new inmates committed to New York state prisons on drug charges has risen by almost 800%. Smith, *supra* note 30, at 5. In California, the percentage of drug offenders among prison admissions nearly tripled between 1985 and 1990. Barry Bearak, *Big Catch: Drug War's Little Fish; More and More of*

given to those convicted of drug violations are rising dramatically as a result of new mandatory penalties.<sup>34</sup> Although the war on drugs produces an increasingly drug-addicted prison population,<sup>35</sup> treatment for those in the criminal justice system remains scarce.<sup>36</sup> The lack of treatment contributes to a high rate of recidivism among drug violators.<sup>37</sup>

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*the Narcotics Trade's Minor Players are Winding Up Behind Bars, Crowding Prisons and Jails*, L.A. TIMES, May 6, 1990, at 1.

34. One commentator discussed this correlation between increased drug sentences and overcrowded prisons:

Over the past six years, Congress and state legislatures have enacted a series of stringent anti-drug laws that have dramatically increased the penalties for even minor drug crimes. The result: an overwhelmed court system and a staggering increase in the nation's prison population. . . . [Between 1988 and 1990], the average sentence for inmates convicted of drug offenses . . . increased from 58 to 77 months.

Michael Isikoff, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More than Kingpins*, WASH. POST, Nov. 4, 1990, at C1. See also DeBenedictis, *supra* note 7, at 77 (noting Attorney General Janet Reno's concern with prison overcrowding caused by mandatory sentences).

35. Between 1983 and 1989, the percentage of all inmates who had ever used cocaine or crack rose from 38% to 50%; the percentage of those who had used cocaine in the month before the offense for which they were incarcerated increased from 11.8% to 23.6%; the percentage who were under the influence of drugs at the time of the offense increased from 5.5% to 13.7%. SOURCEBOOK, *supra* note 29, at 628, tbl. 6.59.

36. Estimates are that "only about 20 percent of the more than 500,000 state prison inmates in need of drug treatment actually receive any treatment, and that only 364 of an estimated 27,000 federal inmates with moderate or severe drug problems were enrolled in intensive treatment." MAUER, *supra* note 28, at 9 (citations omitted). In 1989, only 5% of all jail inmates and 8.1% of jail inmates who have ever used a major drug (heroin, cocaine, crack, methadone, LSD, PCP) were in treatment. SOURCEBOOK, *supra* note 29, at 631, tbl. 6.66.

"Although treatment programs have waiting lists of six months or longer in many communities, 70 percent of federal anti-drug funding is still directed toward law enforcement and only 30 percent to treatment and prevention." Marc Mauer, *Lock 'Em Up is not Key to Crime Control*, NEWSDAY, Feb. 11, 1992, at 44 [hereinafter *Lock 'Em Up*]. In 1989, "the states and federal government allocated \$5.2 billion for new prisons, roughly the same amount the federal government allocated for drug prevention and treatment in the entire decade of the 1980s . . . . About 80% of the [Delaware] inmates arrive with drug or alcohol problems . . . . Once there, treatment is scarce — or nonexistent." Bearak, *supra* note 33, at A1. Drugs, however, are virtually always available to inmates. *Id.*

37. In 1989, over 84% of inmates with prior convictions had used cocaine or crack within one month before their current offense. SOURCEBOOK, *supra* note 29, at 630, tbl 6.64.

Despite the expansion of our prison populations and drug enforcement machinery, there is no evidence that drug use or crime rates are decreasing.<sup>38</sup> The 1991 Household Survey by the National Institute on Drug Abuse reported an 18% increase in the number of people using cocaine at least once a month, and a 29% increase in the number of weekly cocaine users.<sup>39</sup> Although overall drug use among young people has declined somewhat,<sup>40</sup> the government survey revealed an increase in drug use among African-Americans and a persistence of inner-city drug use.<sup>41</sup> In other words, the war on drugs has been ineffective in deterring drug use among urban minorities who are subjected to the heaviest criminal sanctions. This population is not only severely ravaged by the use of drugs, but also suffers from the equally devastating effects of the war on drugs, including high rates of arrests and incarceration, and deprivation of civil liberties.<sup>42</sup>

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38. During the 1980s, U.S. crime rates did not fluctuate substantially. However, the inmate population doubled during that time. *Lock 'Em Up*, *supra* note 36, at 44. Some statistics which show decreasing crime rates do not take into consideration that the U.S. population has aged in the past decade, so that there are fewer people in the age bracket in which most criminals are included. Once adjusted for this change, it is evident that crime rates have increased. See Darell Steffensmire & Miles D. Harer, *Did Crime Rise or Fall During the Reagan Presidency? The Effects of an 'Aging' U.S. Population on the Nation's Crime Rate*, J. RES. CRIME & DELINQ. 3 (1991).

39. NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 33 (1991).

40. NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: HIGHLIGHTS 1990, at 17-18 (1991) [hereinafter HOUSEHOLD SURVEY HIGHLIGHTS]; *Race, Sentencing, and Criminal Justice*, in CRIMINAL LAW AND URBAN PROBLEMS, 159 PLI/Crim. 31 WL at \*25 (PLI Litig. & Admin. Practice Course Handbook Series, 1991) [hereinafter *Race & Sentencing*].

41. HOUSEHOLD SURVEY HIGHLIGHTS, *supra* note 40, at 27-28.

42. See Powell & Hershenov, *supra* note 13, at 580-99 (analyzing the impact of the war on drugs on Fourth Amendment rights). These commentators summarized the racial discrimination inherent in the war on drugs:

The drug crisis targets poor minority populations in four major ways. First, drug abuse itself exacerbates the serious health problems already endemic to poverty. Second, the war on drugs, with its emphasis on law enforcement, drains resources that would be better spent on health, social welfare, job, and education programs desperately needed in minority communities. Third, the profitability of the drug trade, which is perpetuated by the government's prohibition against drugs, attracts a large number of minority youths who perceive few other alternatives for achieving the "good life." These young people have the means and motivation to use violence to protect their livelihood. Fourth,

### B. *The Crime of Black Imprisonment*

In 1989, almost 23% of Black men between ages 20 and 29 were either in prison, jail, or on probation or parole on any given day.<sup>43</sup> In California, this number was 33%.<sup>44</sup> Nationally, the total number of young Black men involved with the criminal justice system (609,690) exceeded the total number of Black men of all ages enrolled in colleges.<sup>45</sup> In contrast, only 1 young White male in 16 (6.2%) was under the control of the criminal justice system.<sup>46</sup> Latino males were in between, with 1 in 10 (10.4%) involved.<sup>47</sup> Although the number of women in the system was much lower, the racial disproportions were parallel.<sup>48</sup>

Annual statistics disclose the exponential increase in racially disparate incarceration rates. Between 1989 and 1990, the incarceration of non-juvenile Black men increased by about 10%, from 454,724 to 499,871; this represented a one-year increase of 8.4% in the rate of incarceration per 100,000 population.<sup>49</sup> It is estimated that by the year 2000, half of all state prisoners will be Black.<sup>50</sup> In Florida, researchers predict that by 1994, nearly half of the Black

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having helped to create the problem, law enforcement efforts then target minority populations for surveillance, arrest, prosecution, and incarceration . . . .  
*Id.* at 599-600.

See generally Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993) (arguing that the war on drugs has, like military wars, led to the erosion of the civil liberties of criminal defendants); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 925 (1987) ("Personal freedom is the inevitable casualty of the War on Drugs.").

43. MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3 (1990). The report looked only at the number of Black men involved in the system on a single day, but the number would presumably be higher if calculated over an entire year. *Id.*

44. Ellis, *supra* note 14, at 6.

45. *Id.*

46. *Race & Sentencing*, *supra* note 40, at \*2.

47. *Id.*

48. *Id.* For women in their 20s, relative rates of criminal justice control are 2.7% for Black women; 1% for White women; and 1.8% for Hispanic women. *Id.*

49. In South Africa, between the same years, the Black male inmate population decreased by 2.3% and the rate of incarceration per 100,000 population decreased by 6.6%. MAUER, *supra* note 28, at 3, tbl. 2.

50. Joseph L. Galloway et al., *A Bleak Indictment of the Inner City*, U.S. NEWS & WORLD REP., Mar. 12, 1990, at 14.

men in the 18-to-34 age group will be in jail or under court supervision.<sup>51</sup>

The primary factor contributing to these imprisonment rates is the focus of the war on drugs on Black drug users. Although Blacks comprise only 12% of the illegal drug users in the country, they account for 44% of all drug arrests.<sup>52</sup> Extreme examples of this abuse occurred in the state of New York, where 92% of those arrested for drug-related crimes in 1989 were Black or Latino,<sup>53</sup> and in Sacramento, California, where 70% of all people sent to prison for drug offenses were Black.<sup>54</sup> In Michigan, drug arrests doubled between 1985 and 1990, while drug-related arrests of Blacks tripled.<sup>55</sup> In 1989, 27% of the nation's Black inmates' most serious offense involved drugs, whereas the same was true of only 14% of White inmates.<sup>56</sup>

The tragedy of these arrest and conviction statistics becomes glaringly apparent when one considers that the discriminatory enforcement of our drug policies in turn results in discriminatory application of mandatory minimum sentences. A recent study by the United States Sentencing Commission,<sup>57</sup> conducted at the request of Congress, examined the sixty federal mandatory sentencing

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51. "In Florida in 1989-90, blacks constituted 39 percent of felony marijuana cases but made up 58 percent of those detained before trial for that charge." Ellis, *supra* note 14, at 6.

52. *Id.* Reports by the FBI and the National Institute on Drug Abuse (NIDA) in 1988 concluded that Blacks comprise 12% of the nation's drug users, a lower percentage than Whites. Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, at A1. From 1984 to 1988, the percentage of all drug arrestees who were Black rose from 30% to 38%. *U.S. Has Highest Rate of Imprisonment in World*, N.Y. TIMES, Jan. 7, 1991, at A14. In 1989, 40.7% of drug arrestees were Black. SOURCEBOOK, *supra* note 29, at 444, tbl. 4.9. See generally Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 750-54 (1993) (finding that racial disparities are greater for drug convictions than drug arrests).

53. Bearak, *supra* note 33, at A1.

54. Ellis, *supra* note 14, at 6.

55. *U.S. Has Top Jailing Rate*, CHI. TRIB., Jan. 6, 1991, at 5 [hereinafter *Top Jailing Rate*].

56. SOURCEBOOK, *supra* note 29, at 622, tbl. 6.48.

57. MANDATORY MINIMUM PENALTIES, *supra* note 32, at 5-15. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2017 (1984) (codified as amended at 28 U.S.C. § 991 (1988)), established the United States Sentencing Commission. See MANDATORY MINIMUM PENALTIES, *supra* note 32, at 16-19, for a historical overview of the Commission.

statutes established since 1984. The Commission found that four of these statutes were responsible for 94% of the mandatory sentences imposed.<sup>58</sup> Over 91% of these convictions were for drug offenses.<sup>59</sup> Consequently, over 63% of defendants convicted for crimes requiring federal mandatory minimum sentences were Black or Latino, and 33% had no prior criminal record.<sup>60</sup> The report also noted "racial disparity in the means by which these statutes were implemented. In one-third of the cases in which the circumstances of the case appeared to call for a mandatory minimum, prosecutors agreed to plea bargain below the minimum."<sup>61</sup> The Commission concluded that the application of the mandatory minimum appeared to be related to the race of the defendant.<sup>62</sup> As of January 1991, forty-six states had also adopted laws requiring mandatory prison time for drug offenses.<sup>63</sup>

Black and Latino juveniles have fared no better in the war on drugs than their adult counterparts. Between 1985 and 1986, there was a 71% increase in the number of non-White youths detained for drug offenses.<sup>64</sup> During those years, the number of Black and Latino detainees increased over 30%, while the number of White detainees increased 1%.<sup>65</sup> According to the United States Department of Justice, the disproportionate increase in the number

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58. MANDATORY MINIMUM PENALTIES, *supra* note 32, at 10. The four offenses were manufacture and distribution of a controlled substance, possession of a controlled substance, importation or exportation of a controlled substance, and possession of a firearm during a drug-related or violent crime. *Id.*

59. *Id.* at 10-12.

60. See MAUER, *supra* note 28, at 10 (analyzing and reporting Sentencing Commission report data); see also MANDATORY MINIMUM PENALTIES, *supra* note 32, at 80, tbl. 22.

61. MAUER, *supra* note 28, at 11.

62. MANDATORY MINIMUM PENALTIES, *supra* note 32, at 76-82.

In contrast to the apparent differences between males and females, which disappear in the multivariate analysis, the differences among Blacks, Hispanics, and Whites did not disappear when measured differences in offense behavior are controlled. However, this is not to say that other unmeasured characteristics account for these differences.

*Id.* at 82. No consistent relationships were found based on age or citizenship. *Id.*

63. *Top Jailing Rate*, *supra* note 55, at 5.

64. HOWARD A. SNYDER, U.S. DEP'T OF JUSTICE, UPDATE ON STATISTICS: GROWTH IN MINORITY DETENTION ATTRIBUTED TO DRUG LAW VIOLATORS 6 (Mar. 1990) (describing data from cases processed during 1985 and 1986) [hereinafter UPDATE ON STATISTICS].

65. *Id.* at 3.

of minority youth being detained resulted from the extremely large increase in the number of these youth referred to juvenile court for drug offenses, as well as to an apparent change in the way courts deal with drug offense cases.<sup>66</sup> Specifically, between 1985 and 1986, the number of White youth referred to court for drug offenses declined by 6%, while the number of non-White youth referred for drug offenses rose by 42%;<sup>67</sup> youths who were referred for drug offenses were detained in disproportionately higher numbers than those referred for other offenses,<sup>68</sup> and non-White drug offenders were detained at almost twice the rate of White drug offenders.<sup>69</sup> Finally, detention was most often ordered in larger counties, where a higher proportion of non-White youth reside.<sup>70</sup>

The disproportionate detention of non-White youth continues to increase. In 1988 drug delinquency cases, Blacks were over twice as likely to be detained pending juvenile disposition than were Whites.<sup>71</sup> Between 1987 and 1989, the number of youth held in public juvenile facilities for alcohol and drug offenses increased by 50%.<sup>72</sup> By 1989, 50% more non-White juveniles were detained than White juveniles.<sup>73</sup>

It is impossible to predict the long term effects of over-incarceration on communities of color. A large segment of the African-American male population is being effectively removed from the job market by the disability and social stigma of conviction, thereby becoming more vulnerable to substance abuse and resorting to the

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66. *Id.* at 5.

67. *Id.* at 6.

68. Although the increase in detention was proportional to the caseload increase, the rise in detention rates was not distributed proportionally across offense categories. The number of drug cases handled by the courts increased by only 1% between 1985 and 1986, while the number of detained drug cases increased by 21%. *Id.* at 5.

69. In drug trafficking cases, 28% of Whites were detained and 50% of non-Whites were detained; in drug possession cases, 22% of Whites were detained and 33% of non-Whites were detained. UPDATE ON STATISTICS, *supra* note 65, at 4.

70. Thirty percent of juveniles handled in large counties were detained, compared to twenty-six percent in medium-sized counties and sixteen percent in small counties. *Id.* at 3.

71. Data compiled for 13 states revealed that 25% of White juveniles were detained; 52% of Black juveniles were detained. SOURCEBOOK, *supra* note 29, at 571, tbl. 5.93.

72. *Id.* at 605, tbl. 6.24.

73. *Id.* at 604, tbl. 6.22.

drug economy for post-incarceration employment.<sup>74</sup> This group also runs a higher risk of death from overdose, AIDS, and drug trade violence.<sup>75</sup> Perhaps equally important are the devastating effects that incarceration can have on the families of prisoners.

This litany of statistics clearly demonstrates that the war on drugs has a racially disparate impact. The statistics do not, however, answer the question of which drug policies are to blame. Two components of drug control strategy can be identified as directly resulting in the over-incarceration of African-Americans and Latinos: the discriminatory enforcement of drug laws, and bias in drug classification and penalty setting. Crack cocaine laws, which are the focus of this Article, exemplify the latter.

## II: BIAS IN DRUG CLASSIFICATION AND PENALTY SETTING

Commentators argue that anti-drug laws always over-criminalize those drugs preferred by disempowered segments of society, while those in charge of the opinion and policy-making machinery normalize the use of drugs they prefer.<sup>76</sup> Thus, the specific contours of our narcotics laws can be seen in terms of cultural competition between White alcohol and prescription drug-users and various social minorities.<sup>77</sup> When a dominant segment of society uses a particular drug, it is classified as an agricultural product, such as wine, tobacco, and coffee, or sold through prescriptions.<sup>78</sup> As per capita intake declines, or the use becomes marginalized to a disempowered population, restrictive legislation expands.<sup>79</sup> David Musto traced this history of drug prohibition:

The most passionate support for legal prohibition of narcotics has been associated with fear of a given drug's effect on a specific minority. Certain drugs were dreaded because they seemed to undermine essential social restrictions which kept these groups under control: cocaine was supposed to enable blacks to withstand bullets which would kill a normal person and to stim-

74. *Race & Sentencing*, *supra* note 40, at \*27.

75. *powell & Hershenov*, *supra* note 13, at 600-02, 608-09.

76. *See generally* DAVID F. MUSTO, *THE AMERICAN DISEASE, ORIGINS OF NARCOTICS CONTROL* 1-23 (1973).

77. *See generally* CHARLES MITCHELL, *THE DRUG SOLUTION* 23 (1992); MUSTO, *supra* note 76, at 5-6, 245.

78. MITCHELL, *supra* note 77, at 25.

79. *Id.*

ulate sexual assault. Fear that smoking opium facilitated sexual contact between Chinese and white Americans was also a factor in its total prohibition. Chicanos in the Southwest were believed to be incited to violence by smoking marihuana. Heroin was linked in the 1920s with a turbulent age-group: adolescents in reckless and promiscuous urban gangs. Alcohol was associated with immigrants crowding into large and corrupt cities. In each instance, use of a particular drug was attributed to an identifiable and threatening minority group.<sup>80</sup>

. . . Customary use of a certain drug came to symbolize the difference between that group and the rest of society; eliminating the drug might alleviate social disharmony and preserve old order.<sup>81</sup>

Historically, the prohibition of particular drugs has also been influenced by racial stereotyping. The connection between Blacks and cocaine is perhaps the most egregious example. Musto wrote:

[T]he problem of cocaine proceeded from an association with Negroes in about 1900, when a massive repression and disenfranchisement were under way in the South, to a convenient explanation for crime waves . . . . In each instance there were ulterior motives to magnify the problem of cocaine among Negroes, and it was to almost no one's personal interest to minimize or portray it objectively. As a result, by 1910 it was not difficult to get legislation almost completely prohibiting the drug.<sup>82</sup>

Such fears also coincided with increased lynchings, legal segregation, and restrictive voting laws, which Musto contends were part of a larger scheme to remove political and social power from Blacks.<sup>83</sup> Although racial animus may be one source of racially discriminatory drug laws, a more complicated factor is the tendency of mainstream culture to attribute the problems of minority groups to illegal

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80. MUSTO, *supra* note 76, at 244-45. It has also been argued that early anti-cigarette efforts arose in large part because urban immigrants in the United States were the first users of cigarettes. *Id.* at 245.

81. *Id.*

82. MUSTO, *supra* note 76, at 255 n.15. *See also* Leiby, *supra* note 7, at F5 (citing "Opium-smoking Chinese immigrants" and "reefer-smoking Mexican-American[s]" as examples of how "[w]hen society is threatened by a new scourge, it often finds easy scapegoats.").

83. MUSTO, *supra* note 76, at 7.

drugs.<sup>84</sup> In many instances, lawmakers may be unable to comprehend the complexity of the crises facing communities of color, or are unable to imagine effective solutions to them.<sup>85</sup> Consequently, they objectify and simplify the problems inherent in poverty — unemployment, lack of health care, crime, etc. — and redefine them as drug problems, which they can pretend to solve through increased police funding, drug convictions, and incarceration.<sup>86</sup>

For example, horror stories of “crack babies” may be the only means by which policy-makers confront the lack of pre-natal care being received by many poverty stricken mothers. Surely, the unavailability of pre-natal care and the appallingly high infant mortality rate are as shocking as crack babies, but those problems require more complicated and expensive remedies than the criminalization<sup>87</sup> or sterilization<sup>88</sup> of cocaine-addicted mothers. This myth of the cocaine-addicted mother also typifies the effect that racial stereotyping can have on drug enforcement. Although the media leads much of the public to believe that “crack mothers” are invariably Black women,<sup>89</sup> studies show that pregnant Black and White women use drugs at the same rate.<sup>90</sup> Partially as a result of this stereotyping, doctors are ten times more likely to report a Black woman than a White woman to child abuse authorities for drug use during pregnancy.<sup>91</sup>

When the denial of a drug’s destructive effect is politically comfortable, *i.e.*, when a majority of the population or a politically powerful sector of society uses the drug, the drug will avoid severe regulation. Our society’s blindness to the destructive effects of alcohol is an example.<sup>92</sup> For every American regularly using cocaine,

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84. See, e.g., Reinerman & Levine, *supra* note 2, at 555-59 (describing historical tendency surrounding “drug scares” to link disparaged drugs to minority populations). *Id.*

85. See, e.g., *id.* at 561-62 (explaining concept of sociological denial as means of misinterpreting causation of drug abuse).

86. See Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 TUL. L. REV. 1945 (1993); see also Powell & Hershenov, *supra* note 13, at 561-62.

87. See generally Harris, *supra* note 52, at A1.

88. See, e.g., Roberts, *supra* note 86, at 1961-65.

89. Harris, *supra* note 52, at A1.

90. *Id.*

91. *Id.*

92. MITCHELL, *supra* note 77, at 14-27.

there are 100 using alcohol,<sup>93</sup> and alcohol and tobacco are arguably more dangerous than cocaine, cannabis, or opiates.<sup>94</sup>

Even absent specific intent to use drug laws to subjugate minority populations, the lack of objective criteria guiding legislators in drug classification and penalty determinations allows social and racial biases to shape drug policies.<sup>95</sup> Thus, arbitrary judgments based upon media-provoked hysteria have become paramount in the establishment of national drug policies.<sup>96</sup> Drug classifications are not even purportedly based on a drug's pharmacological effects.<sup>97</sup> Moreover, when lawmakers provide statistical and scientific documentation for their classification and penalty schemes, that documentation is often distorted by the illegality of drugs<sup>98</sup> or biased because much of the body of scientific data is funded and compiled by agencies such as the National Institute on Drug Abuse, which have an explicitly anti-drug agenda.<sup>99</sup> It may be that non-pharmacological factors are so

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93. *Id.* at 14.

94. Steve Jonas, *Solving the Drug Problem: A Public Health Approach to the Reduction of the Use and Abuse of Both Legal and Illegal Recreational Drugs*, 18 HOFSTRA L. REV. 751, 752 (1990) (noting that two legal drugs, alcohol and tobacco, cause more deaths per year than illegal drugs).

95. Reinerman & Levine, *supra* note 2, at 540-41 (asserting theory that media and politicians focus on crack because of its popularity with lower-class minorities). Reinerman and Levine stated:

These people tend to have fewer bonds to conventional society, less to lose, and far fewer resources to cope with or shield themselves from cocaine problems.

The current drug scare thus began in earnest when crack use became visible among this "threatening" group.

*Id.*

96. Reinerman & Levine, *supra* note 2, at 539-45.

97. "Because of the statutory equivalences, the ratios in Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents." United States Sentencing Guidelines, 18 U.S.C.S. app. § 2D1.1, commentary to note 10 (Law. Co-op. 1993).

For example, politicians have classified cocaine and marijuana as "narcotics." MITCHELL, *supra* note 77, at 26. "In thirteen states marijuana is a narcotic, but in thirty-seven states it is a hallucinogen. In three states LSD is a narcotic. With equal justification lawmakers could declare alcohol, caffeine or tobacco to be narcotics. Indeed, since no scientific rationale need be given by legislators, they could designate grapefruits or pomegranates as narcotics." *Id.* at 44 n.122.

98. See Jerry Mandel, *Problems with Official Drug Statistics*, 21 STAN. L. REV. 991 (1969) (arguing that official drug statistics are often inconclusive or inaccurate given the variety of state and federal drug classification schemes).

99. *Id.* at 1029-31 (speculating that "[a]uthorities may maximize the extent of drug use in order to gain some advantage for their bureaucracy").

important to the effect of a drug that it is impossible to objectively classify drugs in terms of pharmacology.<sup>100</sup>

The lack of objective criteria available for use in classifying drugs also allows bias and arbitrary judgments to influence the setting of penalties for drug convictions. For example, the U.S. Supreme Court in *Harmelin v. Michigan*<sup>101</sup> upheld a Michigan law requiring a sentence of life without parole for possession of more than 650 grams of narcotics. The case involved a 45-year-old Air Force veteran<sup>102</sup> with no prior criminal record.<sup>103</sup> Harmelin was arrested with 672 grams of cocaine.<sup>104</sup> In Michigan, the penalty for possession of 672 grams of cocaine is the same as the penalty for first-degree murder: life without parole.<sup>105</sup> The arbitrary nature of the Michigan statute is significant. If Harmelin had been arrested for possession of cocaine across the Michigan border in Ohio, his penalty would have been a minimum of 2-5 years and a maximum of 15 years in prison.<sup>106</sup>

Because we are aware of the war on drugs' racially disparate impact and the subjectivity inherent in drug scheduling and penalty setting, we have an ethical responsibility to examine our drug penalty schemes for racial discrimination. Given the intractable

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100. "Cross-cultural and historical comparisons confirm that our drug classifications are artificial." MITCHELL, *supra* note 77, at 6. Alcohol, opiates, marijuana, stimulants, and tobacco are among the substances that can be flexibly employed for medicinal purposes or as "fun drugs." Similarly, different cultures use various methods of ingestion to obtain distinct effects from drugs. "[P]ervasive cultural conditioning" influences both society's choice of drugs and their effects upon society. *Id.* at 8.

Reports indicate that "although drugs have specific physiological impact, their effects upon behavior . . . are 'largely nonspecific'. . . [i]n various blind studies . . . users [are] unable to judge the potency of the drugs being taken and observers [are] unable to judge what sort of drug a subject took or even whether they took a drug." *Id.* at 10.

See also Deborah Maloff et al., *Informal Social Controls and Their Influence on Substance Use*, 9 J. DRUG ISSUES 161 (1979) (analyzing how cultural differences between tribes in Africa lead to widely divergent reactions to the same substance).

101. 111 S. Ct. 2680 (1991). The Court also held that a sentence of life imprisonment without parole for a drug offense committed by a first-time offender was not cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 2702.

102. Isikoff, *supra* note 34, at C2.

103. *Harmelin*, 111 S. Ct. at 2716 (White, J., dissenting).

104. *Id.* at 2684.

105. MAUER, *supra* note 28, at 10.

106. *Id.*

problems with requiring objective justification of culpability for the entire criminal code, it is perhaps only within this context of demonstrated abuse that we can demand objective justifications for our criminal policies. Regardless of the legal or ethical reasoning that leads us to examine our drug policies for racial discrimination, such an investigation of enhanced crack penalties demonstrates their racially discriminatory effect and lack of a rational, non-discriminatory purpose. The following section of this Article explores the arbitrary nature and discriminatory impact of enhanced crack penalties, and argues that these laws violate the constitutional guarantee of equal protection.

### III: THE CASE AGAINST ENHANCED CRACK PENALTIES

Media reports of the increasing popularity of crack cocaine surfaced in late 1984.<sup>107</sup> Within two years, the press labeled crack as the most dangerous drug, in terms of addictiveness and association with crime, and decried the outbreak of a national "crack epidemic."<sup>108</sup> Drug czar William Bennett declared that crack is "our biggest and most immediate problem."<sup>109</sup> Congress responded to this hysteria by passing the Anti-Drug Abuse Act of 1986.<sup>110</sup> The Act includes tougher penalties, including mandatory minimum sentences for many drug offenses, but its most draconian provisions

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107. Reinerman & Levine, *supra* note 2, at 541.

108. *Id.* at 541-43.

109. BARBARA WALLACE, *CRACK COCAINE: A PRACTICAL TREATMENT APPROACH FOR THE CHEMICALLY DEPENDENT* 9 (1991). Crack was seen as the cause of "an alarming increase in drive-by shootings and other inner-city crime . . ." Leiby, *supra* note 7, at F4.

110. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of 21 U.S.C. §§ 801-978 (1988 & Supp. IV 1993)).

One commentator attributed the intense anti-drug attitude prevalent in the summer of 1986 in part to the death of basketball star Len Bias, who died as a result of a cocaine overdose in June 1986:

Horror, outrage and sorrow fueled an anti-drug campaign in a summer when "crack" was taking hold of the popular imagination—it was often described by the media as the most addictive, destructive drug ever invented. House Speaker Thomas P. O'Neill returned from his home district of Boston after July Fourth—the city was stunned at the loss of the young man who was to be their new basketball star—and announced that House Democrats would develop an omnibus anti-crime bill. He set a five-week deadline for committee work to conclude.

Leiby, *supra* note 7, at F5.

target offenses involving crack cocaine, referred to in the statutes as cocaine base.<sup>111</sup> Despite the similarities between crack cocaine and cocaine hydrochloride, the powder form of the drug from which crack is derived, the Act treats crack as one hundred times more culpable than cocaine hydrochloride.<sup>112</sup> This equation means that even petty crack dealers are subject to mandatory minimum prison sentences.<sup>113</sup> Congress also drastically increased the mandatory penalties for crack violations and added possession of crack to the list of offenses requiring mandatory minimum sentences.<sup>114</sup> Following the leadership and rhetoric of the Reagan and Bush administrations,<sup>115</sup> and in an attempt to find a cure for the problems of their own inner-cities, state legislatures also adopted statutes dealing specifically with crack cocaine.<sup>116</sup> These state laws vary dramatically in their treatment of crack violations, but several provide harsher sentences for offenses involving crack than for those involving powder cocaine.<sup>117</sup>

### A. Federal Law

One federal judge wrote that there is “nearly overwhelming statistical evidence that blacks are prosecuted much more frequently and ‘disproportionately’ for ‘crack’ violations than whites and that blacks are consequently much more likely than whites to be sub-

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111. Prior to the Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841 provided only for *maximum* sentences. First offenses involving Schedule I & II controlled substance narcotics rendered imprisonments of not more than 15 years, and/or a fine of not more than \$25,000. 21 U.S.C.S. § 841(b)(1)(A) (Law. Co-op. 1984). After the Act, 21 U.S.C. § 841 includes *minimum* sentences. In general, first offenses involving more than 5,000 grams of powder cocaine or 50 grams of crack carry a minimum 10-year sentence; subsequent offenses earn at least 20 years. 21 U.S.C. § 841(b)(1)(A) (1988). First offenses involving 500 grams or more of powder cocaine or 5 grams or more of cocaine base dictate a 5-year sentence; subsequent offenses earn a minimum of 10 years. 21 U.S.C. § 841(b)(1)(B) (1988).

112. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207 (1986).

113. Bearak, *supra* note 33, at A1.

114. *See supra* note 111; compare 21 U.S.C.S. § 841(b)(1)(A) (Law. Co-op. 1984) with 21 U.S.C. § 841 (b)(1)(A) (1988).

115. *See Reinerman & Levine, supra* note 2, at 559-66 (discussing the political and ideological responses to the media attention given to crack cocaine after 1984).

116. *See infra* notes 135-49 and accompanying text for an examination of state crack laws.

117. *See infra* Appendix.

jected to harsh sentences under the [federal] 'crack' guidelines . . . ."<sup>118</sup> Between October 2, 1991, and September 30, 1992, over 90% of the defendants prosecuted under federal crack laws were Black.<sup>119</sup>

At the heart of the controversy over federal crack laws is the use of a "100 to 1" formula. Under section 1002 of the Anti-Drug Abuse Act, which prohibits the manufacturing, distribution, dispensation, or possession with the intent to distribute narcotics, 5 kilograms (5,000 grams) of powder cocaine is equivalent to 50 grams of crack.<sup>120</sup> Violation of section 1002 carries a mandatory minimum sentence of 10 years and a maximum sentence of life.<sup>121</sup> Similarly, a violation involving over 500 grams of cocaine or over 5 grams of crack carries a mandatory minimum sentence of 5 years and a maximum of 40 years.<sup>122</sup> No person sentenced under these laws is eligible for parole.<sup>123</sup>

In addition, mere possession of crack, *without* the intent to distribute, now carries a mandatory minimum sentence.<sup>124</sup> A person convicted of possessing over 5 grams of crack, even a first-time offender, shall be imprisoned not less than 5 years and not more than

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118. *United States v. McMurray*, 833 F. Supp. 1454, 1461 (D. Neb. 1993). The United States Sentencing Commission is re-examining its crack cocaine guidelines and their impact on "certain segments of our society." *United States v. Majied*, No. 8:CR91-00038(02), 1993 WL 315987, at \*5 (D. Neb. July 29, 1993). Judge Terry J. Hatter, a federal district court judge in Los Angeles, has also spoken out against the 100 to 1 ratio, citing it as an example of how sentencing laws target minorities harder than Whites. *DeBenedictis*, *supra* note 7, at 76.

119. *McMurray*, 833 F. Supp. at 1460-61; *Majied*, 1993 WL 315987, at \*5.

120. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. 841(b)(1)(A) (1988)).

121. 21 U.S.C. § 841(b)(1)(A) (1988).

122. *Id.* § 841(b)(1)(B).

123. *Id.* § 841(b)(1)(A), (B).

124. Section 844(a) provides in pertinent part:

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . . [a]ny person who violates this [section] may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both, [except that for subsequent offenses different rules apply]. *Notwithstanding the preceding sentence, a person convicted under this [section] for the possession of a mixture or substance which contains cocaine base shall be fined under title 18 or imprisoned not less than 5 years and not more than 20 years, or both, if the conviction is a first conviction under this [section] and the amount of the mixture or substance exceeds 5 grams . . .*

21 U.S.C. § 844(a) (emphasis added).

20 years.<sup>125</sup> The same penalty applies if the defendant has one prior crack possession conviction and is subsequently caught possessing over three grams of crack,<sup>126</sup> or if the defendant has two such prior convictions and is subsequently convicted for possession of over one gram of crack.<sup>127</sup> The United States Sentencing Commission also promulgated a temporary emergency amendment to Guideline Section 2D2.1, which creates an automatic presumption of intent to distribute when a defendant is convicted for possessing more than five grams of a mixture or substance containing crack.<sup>128</sup>

The United States Sentencing Guidelines, which set a base offense level largely used to determine sentencing within the statutorily permitted range, also follow the 100 to 1 formula.<sup>129</sup> Thus, for purposes of sentencing, an offense involving crack is treated as identical to the same crime involving one hundred times the quantity of powder cocaine. This formula is taken to the extreme by equating an offense involving between 25 grams (almost one ounce) and 50 grams (1 2/3 ounce) of powder cocaine — an amount which almost certainly indicates dealing — with one involving between 1/4 and 1/2 gram of crack — an amount plausibly for personal use.<sup>130</sup>

In severe contrast to the harsh federal sentences for crack possession, a first-time offender possessing any other illicit drug is not subject to mandatory imprisonment, and faces a maximum sentence of 1 year; a second-time drug offender faces a mandatory minimum sentence of 15 days, and a maximum of 2 years; a third-time drug offender faces a mandatory minimum of 90 days, and a maximum of 3 years.<sup>131</sup>

### B. *State Laws*

A survey of federal and state laws relating to cocaine and crack demonstrates the arbitrary nature of drug scheduling and penalty setting, and the resulting potential for abuse. The formulas used by federal and state laws, when viewed as a class, fail to reflect an ob-

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125. 21 U.S.C. § 844 (1988).

126. *Id.*

127. *Id.*

128. 54 Fed. Reg. 46,032 (1989).

129. United States Sentencing Guidelines, 18 U.S.C.S. app. § 2D1.1(c)(1) (1993).

130. *Id.* § 2D1.1(c)(15).

131. 21 U.S.C. § 844; *see also supra* note 124.

jective culpability level of crack offenses compared to cocaine offenses, or any other objective characteristics of crack.

The Uniform Controlled Substances Act<sup>132</sup> appeared in 1970 as a state statutory complement to the federal Controlled Substances Act.<sup>133</sup> All states have adopted the flexible uniform act, which allows the states to name their own penalties.<sup>134</sup> Several states amended their version of the Uniform Controlled Substances Act to reflect the increased crack penalties provided by the Anti-Drug Abuse Act of 1986. An inventory of each state's crack statutes reveals that Iowa and North Dakota followed the lead of the federal government and treat 1 gram of crack as equivalent to 100 grams of cocaine.<sup>135</sup> Maryland enacted a 90 to 1 ratio.<sup>136</sup> Missouri adopted a 75 to 1 ratio,<sup>137</sup> while Connecticut employs a 56 to 1 ratio.<sup>138</sup> The

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132. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. 1 (1990). The Prefatory Note states:

A main objective of this Uniform Act is to create a coordinated and codified system of drug control, similar to that utilized at the Federal level, which classifies all narcotics, marihuana, and dangerous drugs subject to control into five schedules, with each schedule having its own criteria for drug placement. *This classification system will enable the agency charged with implementing it to add, delete or reschedule substances based upon new scientific findings and the abuse potential of the substance.*

*Id.* at 3 (emphasis added).

133. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801-970 (1988 & Supp. IV 1992)).

134. See *supra* note 132.

135. IOWA CODE § 204.401 (West Supp. 1993) (using 100:1 ratio in determining the class of felony and penalty); N.D. CENT. CODE § 19-03.1-23.1.1(c) (1991) (providing that a person who commits a drug offense involving over 500 grams of cocaine or over 5 grams of crack is subject to increased penalties; this aggravating factor will cause the court to treat the felony for punishment purposes as one class above that which it would be absent the aggravating factor).

136. MD. ANN. CODE art. 27, § 286(f) (1992 & Supp. 1993) (providing if a person is convicted of manufacturing, distributing, possessing with the intent to manufacture or distribute over 448 grams of cocaine or over 50 grams of crack, they will be sentenced according to other sections, except they will receive a minimum of 5 years imprisonment without parole).

137. MO. ANN. STAT. § 195.222 (Vernon Supp. 1993) (providing that a person who manufactures or distributes 150-450 grams of cocaine, or 2-6 grams of crack, shall be sentenced to the authorized term of imprisonment for a Class A Felony; if such crime involves more than 450 grams of cocaine or 6 grams of crack, the sentence shall be served without probation or parole); *id.* § 195.223 (providing that a person who possesses or has under his control, purchases or attempts to purchase, or brings into the state 150-450 grams of cocaine, or 2-6 grams of crack, shall be guilty of a Class B Felony; if such crime involves more than 450 grams of cocaine or 6 grams of crack, the person shall be guilty of a Class A Felony).

District of Columbia uses a 10 to 1 ratio,<sup>139</sup> Nebraska uses a 7 to 1 ratio,<sup>140</sup> and Oklahoma uses roughly a 6 to 1 ratio.<sup>141</sup> Finally, California uses a 2 to 1 ratio.<sup>142</sup> Some states employ methods other than

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138. CONN. GEN. STAT. ANN. § 21a-278(a) (West 1993) (providing that any person who manufactures, distributes, transports, or possesses with intent to dispense, gives or administers 1 ounce or more of cocaine or one-half gram or more of crack, and who is not drug dependent at the time, shall be imprisoned for a minimum term of not less than 5 years nor more than 20 years; the mandatory minimum sentence shall not be suspended except if the defendant is under 18 or had significantly impaired mental capacity).

139. D.C. CODE ANN. § 33-541 (1993) (providing that a person who manufactures, distributes, or possesses with the intent of distributing over 500 grams of cocaine, or over 50 grams of crack, shall receive a mandatory minimum sentence of not less than 5 years for the first offense and 10 years for the second or subsequent offense; if that crime involves less than 500 grams of cocaine, the minimum mandatory sentence shall be 5 years for the first offense, 8 years for the second offense, and 10 years for the third or subsequent offense; if that crime involves less than 50 grams of crack, the mandatory minimum sentence shall be 4 years for the first offense, 7 years for the second offense, and 10 years for the third or subsequent offense; no person serving a mandatory-minimum term prescribed in this chapter shall be released on parole, granted probation, or granted a suspended sentence prior to serving such mandatory-minimum sentence).

*See also* ALA. CODE § 12-35-5 (1993) (providing that application from drug offender to enter into drug rehabilitation in lieu of drug prosecution shall not be accepted when the offense involved more than 5 grams of cocaine hydrochloride or more than 500 milligrams (1/2 gram) crack).

140. NEB. REV. STAT. § 28-416 (Supp. 1992) (providing that any person who manufactures, distributes, possesses with intent to manufacture or deliver more than 7 ounces of cocaine, or more than 28 grams of crack, shall be guilty of a class IC Felony; if that crime involves between 1-7 ounces of cocaine, or between 10-28 grams of crack, it shall be a Class ID Felony; persons serving sentences for such crimes involving crack or cocaine shall not be eligible for parole prior to serving the mandatory minimum sentence).

141. OKLA. STAT. ANN. tit. 63, § 2-415 (West Supp. 1993) (providing that any person who "traffics" over 28 grams of cocaine or over 5 grams of crack shall be fined between \$25,000 and \$100,000; any person who "traffics" over 300 grams of cocaine or over 50 grams of crack shall be fined between \$100,000 and \$500,000; in addition to these fines, the defendant convicted of crimes involving the above amounts of controlled substances shall be punished by a term of imprisonment provided for in Section 2-401 of this title; if the person has previously been convicted of a drug felony, they shall be imprisoned for twice that length; if the person has previously been twice convicted of a drug felony, they shall get life without parole; none of the above sentences are eligible for probation, parole, suspended sentence, or appeal bonds).

142. CAL. HEALTH & SAFETY CODE § 11351 (West 1991) (imposing sentences for cocaine of 2-4 years); CAL. HEALTH & SAFETY CODE § 11351.5 (West 1993) (imposing sentences for crack of 3-5 years); CAL. HEALTH & SAFETY CODE § 11370.1 (West 1991) (providing that every person who unlawfully possesses one-half gram or less of a substance containing cocaine-base, or 1 gram or less of cocaine

or in addition to a skewed ratio to enhance crack penalties. These methods include: classifying crack without reference to cocaine,<sup>143</sup> making drug purity an aggravating factor in sentencing guidelines,<sup>144</sup> and codifying distinct crack offenses.<sup>145</sup>

The common denominator among these state laws is that they assume violations involving crack deserve greater punishment than those involving powder cocaine and they punish the offenses accordingly. Most states even provide mandatory minimum sentences, without possibility of parole or probation, to first-time dealers

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while in immediate personal possession of a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for 2-4 years); CAL. PENAL CODE § 1203.073 (West Supp. 1993) (providing that any person who is convicted of the following crimes shall not be granted probation or suspended sentence except in unusual circumstances: possessing for sale 28.5 grams or more of cocaine or 14.25 grams or more of cocaine base; transporting or importing for sale cocaine base; or selling or offering to sell cocaine base).

143. LA. REV. STAT. ANN. § 40:967 (West 1992) (providing that production or manufacturing of amphetamine, methamphetamine, or cocaine base shall be sentenced to imprisonment at hard labor for not less than 20 years nor more than 50 years, without benefit of parole, probation, or suspension of sentence, and in addition, may be sentenced to pay a fine of not more than \$500,000; any other controlled dangerous substance classified in Schedule II shall be sentenced to a term of imprisonment at hard labor for not more than 10 years; and, in addition, may be sentenced to pay a fine of not more than \$15,000).

144. *E.g.*, N.D. CENT. CODE. § 19-03.1-23.1 (1991), *supra* note 135.

145. S.C. CODE ANN. § 44-53-375 (Law. Co-op. Supp. 1992) (Any person possessing or attempting to possess less than 1 gram of crack is guilty of a misdemeanor and, upon conviction for a first offense, must be imprisoned for a term of 2-5 years and fined not less than \$5,000. For a second offense, the offender is guilty of a felony and must be imprisoned for 4-7 years and fined not less than \$10,000. For a third or subsequent offense, the offender is guilty of a felony and must be imprisoned for 10-15 years and fined not less than \$15,000.)

Any person who manufactures, distributes, dispenses, or aids and abets the same, or possesses with intent to distribute crack is guilty of a felony and, upon conviction for a first offense, must be sentenced to a term of imprisonment of not less than fifteen years nor more than twenty years and fined not less than twenty-five thousand dollars. For a second offense, the offender must be imprisoned for not less than twenty-five years nor more than thirty years and fined not less than fifty thousand dollars. Possession of one or more grams of crack is *prima facie* evidence of a violation of the manufacture, distribution, etc. subsection. Anyone who commits the former crime with amounts involving more than 100 grams or more of crack is guilty of a felony known as trafficking and, upon conviction, must be punished by a mandatory term of imprisonment of twenty-five years and a fine of fifty thousand dollars. Except for the crime of possession of crack, sentences for violation of this provision may not be suspended and probation may not be granted.

*Id.*

whose crimes involve very small amounts of crack.<sup>146</sup> The mandatory minimum sentence for these small time offenders can be as long as fifteen years.<sup>147</sup> A few states also impose harsh sentences on individuals convicted of mere possession of crack.<sup>148</sup>

The most serious disparity which results from many of these statutes is that crack users and small-time crack dealers are given lengthy mandatory minimum prison terms, while larger volume powder cocaine dealers escape with stayed sentences and probation. In fact, cocaine dealers in some states would literally have to traffic between an ounce and a pound of powder cocaine in order to be subject to mandatory minimum sentences.<sup>149</sup>

### C. *Ethnography of Crack Users*

Government statistics reveal a significant correlation between ethnicity and preference for crack or powder cocaine. The National Institute on Drug Abuse found that "[i]n general, lifetime use [of crack] was more common among males, blacks, residents of large metropolitan areas, residents of the West, those with less education, and the unemployed."<sup>150</sup> Of the U.S. household population, 1.4% reported having ever used crack cocaine, 0.5% reported using crack in the past year, and 0.2% reported using crack in the past month.<sup>151</sup>

146. See, e.g., CAL. PENAL CODE § 1203.073 (West Supp. 1993) (possessing for sale over 14.25 grams, selling, or offering to sell any amount); CONN. GEN. STAT. § 21a-278(a) (West 1993) (over one half gram); D.C. CODE ANN. § 33-541 (1993) (less than 50 grams); MO. ANN. STAT. § 195.222 (Vernon Supp. 1993) (over 6 grams); NEB. REV. STAT. § 28-416 (Supp. 1992) (over 10 grams); OKLA. STAT. ANN. tit. 63, § 2-415 (West Supp. 1993) (over 5 grams); S.C. CODE ANN. § 44-53-375 (Law. Co-op. Supp. 1992) (any amount).

147. S.C. CODE ANN. § 44-53-375(B) (Law. Co-op. Supp. 1992).

148. See, e.g., MO. ANN. STAT. § 195.223 (Vernon Supp. 1993) (possession of 2-6 grams of crack shall be a Class A Felony); S.C. CODE ANN. § 44-53-375 (Law. Co-op. Supp. 1993) (possession of any amount, upon first offense, must be imprisoned for between 2 and 5 years; upon second offense, between 4 and 7 years; for a third offense, between 10 and 15 years).

149. See, e.g., CONN. GEN. STAT. ANN. § 21a-278(a) (West 1993) (over 1 ounce of cocaine to obtain mandatory 5 year sentence); MD. ANN. CODE art. 27, § 286(f) (1992 & Supp. 1993) (over 448 grams of cocaine to obtain mandatory 5 year sentence); MO. ANN. STAT. § 195.222 (Vernon Supp. 1993) (over 450 grams of cocaine to be ineligible for parole or probation); NEB. REV. STAT. § 28-416 (Supp. 1992) (1-7 ounces of cocaine).

150. NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: MAIN FINDINGS 51 (1990) [hereinafter MAIN FINDINGS].

151. HOUSEHOLD SURVEY HIGHLIGHTS, *supra* note 40, at 29.

Lifetime crack use rates of more than 5% were found only among 18- to 25-year-olds who lived in Western states or had no high school diploma, and for 26- to 34-year-olds who were Black or unemployed.<sup>152</sup> The complete demographic statistics are presented in Table 1.

An analysis of these government statistics reveals that a much higher percentage of Black cocaine users than White cocaine users ingest cocaine in the form of crack. Among the household population aged 12 and older, 11.7% of Whites, 10% of Blacks, and 11.5% of Latinos had ever used cocaine as of 1990.<sup>153</sup> In contrast, 1.1% of Whites, 3.1% of Blacks, and 1.6% of Latinos had used crack.<sup>154</sup> Thus, slightly over 9% of Whites who had used cocaine had tried crack, whereas 31% of Blacks and 14% of Latinos who had used cocaine had tried crack. The correlation between race and preference for crack or cocaine is even more obvious among more recent cocaine users: only 14% of Whites using cocaine in the past year used crack during that time. Meanwhile, 42% of Blacks using cocaine used crack during that time.<sup>155</sup>

This preference results in enhanced penalties, often including mandatory minimum prison sentences, being imposed on a disproportionate number of Black and Latino cocaine users. In addition to the disparate impact on these two minority groups, there may be similar adverse results with respect to other minority groups. Such results are impossible to assess because of the lack of relevant government statistics. The following section explores rationales behind enhanced crack penalties which could justify the disparate treatment of certain minority groups.

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152. MAIN FINDINGS, *supra* note 150, at 51.

153. *Id.* at 47.

154. *Id.* at 59, tbl. 4.8.

155. These figures assume that all respondents who used crack during the period also acknowledged use of cocaine during the period. The survey did not track overlap of these two samples, but one can assume a substantial overlap. The correlation between race and preference is significant even absent overlap: 8.5% of Whites and 23.6% of Blacks who had ever used cocaine in some form had used crack, and 12.5% of Whites and 30% of Blacks who had used some form of cocaine in the past year had used crack during that time. MAIN FINDINGS, *supra* note 150, at 59.

TABLE 1  
 PERCENTAGE REPORTING COCAINE/CRACK USE BY  
 DEMOGRAPHIC CHARACTERISTICS: 1990

Demographic Information	Cocaine Use in Lifetime	Cocaine Use In Past Year	Crack Use in Lifetime	Crack Use in Past Year
<i>Total</i>	11.3%	3.1%	1.4%	0.5%
<i>Sex</i>				
Male	13.8%	4.3%	2.0%	0.8%
Female	9.0%	2.0%	0.8%	0.3%
<i>Race</i>				
White	11.7%	2.8%	1.1%	0.4%
Black	10.0%	4.0%	3.1%	1.7%
Hispanic	11.5%	5.2%	1.6%	*
<i>Pop. Density</i>				
Lg. metro	13.2%	3.8%	1.9%	0.7%
Sm. metro	11.7%	3.0%	1.1%	0.3%
Non-metro	6.9%	2.0%	0.9%	0.4%
<i>Adult Education</i>				
Not HS grad.	7.3%	3.0%	1.5%	0.7%
HS grad.	12.0%	3.3%	1.7%	0.5%
Some college	16.1%	4.2%	1.5%	0.6%
College grad.	14.8%	2.3%	0.7%	*
<i>Employment</i>				
Full-Time	16.5%	4.0%	1.8%	0.7%
Part-Time	11.3%	2.4%	0.9%	*
Unemployed	19.8%	9.1%	3.2%	1.3%

\* Low precision; no estimate reported.

Source: National Institute on Drug Abuse, National Household Survey on Drug Abuse: Main Findings 52-60 (compilation of Graphs 4.1, 4.2, 4.8, and 4.9) (1990).

#### D. *Searching for a Rational Basis for Enhanced Crack Penalties: History and Pharmacology*

To overcome a federal Equal Protection Clause challenge, the government need only articulate a legitimate purpose for the challenged legislation and a reasonable belief that such legislation would promote the purpose.<sup>156</sup> In essence, under federal equal protection principles, the government may prevail on the strength of any ra-

156. See, e.g., *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981).

tional reason for treating crack and powder cocaine differently.<sup>157</sup> The standard is satisfied by the mere fact that the two drugs have different physical forms or means of ingestion. However, it is unlikely that there are sufficient distinctions between crack and powder cocaine to justify enhanced crack penalties under a more probing constitutional inquiry. Examination of the chemical substance, pharmacology, and distribution of crack indicates that crack and powder cocaine are in fact not substantially distinct drugs.

Smoking cocaine only recently became a popular means of ingesting the drug.<sup>158</sup> Both illicit and medicinal uses of cocaine historically relied upon the water-soluble salt, usually cocaine hydrochloride.<sup>159</sup> In the mid-1970s, the drug community in California introduced a new ritual: a process called free-basing.<sup>160</sup> By 1980, reports of cocaine smoking surfaced throughout the United States.<sup>161</sup> The deterrent against free-basing for most cocaine users was that converting cocaine hydrochloride to its free-base form was a do-it-yourself process which required volatile solvents to “free” the pure cocaine base from the impure cocaine hydrochloride.<sup>162</sup> The introduction of crack cocaine — a precooked, ready-to-use form of cocaine base — provided a convenient alternative.<sup>163</sup>

Crack, now the most widely used form of cocaine base,<sup>164</sup> is produced by a relatively simple process that requires only water, baking soda, and a microwave oven.<sup>165</sup> Cocaine hydrochloride is mixed with a solution containing an excess of sodium bicarbonate — usually baking soda — and heated to evaporate the fluid.<sup>166</sup> The heating process produces cocaine base in a bicarbonate crystalline mixture. Cocaine base melts at a much lower temperature than the

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157. See *infra* notes 199-205 and accompanying text for a discussion of the federal rational basis standard.

158. Reese T. Jones, *The Pharmacology of Cocaine Smoking in Humans*, in NATIONAL INSTITUTE ON DRUG ABUSE RESEARCH MONOGRAPH NO. 99: RESEARCH FINDINGS ON SMOKING OF ABUSED SUBSTANCES 30, 30-31 (C. Nora Chiang & Richard L. Hawks eds., 1990); WALLACE, *supra* note 109, at 5-6.

159. WALLACE, *supra* note 109, at 4-5.

160. *Id.* at 5-6.

161. *Id.* at 5.

162. *Id.* at 6.

163. *Id.*

164. WALLACE, *supra* note 109, at 6-10.

165. Jones, *supra* note 158, at 31; WALLACE, *supra* note 109, at 9.

166. Jones, *supra* note 158, at 31.

salt (about 80 degrees C. compared to 180 degrees C.) and then boils, producing an inhalable aerosol.<sup>167</sup> Despite the different modes of preparation, smoking crack, therefore, is essentially smoking cocaine.<sup>168</sup>

In addition to the similar chemistry of crack and cocaine, the pharmacological effects of the two drugs are similar.<sup>169</sup> Because cocaine hydrochloride can be ingested by various methods, including intravenously, without being subject to enhanced crack penalties, this discussion includes data from intravenous (IV) cocaine ingestion. To the extent that the pharmacological effects caused by various modes of ingestion differ, they highlight the central question of this section: Why is the process of smoking cocaine singled out for aggravated punishments while other forms of ingestion — including IV, which is arguably the most dangerous — are not?<sup>170</sup>

The effects of cocaine use, whether smoked, snorted, or injected, “include euphoria, increased energy, enhanced alertness and sensory experience, and elevated feelings of self-esteem and self-confidence.”<sup>171</sup> In a study of cocaine effects, subjects who ingested cocaine through the IV method achieved a subjective “high” significantly more intense than those who smoked the cocaine.<sup>172</sup> The smokers’ highs “peaked” after one minute, while the highs of those who used the IV route peaked four minutes after ingestion.<sup>173</sup> Both peaks were short lived, however, and the high dramatically decreased within twenty to forty minutes.<sup>174</sup> In contrast, those who snorted cocaine achieved a high only one-half as intense as the

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167. *Id.*

168. *Id.* at 30. See also Leiby, *supra* note 7, at F4 (comparing crack and cocaine and concluding that: “[I]t is all the same stuff. Identical molecules.”).

169. However, it is conceded that “relatively little has been published describing the human pharmacology of cocaine smoking.” *Id.* at 32. Also, there are methodological challenges in studying the effects of cocaine smoking. For example, it is almost impossible to know exactly how much of the smoked cocaine is actually being absorbed in the body. *Id.* at 31-32.

170. See *infra* note 253 and accompanying text for the treatment of this issue in *State v. Russell*.

171. WALLACE, *supra* note 109, at 10.

172. The subjects were asked to monitor the intensity of their “high” in comparison to a sober state and the most intoxicated they have ever been from cocaine ingestion. Jones, *supra* note 158, at 36, fig. 4.

173. *Id.*

174. *Id.*

smokers, and their high did not peak until approximately twenty minutes after ingestion.<sup>175</sup> The effects from snorted cocaine lingered for over two hours.<sup>176</sup> Snorting cocaine produces a lower subjective high, despite its higher plasma level, because neuroadaptation (tolerance) to cocaine develops concurrently with the onset of the drug's effect.<sup>177</sup> Therefore, the longer the ingestion takes to "peak," the less intense the subjective "high" will be. When comparing the effects of different modes of ingesting cocaine by analyzing the level of cocaine which reaches the brain — called the mean cocaine plasma level<sup>178</sup> — the results show that IV ingestion produces the highest mean cocaine plasma level, achieved at the quickest rate.<sup>179</sup> Although plasma level peaks earlier when cocaine is smoked than when it is snorted, snorting eventually causes the level to rise higher.<sup>180</sup>

The cardiovascular changes resulting from crack ingestion are similar to those resulting after equivalent cocaine doses administered by an IV or snorted.<sup>181</sup> For example, the mean heart rate increase and the time to maximum increase are: 46 Beats Per Minute (BPM) after 10 minutes for IV users; 32 BPM after 2 minutes for smokers; and 26 BPM after 40 minutes for those who snorted.<sup>182</sup>

Although crack and cocaine produce some different effects, including intensity of the high and plasma levels, there is no pharmacological evidence indicating that crack is more dangerous than powder cocaine. One judge stated that "the evidence is clear that the cocaine molecule is the same whether the drug being used is in powder form or in crack form, and is not inherently more dangerous in crack form."<sup>183</sup> Conclusive evidence of crack's increased danger would certainly strengthen the case for enhanced penalties. Despite

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175. *Id.*

176. *Id.*

177. Rapidly developing tolerance of cocaine has been demonstrated by plotting plasma level against subjective intoxication rating over the term of the drug's effect. Jones, *supra* note 158, at 35-36.

178. The two plasma cocaine levels monitored are venous and arterial. These two levels bear a relationship to the level of cocaine in the brain. *Id.* at 33.

179. *Id.* at 35, fig. 3.

180. *Id.*

181. *Id.* at 32.

182. Jones, *supra* note 158, at 38, tbl. 1.

183. *Majied*, 1993 WL 315987, at \*5.

the lack of evidence regarding the relative dangers of crack and cocaine, lawmakers and some judges<sup>184</sup> have assumed that crack is more dangerous and used this assumption to support or uphold enhanced crack penalties.

In addition to pharmacology, there are a number of other justifications asserted on behalf of enhanced crack penalties.<sup>185</sup> One such justification is that distributors of crack are somehow in a more "evil" line of work than are the distributors of cocaine. However, cocaine distributors may actually be more powerful than crack distributors in the drug distribution chain because all crack is made out of cocaine. This means that every crack sale both relies upon and generates profits for cocaine distributors. These profits have increased since 1985 as cocaine prices have decreased and purities have increased, while the price and purity of crack have remained stable.<sup>186</sup>

Additionally, crack purchasers, whether buying for personal use or petty dealing, are relatively disempowered within the drug distribution network. The common belief that crack is less expensive than powder cocaine is inaccurate. Crack is sold in relatively small quantities, allowing even the very poor to purchase crack, whereas powder cocaine is usually sold in significantly larger and more ex-

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184. Federal judges have differed as to whether crack is more dangerous. One judge stated that "the evidence is clear that the cocaine molecule is the same whether the drug being used is in powder form or in crack form, and is not inherently more dangerous in crack form." *Majied*, 1993 WL 315987, at \*5. Another judge noted that "there was a substantial body of medical evidence presented to me which would indicate that 'crack' is particularly dangerous." *McMurray*, 833 F. Supp. at 1460 n.6 (relying on unnamed medical reports linking crack to strokes, respiratory problems, and other medical and behavioral complications).

185. Three of these justifications will be discussed briefly in the context of the *Russell* decision in Part IV. See *infra* notes 247-57 and accompanying text.

186. Maurice Rinfret, *Cocaine Price, Purity, and Trafficking Trends*, in NATIONAL INSTITUTE ON DRUG ABUSE RESEARCH MONOGRAPH No. 110: THE EPIDEMIOLOGY OF COCAINE USE AND ABUSE 297-98 (Susan Schober & Charles Schade eds., 1991). "In 1982, the national wholesale price for a kilogram of cocaine hydrochloride ranged from \$47,000 to \$70,000; [in 1988], the national price range[d] from \$10,000 to \$38,000 per kilogram, the lowest price reported to date." *Id.* at 297. During the same years in Los Angeles, the price decreased from a range of \$55,000 to \$70,000, to the lowest price of anywhere in the country, \$10,000 to \$16,000. *Id.* at 297-98. Meanwhile, purity levels of cocaine hydrochloride "increased from an average of 50 to 60 percent in 1982 to roughly 80 percent, while purity at the street or gram level has about doubled during this same timeframe from 35 to 70 percent." *Id.* at 298.

pensive quantities.<sup>187</sup> However, the street price per gram of the two substances is often equal, and in some cases crack is higher.<sup>188</sup> Furthermore, crack purchasers usually do not receive quantity discounts like cocaine purchasers.<sup>189</sup> Consequently, if we equate culpability to one's power within the drug marketplace, crack users and small time distributors are and should be treated as less culpable than cocaine distributors and crack manufacturers.

The constitutionality of enhanced crack penalties ultimately depends on the degree of the distinction between crack and powder cocaine required by the applicable constitutional standard. For instance, a constitutional test merely requiring *some* distinction between the two substances can be easily met. On the other hand, if a more intense rational basis standard were applied — perhaps requiring substantial evidence that crack is significantly more dangerous than cocaine — the penalty scheme would probably be unconstitutional. While different in form, crack and powder cocaine are not demonstrably different in terms of chemical substance, pharmacological effects, or distribution. There is insufficient evidence to prove that smoking crack is significantly more dangerous than snorting cocaine. Therefore, the wide disparity of penalties between crack and cocaine violations would not be justified under a probing rational basis inquiry.

#### IV: CHALLENGING ENHANCED CRACK PENALTIES

Because enhanced crack penalties unjustifiably over-incarcerate Black and Latino cocaine users, these penalties strongly suggest a violation of equal protection. Unfortunately, enhanced crack penalties are repeatedly upheld under current applications of federal equal protection.<sup>190</sup> After summarizing the failure of federal equal protection principles, the remainder of this Article explores the possibility that a probing rational basis standard under state constitutional law could be used to challenge enhanced crack penalties.

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187. WALLACE, *supra* note 109, at 6.

188. Rinfret, *supra* note 186, at 297-98.

189. *Id.*

190. See *infra* notes 199-205 and accompanying text; see also, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the constitutionality of the sentencing guidelines of the United States Sentencing Commission).

### A. *The Failure of Federal Equal Protection*

This Article does not advocate the legalization of crack or cocaine,<sup>191</sup> but instead argues for equal protection challenges to crack penalties based on the disparate treatment of two similarly situated populations of cocaine users. In other words, assuming *arguendo* that cocaine use is wrong and should be punished, the principles of equal protection demand that all cocaine users be treated equally, regardless of race or ethnicity.

The Supreme Court has articulated various standards of review for practices challenged as violations of the federal Equal Protection Clause, including strict scrutiny, intermediate scrutiny,<sup>192</sup> and rational basis scrutiny. The Court subjects practices which impair "fundamental rights"<sup>193</sup> or are based upon "suspect classifications" to strict scrutiny. As to suspect classifications, the Supreme Court has held that statutes which purposefully discriminate against mi-

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191. For drug decriminalization arguments, see, e.g., David R. Henderson, *A Humane Economist's Case for Drug Legalization*, 24 U.C. DAVIS L. REV. 655 (1991). See generally *Symposium on Drug Decriminalization*, 18 HOFSTRA L. REV. 457 (1990).

192. Intermediate or "heightened" scrutiny is traditionally applied to gender classifications. The Court originally applied rational basis in gender cases, which resulted in several decisions upholding gender classifications. See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding a law including women on a jury list only upon a woman's special request); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (sustaining a law which prohibited most women from obtaining bartender's licenses).

The Court first articulated their current standard of review of gender classifications in *Craig v. Boren*, 429 U.S. 190 (1976). At issue in *Craig* was a state statute prohibiting the sale of 3.2% beer to males under the age of 21 and to females under 18. The Court stated that "classifications by gender must serve *important* governmental objectives and must be *substantially related* to achievement of those objectives." *Id.* at 197 (emphasis added). See generally John S. Lapham, Comment, *Gender-Based Peremptory Challenges Under United States v. DeGross*, 43 WASH. U. J. URB. & CONTEMP. L. 465, 471-72 n.43 (summarizing applications of strict and intermediate scrutiny as applied to race- and gender-based discrimination).

193. The Court defines "fundamental rights" as those which the Constitution explicitly guarantees (e.g., the right to vote and the right to interstate travel) or those which the Constitution does not explicitly guarantee but are both important and implicitly granted by the Constitution (e.g., the right to privacy). See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (applying strict scrutiny in a case involving the fundamental right of interstate movement); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (noting that the right to vote is a fundamental right, restriction of which must be closely scrutinized); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the "zones of privacy" implicitly created by various amendments to the Constitution).

nority groups who have been historically subject to oppression constitute an equal protection violation.<sup>194</sup>

Purposeful discrimination may be proven in three ways: (1) the law is discriminatory on its face;<sup>195</sup> (2) the law, though facially neutral, is administered in a discriminatory manner;<sup>196</sup> or (3) the law, though neutral on its face and as applied, was passed with discriminatory intent, as established by circumstantial evidence such as adverse impact.<sup>197</sup> A challenged practice may only survive strict scrutiny if the government proves that the classification is necessary to promote a compelling government interest.<sup>198</sup>

Conversely, the Court applies the rational basis standard to those laws which are not based upon suspect classifications and do not

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194. Suspect classifications recognized by the Court include those based on race, *see, e.g.*, *McLaughlin v. Florida*, 379 U.S. 184 (1964), ethnic origin, *see, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944), alienage, *see, e.g.*, *Graham v. Richardson*, 403 U.S. 305 (1971), and legitimacy, *see, e.g.*, *Levy v. Louisiana*, 301 U.S. 68 (1968).

195. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding that a statute excluding Blacks from jury duty was facially discriminatory and therefore an equal protection violation).

196. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a facially-neutral ordinance regulating the issuance of laundry permits was applied in discriminatory manner against Chinese-Americans).

197. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976) (holding that adverse impact may be a factor in establishing a claim of discriminatory intent, but cannot, in and of itself, be used to prove equal protection violation absent proof of discriminatory intent); *Whitus v. Georgia*, 385 U.S. 545 (1967) (holding that party asserting equal protection violation has burden of proving existence of discriminatory intent on the part of alleged violator).

198. The Supreme Court has long looked harshly upon statutes which purposefully discriminate against racial minorities. The Court first recognized racial minorities as "discrete and insular minorities," a classification which calls for strict judicial scrutiny, in *United States v. Carolene Products*, 304 U.S. 144 (1938):

Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* at 153 n.4 (quoting *Nixon v. Condon*, 286 U.S. 73 (1932)).

When the Court subjects a practice to strict scrutiny, the defending party must prove that the practice is the only alternative to achieve an essential government purpose. One commentator referred to this type of scrutiny as "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

impede fundamental rights.<sup>199</sup> Rational basis requires only that the classification bear a rational relationship to a legitimate government interest.<sup>200</sup> If the classification has some reasonable basis, it is not unconstitutional merely because it produces some inequality.<sup>201</sup>

Minority criminal defendants have argued that the disparity between sentences for cocaine convictions and sentences for crack convictions, although facially neutral, have an adverse impact on racial minorities<sup>202</sup> and should therefore be subject to strict scrutiny. Virtually every federal court with the opportunity to address this argument has rejected it, often noting that the challenger had failed

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199. The Court uses rational basis review to evaluate general economic and social regulations. *See, e.g.,* *New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding an ordinance banning certain food vendors); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (upholding Texas system of financing public education); *Dandridge v. Williams*, 397 U.S. 471 (1970) (sustaining Maryland Aid to Families with Dependent Children scheme regarding maximum amounts of aid); *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (sustaining ban on certain advertising on vehicles in New York). *See generally* Edward L. Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications*, 68 *Ky. L.J.* 845 (1980).

200. To satisfy the "mere rationality" test, "the Courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Commentators have argued that "the traditional deference to legislative purposes and legislative selections among means continues on the whole to make the rationality requirement largely equivalent to a strong presumption of constitutionality." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1442-43 (2d ed. 1988).

201. In the context of enhanced crack penalties, the Fifth Circuit summarized: In order to establish a valid equal protection claim . . . more than simply disproportionate impact must be shown. "Even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." Discriminatory purpose in an equal protection context implies that the decisionmaker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group.

*United States v. Galloway*, 951 F.2d 64, 65 (5th Cir. 1992) (citing *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979)).

202. *See, e.g.,* *United States v. Galloway*, 951 F.2d 64, 65 (5th Cir. 1992) (rejecting defendants' adverse impact argument — which the defendants used in attempt to prove that crack cocaine provisions of sentencing guidelines violated equal protection rights of Black defendants — because even if adverse impact existed, there was no indicia of discriminatory intent in the legislative history). *Accord* *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989) (concerning irrationality of sentencing guidelines); *United States v. Madison*, 781 F. Supp. 281, 285 (S.D.N.Y. 1992) (same).

to prove that enhanced crack penalties resulted from purposeful discrimination.<sup>203</sup> Absent such proof, courts review equal protection challenges to crack cocaine laws under the rational basis test.<sup>204</sup> Almost all courts have held that the disparity in sentencing is not an equal protection violation because it is rationally related to the government's legitimate interest in public health and safety.<sup>205</sup>

For the first time, a federal district court recently held that the 100:1 ratio violates the U.S. Constitution's equal protection guarantee,<sup>206</sup> and in doing so "present[ed] a novel legal analysis of the adverse impact on blacks resulting from the imposition [of the 100:1 ratio]."<sup>207</sup> In this case, *United States v. Clary*,<sup>208</sup> Judge Clyde S. Cahill of the Eastern District of Missouri presented a thorough background of racism in America generally,<sup>209</sup> and in particular, the racism inherent in our society's attempt to control crime.<sup>210</sup>

Judge Cahill began his constitutional discussion by mandating that equal protection analysis consider unconscious racism by legislators

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203. Criminal defendants have been unable to prove governmental discriminatory intent. See, e.g., *Galloway*, 951 F.2d at 65-66 (finding no indicia of purposeful discriminatory intent by Congress).

204. See, e.g., *Galloway*, 951 F.2d at 66 (applying rational basis test). Accord *Cyrus*, 890 F.2d at 1248 (finding rational basis apparent in that crack is more addictive, cheaper, more readily available, and more popular than powder cocaine).

205. The shallow scope and conclusory nature of the *Galloway* court's analysis of this test demonstrates its weakness. The court in *Galloway* stated:

Applying the rational basis test to the challenged guideline in the instant case, the district court properly found that the one hundred to one ratio of cocaine to cocaine base in the sentencing guidelines was rationally related to Congress' objective of protecting the public welfare.

*Galloway*, 951 F.2d at 66. Cf. *United States v. Majied*, No. 8:CR92-00012, 1993 WL 315987 (D. Neb. July 29, 1993).

206. *United States v. Clary*, No. 89-167-CR(4) (E.D. Mo. Feb. 11, 1994). See also Tim Bryant, *Judge Voids Crack Law's Heavier Penalties*, St. Louis Post-Dispatch, Feb. 27, 1994, at D1 (discussing the *Clary* decision). Because this decision was publicized immediately prior to publication of volume 45 of the *Washington University Journal of Urban and Contemporary Law*, the discussion of *Clary* in this Article is brief [Editor's note].

207. *Clary*, slip op. at 4.

208. In *Clary*, the defendant, a Black man, was arrested for possession with intent to distribute 67.76 grams of crack, *id.* at 1, an offense punishable under 21 U.S.C. § 841 by a mandatory 10-year prison sentence. *Id.* Judge Cahill gave the defendant a four-year prison sentence after finding the crack law unconstitutional. Bryant, *supra* note 206, at D3.

209. *Clary*, slip op. at 14-20.

210. *Id.* at 4-8, 10-14.

and other government actors.<sup>211</sup> With this said, Judge Cahill determined that the crack sentencing law burdens Blacks disproportionately<sup>212</sup> and that the law can be “traced to racial considerations,” albeit unconscious.<sup>213</sup> Because of this “de facto suspect classification,”<sup>214</sup> Judge Cahill applied strict scrutiny, which requires a compelling government interest and a law narrowly tailored to satisfy this interest.<sup>215</sup> Judge Cahill found neither of these with respect to the 100:1 ratio. First, he rejected the government’s asserted compelling interest that crack must be treated more severely than cocaine because crack is much more dangerous than cocaine.<sup>216</sup> Second, Judge Cahill held that the law is not narrowly tailored because powder cocaine, the derivative source of crack, should be punished at least as severely as crack.<sup>217</sup>

Unfortunately, Judge Cahill appears pessimistic about the chance of his opinion surviving on appeal to the Eighth Circuit Court of Appeals.<sup>218</sup> Regardless of the final disposition of the *Clary* case,

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211. *Id.* at 20-27. Judge Cahill rejected the idea that *overt* racism caused the enhanced crack law, but recognized that “unconscious feelings of difference and superiority still live on even in well-intentioned minds.” *Id.* at 22.

212. *Id.* at 40-45 (citing statistics from the Eastern District of Missouri indicating that of 57 crack convictions between 1989-92, 55 defendants were Black, 1 Hispanic, and 1 White).

213. *Id.* at 38. Judge Cahill summarized the evidence of racism in enactment of the crack laws as follows:

Objective evidence supports the belief that racial animus was a motivating factor in enacting the crack statute. Congress’ decision was based, in large part, on the racial imagery generated by the media which connected the “crack problems” with blacks in the inner city. Congress deviated from procedural patterns, departed from a thorough, rational discussion of the “crack issue” and reacted to it in a “frenzy” initiated by the media and emotionally charged constituents.

*Id.*

214. *Clary*, slip op. at 45.

215. *Id.*

216. *Id.* at 46-49. The government “offered evidence that members of Congress considered crack to be more dangerous because of its potency, its highly addictive nature, its affordability, and increasing prevalence.” *Id.* at 46 (footnote omitted). Judge Cahill discussed “ample” medical and other evidence that rebutted the government’s assertion. *Id.* at 46-49.

217. *Clary*, slip op. at 49. “To impose a more severe penalty on a derivative source of an illegal narcotic while the principal source of the drug is tolerated is illogical.” *Id.*

218. *Id.* at 53. See also Bryant, *supra* note 206 (stating that “Cahill acknowledged in a 58-page order that his decision might be overruled.”). Judge Cahill ap-

Judge Cahill accurately noted its surviving value: "Even if appellate review points to a different path, the evaluation and reflection that this perplexing problem has occasioned is of great value. It will not have been in vain."<sup>219</sup>

Criminal defendants have also repeatedly argued that the 100 to 1 ratio established by the federal drug statutes and sentencing guidelines violates the due process rights of Black defendants.<sup>220</sup> In *United States v. Galloway*,<sup>221</sup> a representative federal appellate case, the Fifth Circuit denied the due process challenge based on a distinction between crack and cocaine. The *Galloway* court relied on its prior reasoning in *United States v. Thomas*<sup>222</sup> and restated:

Cocaine base is a different drug from cocaine, and, because it is prepared for inhalation, concentrates and magnifies the effect of one gram of cocaine to such a degree that dealers profitably can sell it in very cheap yet still-potent quantities. Treating the two substances differently thus is not a due process violation, as when cocaine is changed into cocaine base, it becomes a different chemical substance. Congress need not treat dissimilar drugs similarly.<sup>223</sup>

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parently has good reason to be pessimistic: The Eighth Circuit has rejected constitutional challenges to the crack law at least seven times since 1989. *Clary*, slip op. at 3 n.3.

219. *Clary*, slip op. at 53.

220. See, e.g., *United States v. Galloway*, 951 F.2d 64 (5th Cir. 1992) (holding that crack cocaine provisions of sentencing guidelines did not violate due process rights of Black defendants). Accord *United States v. Thomas*, 932 F.2d 1085, 1090 (5th Cir.) (holding different penalty treatment of crack and cocaine rational because crack is different chemical substance), cert. denied, 112 S. Ct. 887 (1991); *United States v. Turner*, 928 F.2d 956, 960 (10th Cir.) (holding penalty scheme rational), cert. denied, 112 S. Ct. 230 (1991); *United States v. Buckner*, 894 F.2d 975, 978-80 (8th Cir. 1990) (citing Congressional testimony as to crack's potency, addictiveness, affordability, and prevalence); *United States v. Collado-Gomez*, 834 F.2d 280 (2d Cir. 1987) (rejecting argument that possibility of a stricter penalty which defendant was not aware of violated due process, and holding that government must prove defendant knowingly and intentionally possessed crack, not that defendant should have known of relevant enforcement provisions), cert. denied, 485 U.S. 969 (1988).

221. 951 F.2d 64 (5th Cir. 1992).

222. 932 F.2d 1085 (5th Cir.), cert. denied, 112 S. Ct. 887 (1991).

223. *Galloway*, 951 F.2d at 65 (quoting *Thomas*, 932 F.2d at 1090).

Challenges based upon vagueness of the statutory reference to "cocaine base,"<sup>224</sup> as well as Eighth Amendment protections against cruel and unusual punishment,<sup>225</sup> have met similar fates.

The deference represented by the federal rational basis test may be the result of a reasonable fear that an inquiry into the rationality of one criminal law or penalty may open the door to challenges against the entire body of criminal law. The decisions regarding which acts to criminalize and what extent to punish such acts are necessarily based upon subjective societal impressions of morality and culpability. Therefore, it is feared that challenges to the pharmacological basis for enhanced crack penalties call into question not only the entire classification and punishment of drugs in this country, but also the entire criminal code. This would potentially require courts to search for objective proof of culpability for every criminal violation, as each criminal defendant could argue that their particular crime was not "culpable enough" to deserve the designated punishment.

Although judicial deference may be justifiable for the above reasons, its incarnation in the rational basis test leaves the federal courts blind to the greatest racial injustices carried out as part of the war on drugs. Moreover, no justification for deference should absolve our constitutional system from its responsibility to provide

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224. See, e.g., *Thomas*, 932 F.2d at 1090; *United States v. Turner*, 928 F.2d 956, 960 (10th Cir. 1991); *United States v. Avant*, 907 F.2d 623, 625-27 (6th Cir. 1990); *United States v. Van Hawkins*, 899 F.2d 852, 854 (9th Cir. 1990); *United States v. Barnes*, 890 F.2d 545, 552-53 (1st Cir. 1989); *United States v. Williams*, 876 F.2d 1521, 1525 (11th Cir. 1989); *United States v. Brown*, 859 F.2d 974, 975-76 (D.C. Cir. 1988); *United States v. Madison*, 781 F. Supp. 281, 283-85 (S.D.N.Y. 1992).

225. *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991); *United States v. Johnson*, 944 F.2d 396 (8th Cir. 1991). *But see United States v. Walls*, No. 92-0234-LFO, 1994 U.S. Dist. LEXIS 979 (D.D.C. Jan. 26, 1994). In *Walls*, the court held that the sentences under the crack laws as applied to two drug addicts who were "bit players" in a conspiracy constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at \*25. The court noted:

In light of all the circumstances—the historical context of the relevant law, its legislative history, and these defendants' condition, conduct, and compensation—the imposition of additional sentences of 8 and 17 years . . . would be not only cruel, but also "unusual," because their imposition would be arbitrary and capricious . . . and would provide "only marginal contributions to any discernible social or public purposes."

*Id.* (citations omitted). The court elected to sentence the two "bit player" defendants in accordance with the appropriate powder cocaine sentences. *Id.*

protection against criminal statutes which have a blatantly discriminatory impact.

### B. *The Hope of State Equal Protection*

The failure of federal constitutional challenges against enhanced crack penalties places advocates of true equal protection in a “no-win” position. It is virtually impossible to find elected officials willing to speak out against discriminatory drug laws and policies because of the political nature of the drug war.<sup>226</sup> The constitutionalization of civil liberties is based upon the recognition of this very phenomena: representative bodies are institutionally incompetent to protect the rights of minority and unpopular groups against politically popular government actions.<sup>227</sup> When the federal constitution is incapable of combating an entire sphere of politically popular yet discriminatory laws, we are all left helpless. What makes this problem most disturbing is its scope. The inequalities of the drug war arguably represent the greatest injustice since slavery: placing an unprecedented portion of the Black and Latino communities under the supervision of the criminal justice system and causing equally devastating damages to the economy, the families, and the social fabrics of those communities.

Among the options available for reform — including repeal of discriminatory drug policies and sentencing reform — the fervor and popularity of the war on drugs leaves perhaps only one viable option: to advocate a strengthening of the equal protection doctrine itself. Specifically, in the last decades, there has been a movement in state courts to define equal protection under state constitutions as broader than equal protection provided by the Fourteenth Amendment.<sup>228</sup> The final section of this Article examines the only example of a successful state challenge to enhanced crack penalties under a state equal protection doctrine.

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226. Reinerman & Levine, *supra* note 2, at 566 (“[I]n addition to the political capital to be gained by waging the war [on drugs, crack] afforded politicians across the ideological spectrum both an explanation for pressing public problems and an excuse for not doing much about them.”); *see also supra* note 15.

227. THE FEDERALIST No. 51 (James Madison).

228. *See generally* Elizabeth A. Sherwin, *Sex Discrimination and State Constitutions: State Pathways Through Federal Roadblocks*, 13 N.Y.U. REV. L. & SOC. CHANGE 115 (1984); Robert F. Williams, *The Emergence of State Constitutional Law: Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

### C. *State v. Russell*

Gerard Jerome Russell, an African-American, was charged with possession of several grams of crack under Minnesota Statute Section 152.023.<sup>229</sup> Under the statute, possession of 3 grams of crack cocaine carries a penalty of up to 20 years in prison and a presumptive sentence of an executed 48 months imprisonment. Under the same section, possession of 3 grams of powder cocaine carries a maximum penalty of up to 5 years in prison and a presumptive sentence of a stayed 12 months of imprisonment and probation.<sup>230</sup>

Russell and four other Blacks charged with violating section 152.023 jointly moved for dismissal of charges on the ground that the statute had an adverse impact on Blacks, and therefore violated federal and state equal protection guarantees.<sup>231</sup> The trial court credited evidence that crack cocaine is used predominantly by Blacks and powder cocaine is used predominantly by Whites.<sup>232</sup> Because a far greater percentage of Minnesota Blacks were sentenced for possession of three or more grams of crack cocaine and received more severe sentences than their White counterparts who possessed three or more grams of cocaine powder, the trial court concluded

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229. *State v. Russell*, 477 N.W.2d 886, 887 (Minn. 1991).

230. *Id.*

231. *Id.*

232. *Id.* In Hennepin County, Minnesota during 1988, there were 41 convictions for cocaine powder. Of the 41 defendants, 27 were White, 11 were Black, and 3 were Hispanic. In the same year, all 16 defendants convicted in Hennepin County for possession of small amounts of crack were Black. The court found that the trend continued for other offense levels, in both county and state compilations. 5 BNA CRIM. PRAC. MANUAL 51 (Feb. 6, 1993) [hereinafter CPM].

Evidence presented to the trial court in *Russell* showed that of all persons charged with possession of cocaine base in 1988, 96.6% were Black; of all persons charged with possession of powder cocaine, 79.6% were White. *Russell*, 477 N.W.2d at 887 n.1.

Evidence provided by the Hennepin County Attorney showed that from August 1, 1989, to August 1, 1990, the county attorney charged 204 defendants with cocaine offenses. Of these, 166 (81%) were Black and 38 (19%) were White. However, since these figures included all cocaine-related offenses, including minor possession with presumptive probation, the percentages of the White and Black defendants actually jailed were comparable: 23% of all Blacks and 26% of all Whites were jailed. But, of the 55 convictions for serious crack offenses, 50 defendants were black and 5 were white. "The state attaches percentages to these numbers in an effort to try and show equality," the trial court observed, "however, the numbers speak for themselves." CPM, *supra*, at 52.

that the statute had a discriminatory impact.<sup>233</sup> The court further found no rational basis to support the distinction between crack and powder cocaine.<sup>234</sup> Accordingly, the court held that the application of section 152.023 violated state and federal constitutional equal protection guarantees.<sup>235</sup> The trial court granted the defendants' joint motion to dismiss and certified the question of the statute's constitutionality for the court of appeals.<sup>236</sup> Before the certified question reached the court of appeals, the Minnesota Supreme Court granted a joint petition for accelerated review filed by both the State and the defendants.<sup>237</sup>

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233. 477 N.W.2d at 887.

234. *Id.* The trial court concluded that "[t]o base penalties on the weight and makeup of this drug . . . is a fallacy. Cocaine is cocaine, 80 proof whiskey contains the same active ingredients as a can of beer . . . . There is no justifiable reason to uphold a statute which results in such unequal treatment of similarly situated individuals." CPM, *supra* note 232, at 53. The defense presented expert testimony that 10 grams of cocaine could be converted into 10 grams of crack, while the prosecution argued that because cocaine is rarely pure, 10 grams of cocaine would likely only yield 7.3 grams of crack. *Id.* The State further argued that because crack is smoked, it enters the bloodstream faster than when cocaine is snorted; the defense countered with testimony that users often liquify powder cocaine and inject it hypodermically with much the same effect as if it were smoked. *Id.*

235. 477 N.W.2d at 887. This case originally came before the Honorable Pamela G. Alexander on Special Assignment. *State v. Russell*, Hennepin County, Minn., Dist. Ct. No. 89067067, decided Dec. 27, 1990. Judge Alexander held that the statute failed even the rational basis test because there is no justification for such disparate treatment. "In the same way that distinguishing between two classifications of persons without justifications is unconstitutional, the distinction between the two forms of the same drug without justification is unconstitutional," explained Judge Alexander. CPM, *supra* note 232, at 51. "The subject case . . . involves actions against an entire race of people who are repeatedly charged under a statute which results in greater penalties than other persons in possession of cocaine. This is not an isolated violation of the law but it shows a pattern of conduct which continues to adversely affect an entire group." *Id.* at 52. "It is clear that a law that is nondiscriminatory on its face may be grossly discriminatory in its operation." *Id.* "The facts show that powder cocaine is used most often by whites and crack/cocaine is used most often by blacks . . . . It is most likely safe to assume that the legislature is not completely unaware of this." *Id.*

236. Coincidentally, on the same day as the trial court's decision, Minnesota's Department of Public Safety, Office of Drug Policy released a report recommending that the Minnesota Legislature reconsider the crack statute. The report urged repeal because enforcement of the law was, in effect, a "war on minorities." The report noted that Minneapolis police made about 2,300 drug arrests in 1989, and 75% of the arrestees were minorities. However, minorities make up only 20% of the city's population. CPM, *supra* note 232, at 53.

237. *Russell*, 477 N.W.2d at 887.

The Minnesota Supreme Court found it unnecessary to decide the federal constitutional question because it held that the statute violated the Minnesota Constitution's stricter equal protection principles. The court said that the federal equal protection requirement — that a statute be enacted "because of" and not merely "in spite of" an anticipated discriminatory effect — "places a virtually insurmountable burden on the challenger, who has the least access to the information necessary to establish a possible invidious purpose . . . ." <sup>238</sup> In interpreting the Minnesota Equal Protection Clause, however, the court stated that it was not bound by the narrow federal court interpretation of the federal Equal Protection Clause. <sup>239</sup> Although noting that the statute triggers strict scrutiny, <sup>240</sup> the court declined to undergo a strict scrutiny analysis because the statute failed to satisfy even the rational basis standard of review under the Minnesota Constitution. <sup>241</sup> Since the early 1980s, the Minnesota Supreme Court has articulated a rational basis test in equal protection cases that differs from the highly deferential federal standard. <sup>242</sup> Minnesota's rational basis test requires:

- (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby

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238. *Id.* at 888 n.2.

If government is barred from enacting laws with an eye to invidious discrimination against a particular group, it should not be free to visit the same wrong whenever it happens to be looking the other way. . . . If a state may not club minorities with its fist, surely it may not indifferently inflict the same wound with the back of its hand.

*Id.* (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1518-19 (2d ed. 1988)).

239. *Id.* at 889.

240. The court noted in dicta that under Article 1, Section 2, of the Minnesota Constitution, the statute's disparate impact combined with its legislative history "could have been held to create an inference of invidious discrimination which would trigger the need for a compelling state interest." *Id.* at 888 n.2.

Article 1 of the Minnesota Constitution states:

No member of this state shall be disenfranchised or deprived of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers . . . .

MINN. CONST. art. 1, § 2 (1976).

241. 477 N.W.2d at 889.

242. *Id.* at 888-89. See also Deborah K. McKnight, *Minnesota Rational Relation Test: The Lochner Monster in the 10,000 Lakes*, 10 WM. MITCHELL L. REV. 709 (1984) (analyzing the Minnesota Supreme Court's revitalization of substantive due process).

providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.<sup>243</sup>

Under the Minnesota rational basis test, the court has been “unwilling to hypothesize a rational basis to justify a classification,” as is common under the federal rational basis test. Under the Minnesota Constitution, rational basis requires “a reasonable connection between the actual effect of the challenged classification and the statutory goals.”<sup>244</sup>

In *Russell*, the Minnesota Supreme Court noted that it generally avoids inquiries into the legislative process when criminal punishment is involved. However, the court found that the correlation between race and the use of crack or powder cocaine and the resulting disparate punishment “cries out for closer scrutiny of the challenged laws.”<sup>245</sup> Moreover, the court stated that it was particularly appropriate to apply the stricter state constitutional standards where, as here, “the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection.”<sup>246</sup>

The first prong of the Minnesota rational basis test requires a substantial distinction between elements of a statute that are classified differently — crack and powder cocaine in this case. The State attempted to rationalize the crack/powder cocaine distinction created by section 152.023, but the court rejected all three proffered justifications.<sup>247</sup> In doing so, the court noted generally that the State must

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243. *Russell*, 477 N.W.2d at 888.

244. *Id.* at 889.

245. *Id.* at 888 n.2.

246. *Id.* at 889.

247. The *Russell* court also noted that the State failed to meet the second and third prongs of the Minnesota rational basis test. The crack/powder cocaine distinction was not relevant to the purpose of the law, and therefore failed the second prong. *Id.* at 891. The State failed the third prong because the law employed an “illegitimate means to achieve [the statutory] purpose.” *Id.* The statute created an “irrebuttable presumption of intent to sell without affording the defendant an affirmative defense of lack of intent to sell.” *Id.* Because this presumption yields a harsher punishment, the means chosen to affect its purpose are constitutionally suspect. *Id.*

offer more than anecdotal evidence in support of the classification.<sup>248</sup>

First, the State argued that the distinction facilitates prosecution of "street level" drug dealers.<sup>249</sup> Rather than being a rational means to combat street level drug dealing, the court said that the formula was arbitrary and merely penalized some users as if they were dealers.<sup>250</sup> Second, the State argued "that crack is more addictive and dangerous than cocaine powder."<sup>251</sup> The court held that these differences actually resulted from the mode of ingestion, rather than any substantive distinction between the drugs, and therefore could not justify the statute.<sup>252</sup> These differences could not justify disparate treatment in light of evidence that powder cocaine, when ingested intravenously, produces the same effects purported to justify the harsher penalties for crack.<sup>253</sup> Finally, the court rejected the State's third justification — that more violence is associated with the use of crack — because it was based only upon anecdotal evidence. The State's assertion that crack is associated with more violence than powder cocaine also failed to recognize studies concluding that if such differences exist, they could be caused by factors such as gang warfare or group behavior, and not by the pharmacological effects of crack.<sup>254</sup>

The *Russell* court recognized that it generally cannot question the scientific accuracy of legislative determinations under the more def-

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248. *Russell*, 477 N.W.2d at 889.

249. *Id.* The State argued that this purpose was the sole basis of the legislation, and the 3 to 10 gram formula was adopted because these levels were thought to indicate a level at which dealing, not merely using, took place. *Id.* at 891. The State further argued that pharmacological differences between the substances were irrelevant to the constitutional analysis. The other justifications were imputed to the State by the court. *Id.*

250. *Id.* at 890. The court cited a recent report stating "that police and prosecutors contacted by researchers are not persuaded by the 'street dealer' distinction because they believe that most cocaine powder users are dealers as well." *Id.* (citing MINNESOTA DRUG STRATEGY, MINNESOTA DEP'T OF PUBLIC SAFETY, OFFICE OF DRUG POLICY 14 (1991)).

251. *Id.* at 890.

252. *Id.*

253. *Russell*, 477 N.W.2d at 890. "Disparate treatment . . . is not justified on the basis of crack's greater dangerousness when there is evidence that powder cocaine could readily produce the effects purported to justify a harsher penalty for possession of crack." *Id.*

254. *Id.* at 890.

erential federal rational basis test.<sup>255</sup> However, under the Minnesota Constitution's stricter rational basis test, more factual support than presented by the State was required to establish the substantial distinction between the two substances necessary to uphold the law.<sup>256</sup> The court concluded that section 152.023 of the statute violated the defendants' equal protection rights and affirmed the dismissal of charges against them.<sup>257</sup>

### CONCLUSION

It would be difficult, if not impossible, to determine exactly how much of the drug war's racially discriminatory incarceration results from bias in drug scheduling and penalty setting. Other factors not addressed in this Article which contribute to this disparate impact include enforcement strategies targeting urban communities, where a higher portion of the residents are people of color,<sup>258</sup> and reliance on street level enforcement.<sup>259</sup> Together, these factors have contributed to the historic over-incarceration of people of color through drug prohibition, an over-incarceration which has increased to epic and unconscionable proportions in the past decade. The proven disparate impact of the war on drugs should raise suspicions regarding the discriminatory impact of drug statutes, even if the facial neutral-

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255. *Id.*

256. *Id.* In concurring, Justice Simonett denied that the majority holding was a revival of *Lochner* substantive due process. *Id.* at 893 (Simonett, J., concurring). Justice Simonett suggested that the stricter Minnesota rational basis test should only be applied to a facially neutral criminal statute where that statute has a substantial discriminatory racial impact. *Id.* at 894. Absent this showing, Justice Simonett urged courts to apply the more deferential federal rational basis test. *Id.* at 894-95.

257. *Id.* at 891.

258. Partially as a result of residential patterns, statistics reveal that the percentage of Blacks arrested for drug-related offenses differs significant by type of community. In 1990, 44% of the people arrested in cities were Black, whereas Blacks comprised only 29.3% of drug arrests made in suburban areas and 18.9% of drug arrests in rural areas. SOURCEBOOK, *supra* note 29, at 448-56, tbls. 4.11, 4.13, 4.15. Consequently, by focusing drug enforcement resources and making most arrests in cities, Blacks are arrested for drugs in disproportionately high numbers. In 1989, officials made 690,855 arrests for drug violations in cities: 44% of the arrestees were Black and 55.3% were White. *Id.* at 448, tbl. 4.11. In suburban areas, 241,979 drug arrests were made: 29.3% of the arrestees were Black and 70.3% were White. *Id.* at 452, tbl. 4.13. In rural counties, only 46,772 drug arrests were made: 18.9% of the arrestees were Black and 78.9% were White. *Id.* at 456, tbl. 4.15.

259. See Harris, *supra* note 52, at A1; *Top Jailing Rate*, *supra* note 55, at 5.

ity of these statutes allows them to avoid a "suspect classification" label under the federal constitution.

The tragedy of this story is that the racial discrimination now defining our nation's attempt at drug control is not recognized by federal equal protection guarantees, even though, as the Minnesota court aptly noted, the ethnic group being over-incarcerated is the "very class of persons whose history inspired the principles of equal protection."<sup>260</sup> Given the hysteria of the drug war, it is unlikely that the problems described in this Article will be solved by our legislatures. Therefore, state courts are likely to be the only bodies that can apply brakes to the drug war's over-incarceration of non-White drug users. The expansion of state constitutional equal protection guarantees beyond those which are provided by the federal constitution is one effective tool available to them. The Minnesota Supreme Court in *Russell* provides an important legal and ethical precedent for other state courts to follow.

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260. *Russell*, 477 N.W.2d at 889.

APPENDIX  
STATE CRACK COCAINE SENTENCING STATUTES

<u>State</u>	<u>Code Section</u>	<u>Penalty Ratio of Cocaine to Crack</u>
Alabama	ALA. CODE § 13A-12-231(2) (1993)	1:1
	ALA. CODE § 12-35-5 (1993) (rehabilitation)	10:1
Alaska	ALASKA STAT. §§ 11.71.010-11.71.070 (1993)	1:1
Arizona	ARIZ. REV. STAT. ANN. § 13-3408 (1993)	1:1
Arkansas	ARK. CODE ANN. § 5-64-401 (Michie 1993)	1:1
California	CAL. HEALTH & SAFETY CODE §§ 11351-11351.5 (West 1991)	2:1
	CAL. HEALTH & SAFETY CODE § 11370.1 (West 1991)	
	CAL. PENAL CODE § 1203.073 (West Supp. 1993)	
Colorado	COLO. REV. STAT. § 18-18-405(3a) (West 1993)	1:1
Connecticut	CONN. GEN. STAT. ANN. § 21a-278(a) (West 1993)	56:1
Delaware	DEL. CODE ANN. tit. 16, § 4753A(a)(2) (Supp. 1992) (trafficking); § 4751(a) (possession)	1:1
District of Columbia	D.C. CODE ANN. § 33-541(c)(1)(A) (1993)	10:1
Florida	FLA. STAT. ANN. § 893.135(1)(b) (West Supp. 1993)	1:1
Georgia	GA. CODE ANN. § 16-13-31(a)(1) (1992)	1:1
Hawaii	HAW. REV. STAT. §§ 712-1240 to 712-1246 (Supp. 1992)	1:1
Idaho	IDAHO CODE § 37-2732(B)(2) (Supp. 1993)	1:1
Illinois	ILL. REV. STAT. ch. 720, para. 570/401a (Smith-Hurd 1993) (manufacture or delivery); para. 570/402(a) (possession)	1:1
Indiana	IND. CODE ANN. § 35-48-4-1 (Burns Supp. 1993)	1:1
Iowa	IOWA CODE § 124.401(1)(a)(2), (3) (West Supp. 1993)	100:1
Kansas	KAN. STAT. ANN. § 65-4127a (1992)	1:1
Kentucky	KY. REV. STAT. ANN. §§ 218A.1411-218A.1412 (Michie/Bobbs-Merrill Supp. 1992) (trafficking); §§ 218A.1415-218A.1416 (possession)	1:1
Louisiana	LA. REV. STAT. ANN. § 40:967(A) (West 1992) (manufacture & distribution); § 40:967(F) (possession)	1:1

<u>State</u>	<u>Code Section</u>	<u>Penalty Ratio of Cocaine to Crack</u>
Maine	ME. REV. STAT. ANN. tit. 17-A, § 1103(3)(B) (West 1991 & Supp. 1993) (trafficking); § 1105 (aggravated trafficking); § 1106 (furnishing); § 1107 (possession)	1:1
Maryland	MD. ANN. CODE art. 27, § 286(f) (1992 & Supp. 1993)	90:1
Massachusetts	MASS. ANN. LAWS ch. 94C, § 32E(b) (Law. Co-op. Supp. 1993)	1:1
Michigan	MICH. COMP. LAWS ANN. §§ 333.7401- 333.7403 (West 1992)	1:1
Minnesota	MINN. STAT. ANN. §§ 152.021-152.025 (West 1993)	1:1
Mississippi	MISS. CODE ANN. § 41-29-139 (1993)	1:1
Missouri	MO. ANN. STAT. § 195.222(2) & (3) (Vernon Supp. 1993) (trafficking); § 195.223(2) & (3) (possession)	75:1
Montana	MONT. CODE ANN. § 45-9-101 (1993) (sale); § 45-9-101 (possession)	1:1
Nebraska	NEB. REV. STAT. § 28-416(7) & (8) (Supp. 1992)	7:1
Nevada	NEV. REV. STAT. § 453.321 (1991) (manufacture, sale); § 453.336 (possession)	1:1
New Hampshire	N.H. REV. STAT. ANN. § 318-B:26(I)(a)(1) (Supp. 1991)	1:1
New Jersey	N.J. STAT. ANN. § 2C:35-10 (West 1993)	1:1
New Mexico	N.M. STAT. ANN. § 30-31-20 (Michie 1989); § 30-31-22 (distribution); § 30-31-23 (possession)	1:1
New York	N.Y. PENAL LAW § 220.06(5) (McKinney 1989); §§ 220.03-.21 (possession); §§ 220.31-.44 (sale)	1:1
North Carolina	N.C. GEN. STAT. § 90-95(d)(2) (1993)	1:1
North Dakota	N.D. CENT. CODE § 19-03.1-23.1.1(c) (1991)	100:1
Ohio	OHIO REV. CODE ANN. § 3719.99 (Anderson 1992)	1:1
Oklahoma	OKLA. STAT. ANN. tit. 63, § 2-415(C)(2), (7) (West Supp. 1993)	6:1
Oregon	OR. REV. STAT. § 475.992 (Supp. 1992)	1:1
Pennsylvania	PA. STAT. ANN. tit. 35, § 780-113(f)(1.1), §§ 821-825 (1993)	1:1
Rhode Island	R.I. GEN. LAWS §§ 21-28-4.01 to 21-28-4.01.2 (Supp. 1993)	1:1

<u>State</u>	<u>Code Section</u>	<u>Penalty Ratio of Cocaine to Crack</u>
South Carolina	S.C. CODE ANN. § 44.53-370(e)(2) (Law. Co- op. Supp. 1992) (trafficking in cocaine); § 44.53-375 (possession, distribution, and manufacture of crack)	1:1
South Dakota	S.D. CODIFIED LAWS ANN. § 22-42-2 (1993)	1:1
Tennessee	TENN. CODE ANN. § 39-17-417 (Supp. 1993)	1:1
Texas	TEX. HEALTH & SAFETY CODE ANN. §§ 481.115-481.118 (West 1992)	1:1
Utah	UTAH CODE ANN. § 58-37-8 (Supp. 1993)	1:1
Vermont	VT. STAT. ANN. tit. 18, § 4231 (Supp. 1993)	1:1
Virginia	VA. CODE ANN. § 18.2-250 (Michie 1993)	1:1
Washington	WASH. REV. CODE ANN. § 69.50.401 (West Supp. 1993)	1:1
West Virginia	W. VA. CODE § 60A-4-401 (1992)	1:1
Wisconsin	WIS. STAT. ANN. § 161.41 (West 1993)	1:1
Wyoming	WYO. STAT. § 35-7-1031 (1988)	1:1



**NOTES**

