

ESSAY

SORRY SEEMS TO BE THE HARDEST WORD: THE FAIR SENTENCING ACT OF 2010, CRACK, AND METHAMPHETAMINE

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I. INTRODUCTION

On August 3, 2010, President Obama signed the Fair Sentencing Act of 2010 into law.¹ This measure eliminated the five-year mandatory minimum prison sentence that previously adhered under federal law upon a conviction for possession of five grams or more of crack cocaine.² The Act also increased the amount, in weight, of crack that must be implicated for either a five- or a ten-year mandatory minimum sentence to apply upon conviction of any of several federal drug trafficking crimes.³ The latter provision significantly reduces the disparity between the amount of crack that will trigger these mandatory minimums and the amount of powder cocaine that will produce the same results.⁴

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1. Pub. L. No. 111-220, 124 Stat. 2372 (to be codified as amended in scattered sections of 21 U.S.C.).

2. *Id.* § 3, 124 Stat. at 2372 (to be codified as amended at 21 U.S.C. § 844(a)).

3. *Id.* § 2, 124 Stat. at 2372 (to be codified as amended at 21 U.S.C. §§ 841(b)(1), 960(b)). This article uses the term “trafficking” to distinguish offenses such as drug manufacture, sale, importation, or possession for purposes of sale from crimes involving mere possession of contraband.

4. *See id.* “Crack [has] an off-white color[,] resembling coagulated soap powder or pieces of soap. . . . The word ‘crack’ either comes from the crackling sound made when it is smoked before it dries or from its occasional resemblance to cracked paint chips or plaster.” “Crack” Cocaine: *Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 99th Cong. 96 (1986) [hereinafter 1986 Senate Hearing]

Whereas federal law previously treated one hundred grams of powder cocaine as the equivalent of one gram of crack for sentencing purposes, after the Fair Sentencing Act, the statutory ratio now stands at a mere 18:1.⁵

The Fair Sentencing Act succeeded where many earlier attempts to revisit the powder-to-crack ratio had failed. Not long after Congress adopted the quantity thresholds that produced the 100:1 figure back in 1986,⁶ some observers perceived that the defendants implicated in crack cases, most of whom were African-American, were being treated with undue harshness as compared to the white and Latino defendants embroiled in the majority of cases involving powder cocaine.⁷ Bills that would have addressed this disparity by reducing the powder-to-crack ratio were intro-

(statement of David L. Westrate, Assistant Administrator of Operations, Drug Enforcement Administration, U.S. Department of Justice). The Supreme Court of the United States has summarized the similarities of and differences between crack and powder cocaine:

Crack and powder cocaine are two forms of the same drug. Powder cocaine, or cocaine hydrochloride, is generally inhaled through the nose; it may also be mixed with water and injected. Crack cocaine, a type of cocaine base, is formed by dissolving powder cocaine and baking soda in boiling water. The resulting solid is divided into single-dose “rocks” that users smoke. The active ingredient in powder and crack cocaine is the same. The two forms of the drug also have the same physiological and psychotropic effects, but smoking crack cocaine allows the body to absorb the drug much faster than inhaling powder cocaine, and thus produces a shorter, more intense high.

Kimbrough v. United States, 552 U.S. 85, 94 (2007) (citations omitted).

5. Compare 21 U.S.C. § 841 (2006) (providing a 100:1 sentencing disparity), with § 2, 124 Stat. at 2372 (to be codified as amended at 21 U.S.C. § 841(b)) (providing a 17.857:1 sentencing disparity). Shortly after the passage of the Fair Sentencing Act, the United States Sentencing Commission (“Commission”) promulgated an emergency amendment to the United States Sentencing Guidelines (“Guidelines”) that brought the Guidelines into conformance with the Act. Notice of a Temporary, Emergency Amendment to Sentencing Guidelines and Commentary, 75 Fed. Reg. 66,188, 66,188 (Oct. 27, 2010) (discussing amendments to U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1, 2D2.1).

6. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to 3207-3 (1986) (codified as amended at 21 U.S.C. § 841 (2006)).

7. The 100:1 powder-to-crack ratio inspired a deluge of academic commentary, most of it critical of the disparity and its implications. *E.g.*, Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 *FORDHAM L. REV.* 2531, 2548–50 (2010); Knoll D. Lowney, *Smoked not Snorted: Is Racism Inherent in our Crack Cocaine Laws?*, 45 *WASH. U. J. URB. & CONTEMP. L.* 121, 121–26 (1994); Andrew N. Sacher, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 *CARDOZO L. REV.* 1149, 1149–53 (1997); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 *STAN. L. REV.* 1283, 1283–90 (1995); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 *ARIZ. L. REV.* 1233, 1251–56 (1995). For a dissenting view, see Elizabeth Tison, *Amending the Sentencing Guidelines for Cocaine Offenses: The 100-to-1 Ratio Is not as “Cracked” up as Some Suggest*, 27 *S. ILL. U. L.J.* 413, 429–34 (2003).

duced in Congress in 1993,⁸ 1995,⁹ 1996,¹⁰ 1997,¹¹ 1998,¹² 1999,¹³ 2001,¹⁴ 2002,¹⁵ 2003,¹⁶ 2005,¹⁷ 2006,¹⁸ 2007,¹⁹ 2008,²⁰ and 2009,²¹ but these measures and similar proposals offered by the United States Sentencing Commission (“Commission”)²² failed. Even

8. Crack-Cocaine Equitable Sentencing Act of 1993, H.R. 3277, 103d Cong. (1993).

9. Powder-Crack Cocaine Penalty Equalization Act of 1995, H.R. 2598, 104th Cong. (1995); S. 1398, 104th Cong. (1995); Crack-Cocaine Equitable Sentencing Act of 1995, H.R. 1264, 104th Cong. (1995).

10. H.R. 3196, 104th Cong. (1996).

11. Powder-Crack Cocaine Penalty Equalization Act of 1997, S. 1162, 105th Cong. (1997); Get Tough on Cocaine Act of 1997, H.R. 2229, 105th Cong. (1997); Crack-Cocaine Equitable Sentencing Act of 1997, H.R. 2031, 105th Cong. (1997); S. 260, 105th Cong. (1997); S. 209, 105th Cong. (1997); Powder-Crack Cocaine Penalty Equalization Act of 1997, H.R. 332, 105th Cong. (1997).

12. Powder Cocaine Mandatory Minimum Sentencing Act of 1998, S. 2033, 105th Cong. (1998); Powder-Crack Cocaine Penalty Equalization Act of 1998, S. 1593, 105th Cong. (1998).

13. Elimination of the Crack Cocaine Disparate Sentencing Act of 1999, H.R. 1241, 106th Cong. (1999); Crack-Cocaine Equitable Sentencing Act of 1999, H.R. 939, 106th Cong. (1999); Powder Cocaine Sentencing Act of 1999, S. 146, 106th Cong. (1999).

14. Drug Sentencing Reform Act of 2001, S. 1874, 107th Cong. (2001); Crack-Cocaine Equitable Sentencing Act of 2001, H.R. 697, 107th Cong. (2001).

15. Powder-Crack Cocaine Penalty Equalization Act of 2002, H.R. 4026, 107th Cong. (2002).

16. Crack-Cocaine Equitable Sentencing Act of 2003, H.R. 1435, 108th Cong. (2003); Powder-Crack Cocaine Penalty Equalization Act of 2003, H.R. 345, 108th Cong. (2003).

17. Crack-Cocaine Equitable Sentencing Act of 2005, H.R. 2456, 109th Cong. (2005); Powder-Crack Cocaine Penalty Equalization Act of 2005, H.R. 1501, 109th Cong. (2005).

18. Drug Sentencing Reform Act of 2006, S. 3725, 109th Cong. (2006).

19. Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, S. 1711, 110th Cong. (2007); Drug Sentencing Reform Act of 2007, S. 1383, 110th Cong. (2007); Crack-Cocaine Equitable Sentencing Act of 2007, H.R. 460, 110th Cong. (2007); Powder-Crack Cocaine Penalty Equalization Act of 2007, H.R. 79, 110th Cong. (2007).

20. Fairness in Cocaine Sentencing Act of 2008, H.R. 5035, 110th Cong. (2008).

21. Fairness in Cocaine Sentencing Act of 2009, H.R. 1459, 111th Cong. (2009); Powder-Crack Cocaine Penalty Equalization Act of 2009, H.R. 18, 111th Cong. (2009); Crack-Cocaine Equitable Sentencing Act of 2009, H.R. 2178, 111th Cong. (2009).

22. In 1995, the Commission proposed to eliminate the 100:1 ratio, as incorporated within the Guidelines. Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,075–76 (May 10, 1995); U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY xiv (1995) [hereinafter 1995 USSC COCAINE REPORT]. Congress rejected this proposal. See Pub. L. No. 104-38, § 1, 109 Stat. 335, 335 (1995) (codified at 28 U.S.C. § 994 note (2006)). At the same time, Congress directed the Commission to consider revision of the powder-crack ratio “in a manner consistent with the ratios set for other drugs.” *Id.* § 2, 109 Stat. at 335. In 1997, the Commission recommended adoption of a 5:1 ratio. U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997) [hereinafter 1997 USSC COCAINE REPORT]. In 2002, it proposed “at least” a 20:1 ratio. U.S. SENTENCING COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY viii (2002) [hereinafter 2002 USSC COCAINE REPORT]. Neither of these recommendations was adopted by Congress. U.S. SENTENCING COMM’N, REPORT TO CONGRESS: COCAINE AND

when persistence finally paid off in 2010, the Fair Sentencing Act fell short of the stated goal of some members of Congress—namely, treating powder and crack cocaine as identical for sentencing purposes.²³

The Fair Sentencing Act underscores what might seem like an obvious point: because legislatures devise the penalties that adhere to crimes, they retain the power to revisit these punishments when and if changed circumstances suggest that lesser consequences should follow from commission of the offense. Yet legislators rarely exercise their prerogative to reduce the penalties previously affixed to crimes,²⁴ at least absent a judicial command,²⁵ wholesale reform of a criminal code²⁶ or a recurring feature thereof that cuts across multiple offenses (such as the practice of assigning mandatory minimum terms to drug crimes),²⁷ crises prompted by fiscal constraints,²⁸ or outright abolition of an offense.²⁹ In this respect, “sorry” seems to be the hardest word for legislators to say when it comes to the recalibration

FEDERAL SENTENCING POLICY 8 (2007) [hereinafter 2007 USSC COCAINE REPORT].

23. *E.g.*, 156 CONG. REC. H6198 (daily ed. July 28, 2010) (remarks of Rep. Clyburn) (expressing disappointment that the Fair Sentencing Act did not entirely eliminate the disparate treatment of crack and powder cocaine under federal sentencing law).

24. *See, e.g.*, Julia T. Rickert, Comment, *Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions*, 100 J. CRIM. L. & CRIMINOLOGY 213, 240 (2010) (“Congress is rarely able to muster the political will to reduce criminal penalties or advance protections for any criminal defendants, because members fear that when election time rolls around there will be cries that they have been ‘soft on crime.’”).

25. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) (barring administration of the death penalty as punishment for the crime of sexual abuse of a minor).

26. This may occur, for example, when legislatures ratify the work of sentencing commissions. *See* Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 175 (1995) (“Sentencing guidelines were originally conceived as a means of making sentencing more uniform and eliminating unwarranted disparities.”); Michael Tonry, *The Success of Judge Frankel’s Sentencing Commission*, 64 U. COLO. L. REV. 713, 719 (1993) (relating how state sentencing commissions reduced sentences for some offenses while increasing them for others).

27. *See* ADRIENNE AUSTIN, CRIMINAL JUSTICE TRENDS: KEY LEGISLATIVE CHANGES IN SENTENCING POLICY, 2001–2010, at 12–13 (2010) (discussing several states’ recent reform of mandatory minimum sentences for drug offenses).

28. *See* Elizabeth Napier Dewar, *The Inadequacy of Fiscal Constraints as a Substitute for Proportionality Review*, 114 YALE L.J. 1177, 1180 (2005) (observing that in 2003, “to reduce the size of their prison populations,” a few states “repeal[ed] mandatory minimums or otherwise reduc[ed] sentences”). Dewar also observes, however, that “the high political cost of reducing criminal penalties deters legislators from reducing prison sentences in general and makes reducing the sentences for some crimes almost impossible.” *Id.* at 1183.

29. *See* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 233–45 (2007) (discussing legislative willingness to abolish criminal offenses).

of criminal penalties. Instead, political forces typically place *upward* pressure on criminal punishments, or encourage adherence to the status quo.³⁰ The Fair Sentencing Act represents a noteworthy departure from this norm. With the Act, Congress backtracked from one of the most notorious yet persistent quirks of the federal sentencing laws.

The Fair Sentencing Act tacked against prevailing winds by capitalizing upon idiosyncratic circumstances that made the sentencing laws applicable to crack cocaine particularly susceptible to legislative reconsideration. These conditions included: (1) the contemporaneous assignment of lesser penalties to powder cocaine, which would later inspire compelling proportionality arguments; (2) the fact that the penalties initially attached to crack were loosely premised on untested and potentially rebuttable assertions regarding the dangers associated with this substance; (3) the aberrant and extreme nature of the 100:1 ratio, relative to other legislative responses to the crack cocaine “epidemic”; (4) the fact that the strict crack-cocaine penalties applied principally to African-American males, a disparate impact that suggested to some that the nation’s drug laws discriminated on the basis of race and motivated members of Congress to advance legislation that would eliminate or reduce the ratio; (5) the compromise implicit in the Act, which only reduced the powder-crack disparity, instead of eliminating the gap altogether; and (6) the decreasing crime rates of the past two decades, which have made it politically feasible for legislatures to consider the reduction of criminal penalties attached to some drug crimes.³¹

30. See, e.g., Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 310 (2008).

31. See Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 181 (2007) (“If it remains risky for politicians to appear to express sympathy for criminal defendants, it has ceased to be politically *suicidal* for them the discuss—even to advocate and carry out—some pragmatically justified reductions in criminal penalties.”). The Federal Bureau of Investigation reports that the number of violent crimes per 100,000 population peaked at 758.2 in 1991 and has been gradually declining ever since, to 429.4 per 100,000 population in 2009. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2009 tbl.1, http://www2.fbi.gov/ucr/cius2009/data/table_01.html (last visited Mar. 2, 2011). Property crimes have experienced a similar decline. *Id.* Curiously, a disconnect sometimes appears between crime rates and public concern over crime. Recent polls reflect increasing concern about crime, even as crime rates have dropped. See, e.g., Jeffrey M. Jones, *Americans Still Perceive Crime as on the Rise*, GALLUP (Nov. 18, 2010), <http://www.gallup.com/poll/144827/Americans-perceive-crime-rise.aspx> (last visited Mar. 2, 2011).

Though one cannot pinpoint the precise contribution of each of these factors, it seems safe to say that each played an important role in the passage of the Act. These circumstances created an environment in which Congress *could* rethink its earlier decision, ensured that it *would* have occasion to do so, and provided specific reasons why it *should* take action—without necessarily admitting that its earlier adoption of extremely different penalty provisions for powder and crack cocaine was mistaken, given the facts known at the time.

No comparable narrative accompanies most crimes. Illustrating the point, the Fair Sentencing Act left in place sentencing laws that effectively create a 100:1 sentencing disparity between powder cocaine and either actual methamphetamine or methamphetamine in its crystal “ice” form. A perception now exists that methamphetamine presents a greater threat to public safety than crack does. Consistent with this transition, in key respects the penalties imposed for methamphetamine trafficking crimes are now precisely the same as the supposedly draconian penalties previously tethered to crack cocaine. Federal law now calls for a five-year minimum term for trafficking crimes involving just five grams of actual (pure) methamphetamine, or methamphetamine in its “ice” form, and a ten-year minimum sentence for crimes involving fifty grams or more of these forms of methamphetamine.³²

There is little reason to believe that the Fair Sentencing Act will prompt legislative reconsideration of the penalties attached to methamphetamine offenses. Many of the forces that aligned to produce the Fair Sentencing Act have no apparent application or analogs insofar as methamphetamine is concerned. That said, the Act may open the door to greater judicial scrutiny of the prescribed sentences for methamphetamine crimes. The Act can be understood as endorsing a form of proportionality analysis whereby the sentences for trafficking in powder cocaine provide a baseline for determining the reasonableness of sentencing provisions that apply to crimes involving other controlled substances. Going forward, because federal courts now have the authority to disagree with policy determinations embedded within the United States Sentencing Guidelines (“Guidelines”) applicable to drug offenses, judges might build upon the Fair Sentencing Act by recognizing and scrutinizing other drug ratios, such as a powder co-

32. See *supra* notes 120–24 and accompanying text.

caine-to-methamphetamine juxtaposition. If this comparison of the drugs, their respective penalties, and the dangers associated with each substance indicates that the policies embraced by the Guidelines produce excessive penalties, courts could adopt smaller ratios (i.e., higher quantity thresholds, as they relate to specific sentencing ranges, for the drug(s) being compared to powder cocaine) to the extent permitted under federal law. “Sorry” may be the hardest word to say, but the logic of the Fair Sentencing Act suggests that some change may come without Congress having to say anything else at all.

II. THE ORIGINS AND ENACTMENT OF THE POWDER AND CRACK COCAINE PENALTY PROVISIONS

The cognoscenti “discovered” crack in 1985³³ in the same sense that Christopher Columbus “discovered” America in 1492; in both cases, the phenomenon predated the epiphany.³⁴ But just as Columbus’s report of his unexpectedly truncated voyage electrified its audience, reports of a new form of cocaine that was more potent and insidious than cocaine powder commanded popular notice,³⁵ headlines,³⁶ and then, predictably, the rapt attention of Congress. In July 1986, in the midst of a surge of articles regarding the crack “epidemic,”³⁷ both the United States Senate and the

33. 1986 Senate Hearing, *supra* note 4, at 14 (statement of Charles Schuster, Director, National Institute on Drug Abuse) (“In May 1985, NIDA conducted a field investigation in New York City and initially brought crack to the attention of Federal and State Authorities.”). The first mass-media articles on crack appeared in late 1984. Sklansky, *supra* note 7, at 1291 (footnotes omitted).

34. 1986 Senate Hearing, *supra* note 4, at 38 (statement of Michael Taylor) (“Crack is not something new. It has been around for as long as I can remember.”); U.S. DRUG ENFORCEMENT ADMIN., DRUG ENFORCEMENT ADMINISTRATION: A TRADITION OF EXCELLENCE 1973–2003, at 59–60, <http://www.justice.gov/dea/pubs/history/1985-1990.html> (last visited Mar. 2, 2011) [hereinafter DEA REPORT]; Beaver, *supra* note 7, at 2538–39 (discussing the development of crack cocaine and early media coverage of the drug); *see also* *Rock Cocaine Use in LA Called “Out of Control,”* ORANGE COUNTY REG., Dec. 9, 1984, at B6 (“Hundreds of drug-dispensing fortresses have sprung up in south-central Los Angeles in the past 18 months, bringing affordable rock cocaine and an epidemic of addiction to the inner city.”).

35. According to a Gallup survey conducted between July 31, 1986 and August 1, 1986, Americans identified crack as the nation’s second most serious problem drug, behind only alcohol. GEORGE GALLUP, JR., 1986 GALLUP POLL: PUBLIC OPINION 191 (1987).

36. *See, e.g.,* Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in the Crack Scene*, in *CRACK IN AMERICA* 18, 20 (Craig Reinerman & Harry G. Levine, eds., 1997) (discussing the surge in media coverage of “crack” in 1986).

37. *E.g.,* John J. Goldman, *New York City Being Swamped by “Crack”; Authorities Say*

House of Representatives held hearings on the perceived crisis.³⁸ At these hearings, it was asserted that crack: (1) was more addictive than powder cocaine,³⁹ (2) produced physiological effects that were different from and worse than those caused by powder co-

They Are Almost Powerless to Halt Cocaine, L.A. TIMES, Aug. 1, 1986, at A1; Steven K. Johnson, 'Crack' Puts New Pop in Cocaine Market, CHI. TRIB., May 21, 1986, at C1; Peter Kerr, *Crack Addiction Spreads Among the Middle Class*, N.Y. TIMES, June 8, 1986, at A1; Peter Kerr, *Drug Treatment in City Is Strained by Crack, a Potent New Cocaine*, N.Y. TIMES, May 16, 1986, at A1; Peter Kerr, *Extra-Potent Cocaine: Use Rising Sharply Among Teen-Agers*, N.Y. TIMES, Mar. 20, 1986, at B1 ("In dramatically rising numbers in the last five months, teen-agers in New York City and its suburbs have been using 'crack,' an especially potent and addicting form of cocaine."); R.H. Melton & Linda Wheeler, *Once for Elite, Cocaine Now an Equal-Opportunity Vice; Bias' Death Puts Focus on Growing Threat*, WASH. POST, June 22, 1986, at A1 ("The illegal use of cocaine has reached record levels throughout the Washington area, posing a virtually insurmountable challenge to police departments."); Tom Morganthau et al., *Crack and Crime*, NEWSWEEK, June 16, 1986, at 16, 16 ("Crack—smokeable cocaine—has suddenly become America's fastest-growing drug epidemic and potentially its most serious."); Michele L. Norris, *Hard Rock: Crystallized Cocaine, the Poor Man's High, Grips Richer, Growing Clientele*, L.A. TIMES, June 22, 1986, at SB1 ("Rock cocaine, once considered a low-income high, has moved out of the Los Angeles ghettos and into the South Bay."); Dody Tsiantar, *Crack Making Violent Presence Felt in New York; Cheap, Highly Addictive Form of Cocaine Is Spreading in Major Cities, Authorities Say*, WASH. POST, June 13, 1986, at A3 ("Virtually unheard of nine months ago on the East Coast, crack has swept affluent and poor neighborhoods alike, tempting children as young as 8 years old."). Three prominent wire services (Scripps-Howard, Associated Press, and United Press International) all distributed stories over a two-week period beginning in late May 2006 that discussed the crack "epidemic." See 'Crack' Called Nation's Drug Epidemic, SUNDAY INTELLIGENCER (Doylestown, Pa.), June 8, 1986, at A6 ("They call it 'crack' on the East Coast and 'rock' out West. Whatever its name, this refined, smokeable form of cocaine may be the most addictive narcotic ever sold on the streets of America."); *Crack: It's a New, Popular and Dangerous Cocaine Substitute*, PHAROS-TRIB. (Logansport, Ind.), May 30, 1986, at 11 ("Crack, a cheap new smokeable form of cocaine, is highly addictive, extremely harmful and is rapidly becoming the 'fast-food' alternative to regular cocaine."); *More People Take Crack at Crack*, SALINA JOURNAL (Salina, Kan.), June 13, 1986, at 18 (noting that crack, "obscure" eight months earlier, is now "an epidemic"). Two commentators have described the onslaught of press coverage of the nation's drug problem the "Media Epidemic of 1986." James D. Orcutt & J. Blake Turner, *Shocking Numbers and Graphic Accounts: Quantified Images of Drug Problems in the Print Media*, in DRUGS, ALCOHOL AND SOCIAL PROBLEMS 35, 35 (James D. Orcutt & David R. Rudy, eds. 2003).

38. See 1986 Senate Hearing, *supra* note 4; *The Crack Cocaine Crisis: J. Hearing Before the H. Select Comm. on Narcotics Abuse and Control and the H. Select Comm. on Children, Youth, and Families*, 99th Cong. (1987).

39. 1986 Senate Hearing, *supra* note 4, at 8 (statement of Sen. Chiles) ("We are all familiar with cocaine; it has been with us for a long time. Crack, however, is something altogether different. It is far more powerful, far cheaper, far more addictive, and increasingly available."); *id.* at 59 (testimony of James Adams, Sheriff, Sumter County, Fla.) ("[W]e do know that cocaine is a highly addictive drug, and rock cocaine seems to produce an even more addictive effect."); *id.* at 87–88 (statement of Robert Byck, Professor of Psychiatry and Pharmacology, Yale University School of Medicine) ("A very high percentage of 'crack' users become addicted to the use of the drug. Some experts estimate a fifty times greater risk of addiction than with snorted intranasal cocaine hydrochloride.").

caine,⁴⁰ (3) attracted users who could not afford powder cocaine, especially young people,⁴¹ and (4) led to more crime than powder cocaine did.⁴²

To paraphrase an old proverb, if the closest tool is a hammer, every problem starts to look like a nail.⁴³ Because the creation of new criminal sanctions is one of Congress's core competencies,⁴⁴ it was predictable that the federal legislature would respond to the nation's drug problem generally, and the crack crisis specifically, by ramping up the penalties attached to drug crimes—especially those involving cocaine base, a substance understood as being essentially congruent with crack.⁴⁵ Prior to 1986, federal sentencing

40. *Id.* at 2 (statement of Sen. Roth) (“Instead of being satisfied with one or two snorts, as is the case in traditional cocaine users, crack users demand multiple hits immediately to offset the physical and psychological depression they experience each time they crash.”).

41. *Id.* at 15 (testimony of Charles R. Schuster, Director, National Institute on Drug Abuse) (observing that crack “sells for a lower unit price [than cocaine], which attracts younger and less affluent street customers” and that the low cost of crack “is very important since it reduces the price barrier that prohibited young children from being able to purchase the drug in the past.”); 132 CONG. REC. S14,295 (daily ed. Sept. 30, 1986) (remarks of Sen. Leahy) (“Drug merchants are now pushing a new craze that is sweeping the Nation. Crack is available to the young, and it will be in the schools this fall. I have heard stories of children as young as nine who are already crack users. The sellers also use these children as lookouts and as workers in houses that manufacture crack. One hit costs just \$10. Users say addiction can begin after only the second use of crack.”).

42. 1986 Senate Hearing, *supra* note 4, at 6 (statement of Sen. Nunn) (“Dealers in the more conventional form of cocaine—the so-called ‘white powder’ variety—generally do not barter their cocaine for stolen goods. But reportedly, because of the relatively low price of this form of cocaine, crack dealers do accept stolen property as payment. . . . Police are anticipating an increase in burglaries and similar violations as crack use spreads.”); *see also* 132 CONG. REC. 22,991 (1986) (remarks of Rep. Dorgan) (“Police report that increased crack use has also engendered increased crime in several cities. Users become so deranged from its psychotic effects that they may perpetrate brutal crimes.”).

43. In fairness, the Anti-Drug Abuse Act of 1986 also allocated funds for drug research, education, treatment, and prevention efforts by law enforcement. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; *see also* Beaver, *supra* note 7, at 2548 (citing 132 CONG. REC. 26,451–52, 26,460 (1986)) (discussing various congressional earmarks for treatment, education, research, and prevention).

44. *See generally* HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009) (discussing the expansion of the federal criminal law); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 523–39 (2001) (discussing the forces that cause legislatures to expand criminal sanctions).

45. There exists a lively debate over whether “cocaine base,” as used in the statute, is limited to crack cocaine, or includes other forms of cocaine base. *See* *United States v. Higgins*, 557 F.3d 381, 394–95 (6th Cir. 2009) (discussing the split of authority on this subject); Andrew King, *The Meaning of the Term “Cocaine Base” in 21 U.S.C. 841(b)(1): A Circuit Split over Statutory Interpretation*, 48 DUQ. L. REV. 105 (2010) (same). The issue is presently before the Supreme Court of the United States. *See* *DiPierre v. United States*, No. 09-1533 (argued Feb. 28, 2011). The term “cocaine base” as used within the Guidelines

law did not distinguish between the powder and crack forms of cocaine.⁴⁶ In assigning mandatory minimum prison sentences to defendants involved in the distribution of certain illegal drugs,⁴⁷ however, the Anti-Drug Abuse Act of 1986 drew a clear distinction between the two types of cocaine, treating crack as by far the greater evil.⁴⁸ Congress tied these sentences to the amount, in weight, of the particular drug involved.⁴⁹ The Act predicated a five-year mandatory minimum sentence on a defendant's involvement with at least five hundred grams of powder cocaine (i.e., more than a pound of the substance).⁵⁰ A mere five grams of cocaine base (about the weight of a nickel) implicated this same minimum term.⁵¹ Meanwhile, the Act's ten-year mandatory minimum sentence was reserved for persons convicted of trafficking crimes involving at least five kilograms of powder cocaine—or just fifty grams of cocaine base.⁵² Overall, this disparity meant that street dealers of crack would be treated the same as large-scale cocaine distributors for sentencing purposes, while low-level dealers of powder cocaine usually would escape any mandatory minimum term.

Though the history and terms of the Anti-Drug Abuse Act of 1986 are interesting for a number of reasons, a few points seem particularly relevant to the later reconsideration of the Act's penalty provisions. First, Congress essentially pulled the low quantity thresholds applicable to crack cocaine out of thin air⁵³ in its

(as opposed to the statute) is more clearly defined. In 1993, an amendment to the Guidelines adopted a narrow definition of cocaine base that equates cocaine base with crack. U.S. SENTENCING GUIDELINES MANUAL app. C (2010); *see also* United States v. Person, 377 F. Supp. 2d 308, 309–10 (D. Mass. 2005) (discussing the amendment).

46. Compare 21 U.S.C. § 841(b)(1) (1982) (providing no distinct penalties for possession of cocaine base), with Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 (1986) (amending 21 U.S.C. § 841(b) to include express quantity thresholds for trafficking crimes involving cocaine base).

47. The Anti-Drug Abuse Act of 1986 was not the first federal law to impose mandatory minimum sentences for drug crimes, but it did fill a void in the law at the time of its enactment. The earlier minimum terms were established by Pub. L. No. 82-255, 65 Stat. 767 (1951), and then amended by the Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567; however, these statutory minimums were largely repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1101, 84 Stat. 1236, 1291–92. For additional discussion of this history, see Sklansky, *supra* note 7, at 1286 n.13.

48. *See* Pub. L. No. 99-570, § 1002(1)(A)–(B), 100 Stat. 3207, 3207-2 to 3207-3 (1986).

49. *Id.*

50. *Id.* § 1002(1)(B), 100 Stat. at 3207-3.

51. *Id.*

52. *Id.* § 1002(1)(A), 100 Stat. at 3207-2.

53. *See* 1995 USSC COCAINE REPORT, *supra* note 22, at 117 (“[T]he legislative history

rush to pass significant anti-drug legislation before the November 1986 elections.⁵⁴ No testimony or other evidence placed before Congress clearly pointed toward the chosen quantities as triggers for mandatory minimum terms, as opposed to somewhat greater amounts that would still reflect the presumably substantial perils associated with crack cocaine.

Second, most members of Congress were not especially concerned with calibrating an appropriate “ratio” between the quantity thresholds that would apply to powder and crack cocaine. At most, there existed an inchoate sense that crack implicated different and greater dangers than powder cocaine, and that crimes involving crack should be punished accordingly. Ultimately, Senators and Representatives became preoccupied with driving up the penalties attached to crack,⁵⁵ with the punishment for crimes involving powder cocaine (and other controlled substances addressed by the Act) representing a relative afterthought. Widespread recognition of a powder-crack “ratio” would come only much later.

Third, the 100:1 powder-to-crack quantity disparity adopted by Congress represented an outlier among legislative responses to the crack cocaine “epidemic.” Like their federal counterparts, state legislators faced substantial pressure to respond to the spike in drug trafficking and abuse perceived to be occurring in the mid-to-late 1980s. Some states responded by stiffening the penalties attached to drug crimes, including offenses involving crack cocaine. Yet to the extent that these states tied these penalties to the amount, in weight, of the given drug involved, only two states even partially adopted the 100:1 powder-to-crack cocaine disparity chosen by Congress, and no state endorsed an even

[of the Anti-Drug Abuse Act of 1986] does not include any discussion of the 100-to-1 powder cocaine/crack cocaine quantity ratio *per se.*); Sklansky, *supra* note 7, at 1297 (noting the lack of explanation for the quantities chosen by Congress). Representative Dan Lungren of California candidly acknowledged as much during the floor debate over the Fair Sentencing Act. Lungren, who was involved in drafting the 1986 law, noted, “We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn’t really have an evidentiary basis for it, but that’s what we did, thinking we were doing the right thing at the time.” 156 CONG. REC. H6202 (daily ed. July 28, 2010) (remarks of Rep. Lungren).

54. See Sklansky, *supra* note 7, at 1294 & n.55 (discussing the push for stiffer drug penalties in light of looming congressional elections); Jonathan Fuerbringer, *House Approves Use of Military to Fight Drugs*, N.Y. TIMES, Sept. 12, 1986, at A1 (same).

55. See Sklansky, *supra* note 7, at 1296 (describing congressional action as a sort of “partisan bidding war over the penalties for crack trafficking”).

greater discrepancy.⁵⁶ Maryland, for example, considered a 44.8:1 powder-to-crack ratio for sentencing purposes, but cooler heads prevailed, and the legislature ultimately endorsed a ratio of just less than 9:1.⁵⁷ Minnesota adopted a 10:3 powder-to-crack ratio.⁵⁸ Most states declined to revisit their sentencing laws at all, such that the powder-to-crack ratio in these states effectively stood at 1:1.⁵⁹

Fourth, the creation of the federal mandatory minimums prompted the wholesale adoption of a 100:1 powder-to-crack quantity discrepancy throughout the Guidelines, then under development. Though the 1986 Act mandated five- or ten-year minimum sentences for defendants involved with certain amounts of powder or crack cocaine, this law said nothing about the sentences to be imposed upon defendants who were involved with amounts *less* than those necessary to trigger a mandatory minimum.⁶⁰ Nor did the Act relate the precise sentences, above and beyond the relevant mandatory minimum, courts should issue to defendants involved with quantities significantly greater than those necessary to implicate the ten-year minimum sentence, or quantities that were more than the amount necessary to implicate the five-year minimum term but less than those necessary to trigger the ten-year mandatory sentence.⁶¹ In drafting the Guidelines, the Commission filled in these gaps by using the quantities and minimum terms prescribed by the 1986 Act as baselines.⁶²

56. See 2007 USSC COCAINE REPORT, *supra* note 22, at 98–99 (noting that only thirteen states draw a distinction between powder and crack cocaine in their penalty schemes); Sacher, *supra* note 7, at 1170 app. A (reporting that only Iowa and North Dakota had adopted a 100:1 powder-to-cocaine ratio); Bill Rankin, *U.S. Crack Laws Tip Scales Against Blacks, Statistics Show*, ATLANTA J. & CONST., Feb. 11, 1993, at A1 (explaining that most states do not distinguish between crack and powder cocaine when sentencing criminal defendants convicted of drug crimes).

57. 1990 Md. Laws 1187 (repealed by 2002 Md. Laws 26).

58. 1987 Minn. Laws 1951, 1952 (repealed by 1989 Minn. Laws 1612).

59. See 2007 USSC COCAINE REPORT, *supra* note 22, at 130 (noting that thirty-seven states have a 1:1 ratio); 1995 USSC COCAINE REPORT, *supra* note 22, at 98 (noting that thirty-six states have a 1:1 ratio).

60. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1302, 100 Stat. 3207, 3207-16 to 3207-17 (codified at 21 U.S.C. § 841(b) (2006)).

61. See *id.*

62. 1995 USSC COCAINE REPORT, *supra* note 22, at 1. As originally promulgated, the Guidelines created sixteen different base offense levels. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (1987). The three lowest levels were reserved for drugs other than cocaine. *Id.* The other thirteen levels all prescribed sentencing ranges for trafficking crimes involving specific quantities of powder cocaine or cocaine base:

For first offenders, the smallest quantity of crack or powder cocaine necessary to implicate a given mandatory term was assigned a Guidelines base offense level corresponding to a sentencing range that hovered just above that minimum sentence.⁶³ These pairings then served as benchmarks for the first-offender sentencing ranges assigned to offenses involving greater or lesser quantities of powder or crack cocaine. Quantities slightly less than the amounts necessary to implicate the mandatory mini-

Amount of Powder Cocaine	Amount of Cocaine Base	Base Of- fense Level	Guidelines Range (No Prior Criminal History)
50 kilograms or more	500 grams or more	36	188–235 months
15–49.9 kilograms	150–499 grams	34	151–188 months
5–14.9 kilograms	50–149 grams	32	121–151 months
3.5–4.9 kilograms	35–49 grams	30	97–121 months
2–3.4 kilograms	20–34.9 grams	28	78–97 months
.5–1.9 kilograms	5–19 grams	26	63–78 months
400–499 grams	4–4.9 grams	24	51–63 months
300–399 grams	3–3.9 grams	22	41–51 months
200–299 grams	2–2.9 grams	20	33–41 months
100–199 grams	1–1.9 grams	18	27–33 months
50–99 grams	500–999 milligrams	16	21–27 months
25–49 grams	250–499 milligrams	14	15–21 months
<25 grams	<250 milligrams	12	10–16 months

Id. §§ 2D1.1, 5A. The Commission’s avoidance of steep sentencing “cliffs” led to the perpetuation of the 100:1 ratio across all federal cocaine trafficking convictions, regardless of the quantities involved. For example, as the table reflects, the Guidelines initially recommended a sentence between eight years, one month and ten years, one month for a defendant convicted of a crime involving 4.9 kilograms of powder cocaine or 49 grams of crack—well in excess of the five-year mandatory minimum sentence prescribed by the 1986 Act for crimes involving these quantities, but close to the ten-year mandatory minimum sentence mandated for convictions involving just slightly greater quantities of these forms of cocaine (as to which a sentencing range of ten years, one month to twelve years, seven months adhered). *See id.*

63. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1, 5A (1987) (prescribing a low-end sentence of five years, three months for possession of five grams of cocaine base and a low-end sentence of ten years, one month for possession of fifty grams of cocaine).

mums were assigned sentencing ranges with floors slightly lower than the mandatory minimum terms, and so forth.⁶⁴

Fifth and finally, at their inception, the stiff penalties attached to crack cocaine did not carry the same political valence that they later acquired. The core of what would become the Anti-Drug Abuse Act of 1986 sailed through the House of Representatives by a 392–16 vote; in the key Senate vote, the tally was 97–2.⁶⁵ A majority of the members of the Congressional Black Caucus voted for the measure.⁶⁶ The handful of opponents included some of the most progressive members of Congress, who were concerned about the Act's sweeping terms (which went well beyond the adoption of mandatory minimum sentences).⁶⁷ In the atmosphere of that time, however, many liberals put aside any doubts that they may have held about the legislation, held their noses, and voted "aye."

64. As originally promulgated, the comments to the relevant Guidelines provision provided, in relevant part, as follows:

The base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. The base offense levels [at levels 26 and 32] represent mandatory minimum sentences established by the Anti-Drug Abuse Act of 1986. These levels reflect sentences with a lower limit as close to the statutory requirement as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.

Id. § 2D1.1 cmt.

65. 1986 CONG. Q. ALMANAC 98-H to 99-H; 1986 CONG. Q. ALMANAC 50-S.

66. *Cracked Justice—Addressing the Unfairness in Cocaine Sentencing: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 3 (2008) [hereinafter *Cracked Justice Hearing*] (statement of Rep. Gohmert).

67. See, e.g., 132 CONG. REC. 23,001–02 (1986) (remarks of Rep. Weiss). The Representatives who voted against the Act were: Dellums (D-CA), Edwards (D-CA), Roybal (D-CA), Savage (D-IL), Crane (R-IL), Mitchell (D-MD), Frank (D-MA), Conyers (D-MI), Crockett (D-MI), Sabo (D-MN), Clay (D-MO), Weiss (D-NY), Stokes (D-OH), Weaver (D-OR), Gonzales (D-TX), and Lowry (D-WA). 1986 CONG. Q. ALMANAC 98-H to 99-H.

III. RECONSIDERATION

Representative Charles Rangel of New York was among the members of Congress who voted for the Anti-Drug Abuse Act of 1986.⁶⁸ Rangel also (grudgingly) voted for an omnibus 1988 law that imposed mandatory minimum prison terms on individuals convicted of mere possession of five grams or more of crack cocaine.⁶⁹ Just five years after the second of these votes, Rangel dropped House Bill 3277, the Crack-Cocaine Equitable Sentencing Act of 1993, into the hopper.⁷⁰ This measure would have eliminated the distinction between crack and powder cocaine for sentencing purposes, with both forms of the drug henceforth being governed by the sentencing rules that previously applied only to powder cocaine.⁷¹

What changed over the intervening five years to produce such a reversal? For one thing, little evidence appeared over this span to confirm that crack cocaine was as great a threat to the general public welfare as many had feared just a few years earlier. On the contrary, use of crack appeared to decline.⁷² In 1993, a *Washington Post* staff writer named Malcolm Gladwell observed that the crack business was “not the monster it used to be.”⁷³ Explaining a perceived drop in crack usage in New York, he continued, “In a pattern that experts said is being repeated nationwide, teenagers coming of age in New York’s most drug-ridden neighborhoods have seen the damage crack has done and apparently are turning

68. 1986 CONG. Q. ALMANAC 98-H to 99-H.

69. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6371, 102 Stat. 4181, 4370. The key House of Representatives votes on the measure, H.R. 5210, 101st Cong. (1988), were 375–30 and 346–11 in favor of the bill. 1988 CONG. Q. ALMANAC 102-H, 138-H. This provision represented “the only federal mandatory minimum for a first offense of simple possession of a controlled substance. . . . [S]imple possession of any quantity of any other substance—including powder cocaine—by first-time offenders is a misdemeanor offense punishable by no more than one year in prison.” 1995 USSC COCAINE REPORT, *supra* note 22, at 2.

70. Crack-Cocaine Equitable Sentencing Act of 1993, H.R. 3277, 103d Cong. (1993).

71. *See id.*

72. *See* Richard L. Berke, *Student Survey Detects Decline in Use of Crack*, N.Y. TIMES, Mar. 1, 1989, at A16; Rick DeVecchio, *Bay Area Crack Baby Epidemic Declines*, S.F. CHRON., June 3, 1991, at A13; Matt Neufeld & Enrique J. Gonzalez, *Police Report Drop in Crack Use in District*, WASH. TIMES, Aug. 5, 1991, at B1; Joseph B. Treaster, *New York State Reports a Drop in Crack Traffic*, N.Y. TIMES, Dec. 27, 1990, at B5.

73. Malcolm Gladwell, *N.Y. Crack Epidemic Appears to Wane*, WASH. POST, May 31, 1993, at A1.

against it.”⁷⁴ The stagnation of the erstwhile “epidemic” led some to rethink whether the drug was as addictive as previously thought.⁷⁵ In 1986, *Newsweek*, quoting a drug expert, reported that “[c]rack is the most addictive drug known to man.”⁷⁶ Less than four years later, the same magazine explained, “[A]s with most other drugs, a lot of people use [crack] without getting addicted.”⁷⁷ Meanwhile, other commentators started to question the supposedly close connection between crack and violent crime.⁷⁸

Given these developments, a growing number of observers came to believe that crack was not a new drug that involved unprecedented threats to public safety and health, but merely a form of cocaine that, due to its manner of ingestion, produced a rush that was more intense but shorter-lived than that created by the inhalation of cocaine powder. This appreciation of the similarities between powder and crack cocaine—instead of a single-minded focus on the allegedly unique perils associated with crack—naturally led to a juxtaposition of the federal penalty provisions applicable to the different forms of cocaine. This comparison came to be framed in terms of a powder-to-crack “ratio.”

The crack trade did not decline so significantly as to dry up the flow of defendants into federal court.⁷⁹ It did, however, contribute to a shift in media and popular attention from current and potential crack users—whose plight no longer seemed quite so prevalent or desperate—to the sentences that were being imposed on individuals prosecuted for making or selling crack.⁸⁰ To many, it

74. *Id.* Use of powder and crack cocaine continued to decline in the years that followed, from 5.8 million users in 1985 to 1.7 million users in 2006. DEA REPORT, *supra* note 34, at 59–60; OFFICE OF NAT'L DRUG USE POLICY, THE STATE OF DRUG USE IN AMERICA (2007), <http://www.whitehousedrugpolicy.gov/dfc/files/nsdun.pdf>.

75. Reinerman & Levine, *supra* note 36, at 24 (“By the beginning of 1992 . . . the War on Drugs in general, and the crack scare in particular, had begun to decline significantly in prominence and importance.”).

76. Tom Morganthau et al., *Kids and Cocaine*, NEWSWEEK, Mar. 17, 1986, at 58.

77. Larry Martz, *A Dirty Drug Secret: Hyping Instant Addiction Doesn't Help*, NEWSWEEK, Feb. 19, 1990, at 74. Conflicting reports also appeared about the addictive properties of crack, relative to powder cocaine. Compare Jeffrey Fagin & Ko-Lin Chen, *Initiation into Crack and Cocaine: A Tale of Two Epidemics*, 16 CONTEMP. DRUG PROBLEMS 579 (1989), with Pamela S. Zurer, *Scientists Struggling to Understand and Treat Cocaine Dependency*, CHEMICAL & ENGINEERING NEWS, Nov. 21, 1988, at 9 (“People often snorted cocaine for a year or two before they got in trouble with it, whereas people smoking crack can get into trouble within a matter of a few weeks or months.” (quoting a researcher)).

78. *E.g.*, Fagin & Chin, *supra* note 77, at 605–06.

79. See 2007 USSC COCAINE REPORT, *supra* note 22, at 12 & fig.2-1 (charting the number of federal “crack” prosecutions between 1992 and 2006).

80. *E.g.*, Dennis Cauchon, *Balanced Justice?*, USA TODAY, May 26, 1993, at 1A (ex-

was impossible to justify the 100:1 powder-crack disparity that had been codified back in 1986, or the lengthy prison sentences that individuals convicted of selling small amounts of crack were receiving in federal court.

Even so, the predicament of defendants convicted of trafficking in crack might not have attracted significant attention, but for the fact that most of these individuals were African-American, whereas most defendants charged with crimes involving powder cocaine were Caucasian or Latino.⁸¹ This disparity raised concerns⁸² that the 100:1 ratio was “discriminatory in operation” and merited reconsideration on this basis.⁸³ The Commission summarized sentiments on this score in a report it produced a few years after the backlash to the 100:1 ratio first emerged:

When one form of a drug can be rather easily converted to another form of the same drug and when that second form is punished at a quantity ratio 100 times greater than the original form, it would appear reasonable to require the existence of sufficient policy bases to support such a sentencing scheme regardless of racial impact. Moreover, when such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population, it is particularly important that sufficient policy bases exist in support of the enhanced ratio.⁸⁴

aming disparities in sentences for crimes involving crack cocaine and crimes involving powder cocaine); Jim Newton, *Crack Cocaine Laws Unfairly Penalize Blacks, Critics Say*, OMAHA WORLD-HERALD, Dec. 4, 1992, at 10 (examining the difference between the punishments for crimes involving powder cocaine and the punishments for crimes involving crack cocaine).

81. See, e.g., Val Ellicott, *Crack Crackdown Singles out Blacks, Lawyers Say*, PALM BEACH POST (Fla.), May 10, 1992, at 1A (“[The federal 100:1 ratio] didn’t attract widespread critical attention until about a year ago, when defense attorneys noticed that almost all their crack clients had something in common: They were black.”); Newton, *supra* note 80, at 10 (observing that concerns about the 100:1 ratio “are shared by a growing chorus of legal scholars and defense lawyers”); see also Sklansky, *supra* note 7, at 1289 (discussing the racial dimensions of the powder cocaine-crack divide).

82. See, e.g., *Cocaine Sentences Discriminate Against Blacks, Activists Say*, S.F. CHRON., Aug. 26, 1993, at A2 (discussing the objections raised by some civil-rights activists to mandatory minimum sentences for crack offenses); Sonya Ross, *Activists Say U.S. Drug Law on Sentencing Targets Blacks*, WIS. ST. J. (Madison), Aug. 26, 1993, at 3A (same).

83. Op-Ed., *Same Drug, Different Penalties*, WASH. POST, Aug. 4, 1993, at A16; see Cauchon, *supra* note 80, at 1A (“Any law that distinguishes between crack cocaine and powder cocaine is designed to discriminate.” (quoting Rev. Joseph E. Lowery, President of the Southern Christian Leadership Conference)); Rankin, *supra* note 56, at 1 (quoting the Rev. Joseph E. Lowery, President of the Southern Christian Leadership Conference, as attacking the powder-crack ratio).

84. 1995 USSC COCAINE REPORT, *supra* note 22, at xii.

Defense attorneys also perceived invidious discrimination in the different sentencing rules applicable to powder and crack cocaine, with their arguments commonly being couched in Equal Protection terms.⁸⁵ These views gained traction with a few courts, but just a few.⁸⁶ In *State v. Russell*, decided in 1991, the Minnesota Supreme Court held that the state's 10:3 powder-to-crack ratio failed for want of a rational basis behind the distinction.⁸⁷ In so holding, the *Russell* court evinced a skepticism toward heightened penalties for crack that would have been unheard of just a few years earlier.⁸⁸ In a footnote, the majority opinion in *Russell* also commented on the significance of how the different penalties for crimes involving powder cocaine on the one hand, and crack cocaine on the other, tended to apply to distinct cohorts of defendants: "While we are ordinarily loathe to intrude or even inquire into the legislative process on matters of criminal punishment, the correlation between race and the use of cocaine base or powder and the gross disparity in resulting punishment cries out for closer scrutiny of the challenged laws."⁸⁹ The two concurring opinions in *Russell* likewise stressed that virtually all of the defendants being sentenced for crack offenses in Minnesota were African-American.⁹⁰

While it drew attention to the possibility that powder-crack sentencing discrepancies might not rest on compelling evidence,⁹¹

85. See Harriet Chiang, *Drug Lawyers Say Anti-Crack Law Is Anti-Black*, S.F. CHRON., Sept. 15, 1988, at A7 (reporting a courthouse challenge to California state laws that assigned a higher maximum sentence to defendants convicted of selling crack cocaine than that applicable to defendants convicted of selling powder cocaine).

86. In the rare instances in which federal district courts granted downward departures from the applicable Guidelines range due to concerns about the disparate impact of the sentencing laws applicable to crack cocaine, they were reversed on appeal. *E.g.*, *United States v. Alton*, 60 F.3d 1065, 1071 (3d Cir. 1995); *United States v. Maxwell*, 25 F.3d 1389, 1400-01 (8th Cir. 1994), *remanded*, 90 F.3d 302 (8th Cir. 1996). Other judges expressed sympathy for defendants' attacks on the federal sentencing laws, even as they applied them. For example, one federal judge described a sentence he was about to impose as "one of the unfairer" he had ever given, but felt obliged to adhere to the "awful" mandatory minimum term that governed the case. Cauchon, *supra* note 80, at 1A (describing this colloquy).

87. 477 N.W.2d 886, 888, 891 (Minn. 1991).

88. *Id.* at 889-91.

89. *Id.* at 888 n.2.

90. *Id.* at 892 (Yetka, J. concurring); *id.* at 893-95 (Simonett, J., concurring).

91. See Robb London, *Judge's Overruling of Crack Law Brings Turmoil*, N.Y. TIMES, Jan. 11, 1991, at B5 (discussing a dearth of scientific studies supporting the notion that crack is more powerful or addictive than powder cocaine).

the *Russell* decision was, and remains, an outlier.⁹² The vast majority of courts have declined defendants' invitations to strike down stiff mandatory minimum sentences applied to crimes involving relatively small amounts of crack.⁹³ This result has held regardless of the line of attack pursued by a given defendant. Courts typically dispose of the most common challenge, sounding in Equal Protection, by first concluding that the powder-crack distinction implicates neither a suspect classification nor a fundamental right; and then finding that the legislature had before it (or might have recognized) adequate grounds to distinguish between crack and powder cocaine.⁹⁴ That the arguments in favor of this distinction might not be quite as persuasive as originally estimated, courts have determined, did not mean that legislators lacked a rational basis for treating crack as a greater threat, and thus worthy of greater sanctions, than powder cocaine.

By 1993, it was evident that any change in the 100:1 federal powder-to-crack ratio⁹⁵ would have to come from Congress. Around this time, there was some sign of movement at the federal level: Attorney General Janet Reno expressed concern about the discrepancy,⁹⁶ a member of the Commission said that he found the disparity "troubling,"⁹⁷ and in November 1993, the Commission held a hearing that probed the rationales for the heightened punishments attached to crack crimes.⁹⁸ Yet there existed little enthusiasm among most members of Congress to revisit penalties so

92. The *Russell* decision generated significant criticism at the time. *See, e.g.*, George Will, *Crack vs. Powder Ruling Cracked*, SEATTLE POST-INTELLIGENCER, Dec. 22, 1991, at F2 (criticizing the *Russell* decision).

93. *See generally* THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE 458 & n.227 (2009) (listing decisions rejecting challenges to the powder-crack ratio).

94. *E.g.*, *United States v. Harding*, 971 F.2d 410, 413–14 (9th Cir. 1992); *United States v. Lawrence*, 951 F.2d 751, 755 (7th Cir. 1991); *United States v. House*, 939 F.2d 659, 664 (8th Cir. 1991); *United States v. Avant*, 907 F.2d 623, 626–27 (6th Cir. 1990); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989); *United States v. Solomon*, 848 F.2d 156, 157 (11th Cir. 1988).

95. Other jurisdictions faced similar decisions. In 1993, Wisconsin addressed the disparate treatment of powder cocaine and crack under state law by simultaneously decreasing the penalties attached to crimes involving crack and increasing the penalties affixed to trafficking in powder cocaine. 1993 Wis. Sess. Laws 640, 653–55; *see also* David Doege, *New Law Eases Penalties for State's Crack Dealers*, MILWAUKEE SENTINEL, Dec. 25, 1993, at A1 (discussing the reasons for the revision).

96. Cauchon, *supra* note 80.

97. *Id.* (quoting Commissioner David Mazzone).

98. U.S. SENTENCING COMM'N, HEARING ON CRACK COCAINE 9 (Nov. 9, 1993).

recently enacted into law. Congressman Rangel's bill ultimately died in committee, as did other, similar proposals.⁹⁹ The Commission issued an amendment to the Guidelines in 1995 that would have eliminated the categorically disparate treatment of powder and crack; however, Congress rejected the suggestion by a convincing margin (the vote in the House of Representatives was 332–83).¹⁰⁰ When President Clinton signed the measure disapproving the amendment, he observed, "We have to send a constant message to our children that drugs are illegal, drugs are dangerous, drugs may cost you your life—and the penalties for dealing drugs are severe."¹⁰¹ Clinton added that he was "not going to let anyone who peddles drugs get the idea that the cost of doing business is going down."¹⁰²

Perhaps it was too soon to reduce the penalties attached to crack. Yet there existed another route toward shrinking the 100:1 ratio: *increasing* the penalties attached to powder cocaine, while leaving those attached to crack untouched. Some members of Congress who disagreed with the 100:1 ratio supported this approach.¹⁰³ Proposals to this effect failed to gain traction, however, because by the late 1990s Congress had turned its legislative energies to a different drug: methamphetamine.¹⁰⁴

99. See H.R. 697, 107th Cong. (2001).

100. See Spade, *supra* note 7, at 1275; 1995 CONG. Q. ALMANAC H-208 to H-209.

101. 145 CONG. REC. 887 (1999) (statement of William J. Clinton, President of the United States).

102. *Id.*

103. 141 CONG. REC. 27,203 (1995) (remarks of Sen. Abraham) (agreeing that the differential may not represent the "best policy," but arguing that the best remedy would be to decrease the amounts of powder cocaine required to implicate the mandatory minimums); see also H.R. REP. NO. 104-272, at 4 (1995), reprinted in 1995 U.S.C.C.A.N. 335, 337 ("While the evidence clearly indicates that there are significant distinctions between crack and powder cocaine that warrant maintaining longer sentences for crack-related offenses, it should be noted that the current 100-to-1 quantity ratio may not be the appropriate ratio."); Rankin, *supra* note 56 ("It's no coincidence we tried to put a harsher sentence on crack. It's important to remember that an awful lot of the victims of crack cocaine are in the black community We may just need to increase the other sentences." (quoting Sen. Nunn)). For examples of bills that would have adopted this approach, see Powder Cocaine Sentencing Act of 1999, S. 146, 106th Cong. (1999) (increasing penalties for powder cocaine); Get Tough on Cocaine Act of 1997, H.R. 2229, 105th Cong. (1997) (same); S. 1398, 104th Cong. (1995) (increasing the penalties for trafficking powder cocaine).

104. See, e.g., Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 867 (2010); Note, *Cooking up Solutions to a Cooked up Menace: Responses to Methamphetamine in a Federal System*, 119 HARV. L. REV. 2508, 2509–12 (2006).

Fears of a methamphetamine “epidemic” waxed as concerns about a crack cocaine “epidemic” waned. A 1998 report prepared by the House of Representatives Judiciary Committee warned, “Methamphetamine is no longer a problem confined to California and the Southwest, but has spread east, devastating some communities much like cocaine did in the 1980s.”¹⁰⁵ In the years that followed, Congress issued several more reports announcing a methamphetamine “epidemic.”¹⁰⁶ One intoned, “Of the many drug threats facing our Nation, few can compare in their growth or destructiveness to methamphetamine abuse.”¹⁰⁷ Another advised that methamphetamine “is among the most powerful and dangerous drugs available”¹⁰⁸ and “[t]he methamphetamine problem has grown at a dramatic rate, and is now considered the most significant drug abuse problem in the country.”¹⁰⁹ Instead of fretting about “crack babies” and the violent crime linked to crack distribution and abuse, these reports dwelled on the environmental hazards created by methamphetamine labs and the neglect of children trapped in households afflicted by methamphetamine use.¹¹⁰ As some members of the media observed, by the mid-2000s the concerns voiced about methamphetamine echoed the fears regarding crack that had been expressed back in the 1980s.¹¹¹

105. REP. MCCOLLUM, SPEED TRAFFICKING LIFE IN PRISON ACT OF 1998, H.R. REP. NO. 105-711, pt. 1, at 2 (1998).

106. REP. DAVIS, THE METHAMPHETAMINE EPIDEMIC: INTERNATIONAL ROOTS OF THE PROBLEM, AND RECOMMENDED SOLUTIONS, H.R. REP. NO. 109-352 (2005) (“The Methamphetamine Epidemic: International Roots of the Problem, and Recommended Solutions”); REP. SENSENBRENNER, METHAMPHETAMINE EPIDEMIC ELIMINATION ACT, H.R. REP. NO. 109-299, pt. 1 (2005) (“Methamphetamine Epidemic Elimination Act”); REP. MCCOLLUM, METHAMPHETAMINE AND CLUB DRUG ANTI-PROLIFERATION ACT OF 2000, H.R. REP. NO. 106-878, at 22 (2000) (“The methamphetamine epidemic in America differs in kind from the threat of other illegal drugs because methamphetamine can be made from readily available and legal chemicals and substances, and because it poses serious dangers to both human life and to the environment.”).

107. H.R. REP. NO. 109-352, at 1.

108. H.R. REP. NO. 109-299, pt. 1, at 10.

109. *Id.* at 13.

110. H.R. REP. NO. 109-352, at 2–3; H.R. REP. NO. 109-299, pt.1, at 17–20.

111. *E.g.*, John Tierney, *Debunking the Drug War*, N.Y. TIMES, Aug. 9, 2005, at A19; Jack Shafer, *Crack Then. Meth Now*, SLATE (August 23, 2005, 6:18 p.m.), <http://www.slate.com/id/2124885>. By 2000, Congress had already adopted low quantity thresholds for methamphetamine mandatory minimums. *See infra* text accompanying notes 122–26. Accordingly, Congress took a different anti-methamphetamine tack in the 2000s. *See Ahrens, supra* note 104, at 843 (relating that Congress’s recent anti-methamphetamine initiatives “have either restricted the ability of potential methamphetamine manufacturers to access the materials used to generate methamphetamine or sought to contain the effects of methamphetamine use and production on innocent bystanders who might be exposed to envi-

With these heightened concerns came heightened penalties. Methamphetamine was once sufficiently obscure that Congress did not include it among the drugs to which the Anti-Drug Abuse Act of 1986 assigned mandatory minimum prison terms.¹¹² As promulgated one year later, the original Guidelines treated one gram of methamphetamine as the equivalent of two grams of powder cocaine for sentencing purposes, effectively creating a 2:1 powder-to-methamphetamine ratio.¹¹³ Only in 1988 did Congress prescribe a mandatory minimum term for trafficking crimes involving methamphetamine.¹¹⁴ So little attention was paid to this provision that it contained a significant typographical error; as corrected in 1990, the law prescribed a five-year minimum term for crimes involving ten grams or more of methamphetamine (sometimes referred to as “methamphetamine-actual”) or one hundred grams or more of a mixture containing a detectable amount of methamphetamine, and a ten-year minimum term for crimes involving one hundred grams or more of methamphetamine or one kilogram or more of a mixture containing a detectable amount of methamphetamine.¹¹⁵ Shortly thereafter, in response to another act of Congress,¹¹⁶ the Commission revised the Guidelines to create a new category of methamphetamine—“ice,” defined as “a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.”¹¹⁷ For sentencing

ronmental toxins and laboratory explosions”).

112. Pub. L. No. 99-570, 100 Stat. 3207, 3207-2 to 3207-3. The Anti-Drug Abuse Act only prescribed mandatory minimums for heroin, cocaine and cocaine base, phencyclidine (PCP), lysergic acid diethylamide (LSD), fentanyl, and marijuana. *Id.* For a review of modern federal sentencing law as it relates to methamphetamine, see generally U.S. SENTENCING COMM’N, METHAMPHETAMINE FINAL REPORT (1999) [hereinafter METHAMPHETAMINE REPORT].

113. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. 10 (1987).

114. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(g)(3), 102 Stat. 4181, 4378 (codified as amended at 21 U.S.C. § 841(b)(1)(A) (2006)). The 1988 legislation prescribed that the ten-year mandatory minimum would apply to crimes involving either one hundred grams of methamphetamine or one hundred grams of a substance containing a detectable amount of methamphetamine. *Id.*

115. Crime Control Act of 1990, Pub. L. No. 101-647, § 1202, 104 Stat. 4789, 4830 (codified at 21 U.S.C. § 841(b)(1)(A) (2006)). In passing the 1990 law, Congress expressly acknowledged that it was fixing a mistake (the title of the section making the amendment was “Correction Of An Error Relating to the Quantity of Methamphetamine Necessary to Trigger a Mandatory Minimum Penalty”). *Id.* § 1202, 104 Stat. at 4830.

116. *Id.* § 2701, 104 Stat. at 4912.

117. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 370 (1991); U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(e) note C (2010).

purposes, “ice” would be (and is) treated as the equivalent of “actual” or pure methamphetamine, notwithstanding its impurity.¹¹⁸

In any event, Congress would go still further. The Methamphetamine Trafficking Penalty Enhancement Act of 1998¹¹⁹ applied the five-year mandatory minimum to trafficking crimes involving five grams or more of methamphetamine or fifty grams or more of a mixture containing a detectable amount of methamphetamine,¹²⁰ and the ten-year mandatory minimum to crimes involving at least fifty grams of methamphetamine or five hundred grams of a mixture containing a detectable amount of methamphetamine.¹²¹ This statute thus created the current 100:1 disparity between the amount of powder cocaine that will implicate the five- and ten-year mandatory minimum sentences and the amount of actual methamphetamine or “ice” that will produce these results.¹²² With the notable exception of methamphetamine

118. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2010).

119. Pub. L. No. 105-277, 112 Stat. 2681, 2681-759 (codified as amended at 21 U.S.C. § 841 (2006)). Also, Congress passed the Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, 110 Stat. 3099. In pertinent part, this Act directed the Commission to “review and amend its guidelines and its policy statements to provide for increased penalties for unlawful manufacturing, importing, exporting, and trafficking of methamphetamine, and other similar offenses.” *Id.* § 301(a), 110 Stat. at 3105. Just to make certain that the Commission would get the hint, Congress added that the Commission needed to

ensure that the sentencing guidelines and policy statements for offenders convicted of [these offenses] reflect the heinous nature of such offenses, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity involving methamphetamine, including—(1) the rapidly growing incidence of methamphetamine abuse and the threat to public safety such abuse poses; (2) the high risk of methamphetamine addiction; (3) the increased risk of violence associated with methamphetamine trafficking and abuse; and (4) the recent increase in the illegal importation of methamphetamine and precursor chemicals.

Id. § 301(b), 110 Stat. at 3105.

120. Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. No. 105-277, § 2, 112 Stat. 2681, 2681-759.

121. *Id.*

122. 21 U.S.C. § 841(b)(1)(A)(ii), (viii) (2006) (relating the relevant ten-year mandatory minimum provisions for manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute, or dispense these controlled substances); *id.* § 841(b)(1)(B)(ii)–(viii) (relating the relevant five-year mandatory minimum provisions for these offenses); *id.* § 960(b)(1)(B), (H) (relating the relevant ten-year mandatory minimum provisions for importing these controlled substances); *id.* § 960(b)(2)(B), (H) (relating the relevant five-year mandatory minimum provisions for importing these controlled substances). Congress may go still further. In 2005, legislation was proposed that would have decreased to five grams the amount of methamphetamine that would implicate the ten-year mandatory minimum, and to three grams the amount of methamphetamine that would implicate the five-year mandatory minimum. Methamphetamine Epidemic Elimination

that qualifies as “ice,” in practice the quantity ratio is not quite as severe as the 100:1 figure might suggest, since impurities are adjusted for in considering the amount of “actual” methamphetamine for which a defendant will be held responsible at sentencing (whereas impurities in a given quantity of powder or crack cocaine are not similarly discounted).¹²³ For example, it takes ten grams of 50% pure methamphetamine to implicate the five-year mandatory minimum term. Even as adjusted, the quantity thresholds fixed by statute ensure stiff penalties for trafficking crimes involving small quantities of methamphetamine. Furthermore, just as they had done with crack and powder cocaine, the Commission used the statutory mandatory-minimum thresholds for methamphetamine as benchmarks for the sentence ranges that adhere to trafficking crimes involving greater or lesser quantities of the drug.¹²⁴ This slow accretion of methamphetamine penalties

Act, H.R. 3889, 109th Cong. § 301 (2005). However, these adjustments ultimately were stripped from the bill. See Michael B. Cassidy, *Examining Crack Cocaine Sentencing in a Post-Kimbrough World*, 42 AKRON L. REV. 105, 134 (2009). Another contemporary measure would have reduced the amounts of a mixture containing a detectable amount of methamphetamine that would implicate the mandatory minimums to fifty and five grams, respectively. Stop Crystal Meth Act of 2004, S. 2444, 108th Cong. (2004). In support of the latter proposal, Senator Charles Schumer stated,

Twenty years ago, crack was headed east across the United States like a Mack Truck out of control, and it slammed New York hard because we just didn't see the warning signs. Well, the headlights are glaring bright off in the distance again, this time with meth. We are still paying the price of missing the warning signs back then, and if we don't remember our history we will be doomed to repeat it, because crystal meth could become the new crack.

Press Release, Senator Charles Schumer, New Stats Show Crystal Meth Quickly Becoming the New Crack—Seizures in New York up 31% Over Last Year (April 25, 2004), http://schumer.senate.gov/new_website/record_print.cfm?id=265406.

123. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) note B (2010). Presently, the “average” batch of methamphetamine seized by federal agents is much less than 100% pure, meaning that more than five grams of the substance is needed to trigger a five-year minimum term. See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.42 (2009) [hereinafter 2009 SOURCEBOOK] (reflecting that the mean and median quantities of methamphetamine associated with the 345 methamphetamine defendants sentenced to Base Offense Level 26 in fiscal year 2009 was 11.0 and 10.5 grams, respectively). However, the average purity of methamphetamine tested by the government has sharply increased over the last five years. Michael G. Vrakatitsis, Strategic Intelligence Section, Drug Enforcement Administration, Methamphetamine in 2010, <http://www.methpedia.org/download/nrlemi/NRLEM-MarkKrawczyk.pdf> (last visited Mar. 2, 2011) [hereinafter Methamphetamine in 2010] (reporting that, while the average price per gram of methamphetamine decreased 58.5% from 2007 to 2009, the average purity increased 88.2%).

124. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2010). This enhancement of the powder-to-methamphetamine ratio went hand-in-hand with a significant uptick in federal prosecutions for crimes involving methamphetamine. Between fiscal year 1996 and fiscal year 2000, the number of defendants sentenced under the mandatory minimum pro-

means that the 100:1 ratio has not disappeared so much as it has shifted, in sync with changing views regarding the nation's "most dangerous" drug.

The new millennium brought yet another threat to the powder-crack ratio, in the form of a series of decisions by the Supreme Court of the United States holding: (1) that the Sixth Amendment requires jury determinations as to all facts that increase the maximum prison term applicable to an offense;¹²⁵ (2) that this constitutional rule means that the Guidelines must be understood as advisory, rather than mandatory, insofar as they do not reflect statutory sentencing directives;¹²⁶ (3) that the provisions of the Guidelines that adopt and apply the 100:1 powder-crack ratio are likewise advisory, to the extent that they extrapolate beyond the five- and ten-year mandatory minimum terms assigned by Congress;¹²⁷ and (4) that sentencing judges could reasonably voice a categorical disagreement with the 100:1 powder-crack ratio, such that they could sentence *all* defendants in crack cases to terms well below the relevant Guidelines range (provided they still imposed any applicable mandatory minimum term).¹²⁸ Some federal district court judges responded to these decisions by adopting a powder-crack ratio of 20:1¹²⁹ or even 1:1¹³⁰ as a general rule in

visions applicable to methamphetamine increased 226%, from 1185 to 2680. *Compare* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.38 (1996) [hereinafter 1996 SOURCEBOOK], *with* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.32 (2000) [hereinafter 2000 SOURCEBOOK]. By comparison, over the same span the number of defendants sentenced under the mandatory minimums applicable to crack cocaine increased only 10%, from 3677 to 4045. *Compare* 2000 SOURCEBOOK, *supra*, tbl.32, *with* 1996 SOURCEBOOK, *supra*, tbl.38.

125. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

126. *United States v. Booker*, 543 U.S. 220, 245 (2005).

127. *Kimbrough v. United States*, 552 U.S. 85, 110 (2007).

128. *Spears v. United States*, 555 U.S. 261, ___, 129 S. Ct. 840, 843–44 (2009) (per curiam) (“[W]e now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.”).

129. *E.g.*, *United States v. Edwards*, 693 F. Supp. 2d 575, 584 (S.D. W. Va. 2010); *United States v. Dozier*, No. S2-08-CR-008, 2009 WL 2870079, at *5–6 (S.D.N.Y. Sept. 3, 2009); *United States v. Rodriguez*, No. 08-CR-509, 2009 WL 1811001, at *2 (N.D. Ill. June 23, 2009); *United States v. Perry*, 389 F. Supp. 2d 278, 307–08 (D.R.I. 2005); *United States v. Smith*, 359 F. Supp. 2d 771, 782 (E.D. Wis. 2005).

130. *E.g.*, *United States v. Whigham*, No. 06-CR-10328, 2010 WL 4959882, at *5–6 (D. Mass. Dec. 3, 2010); *United States v. Canada*, No. 09-CR-30188, 2010 WL 3023503, at *7–8 (S.D. Ill. July 30, 2010); *United States v. Greer*, 699 F. Supp. 2d 876, 879–80 (E.D. Tex. 2010); *Henderson v. United States*, 660 F. Supp. 2d 751, 752, 754–55 (E.D. La. 2009); *United States v. Medina*, No. 08-CR-256, 2009 WL 2948325, at *1 (S.D. Cal. Sept. 11, 2009); *United States v. Gully*, 619 F. Supp. 2d 633, 644, 646 (N.D. Iowa 2009); *United States v. Lewis*, 623 F. Supp. 2d 42, 45 (D.D.C. 2009); *United States v. Owens*, No. 08-48

crack trafficking cases (thereby reducing the sentences imposed on many defendants convicted of crimes involving crack), while others continued to adhere to the sentencing ranges prescribed by the Guidelines.¹³¹ These variations meant that the sentence a crack defendant would receive, when prosecuted in federal court, often depended on the judge who had been randomly assigned the defendant's case, and the particular powder-crack ratio the judge chose to adopt. This additional layer of arbitrariness, atop an already seemingly arbitrary statutory distinction between powder and crack cocaine, was difficult for some observers to swallow.¹³²

IV. THE FAIR SENTENCING ACT OF 2010

Such were the circumstances when Congress took up the legislation that would become the Fair Sentencing Act. To recap, (1) the 100:1 disparity had emerged from a peculiar rush to enact anti-drug abuse legislation more than two decades earlier, and was premised on little more than an inchoate sense that crack was a particularly dangerous substance; (2) by 2010, early assumptions regarding the perils posed by crack had been called into question;¹³³ (3) crack use seemed to be in decline, with methamphetamine usurping its throne as the nation's "problem drug"; (4) African-Americans continued to represent the lion's share of defendants prosecuted for crimes involving crack, as compared to the mostly Caucasian and Latino defendants charged with federal crimes involving powder cocaine;¹³⁴ (5) more than a decade's worth

Erie, 2009 WL 2485842, at *2-3 (W.D. Pa. Aug. 12, 2009); *United States v. Russell*, No. 06-72 Erie, 2009 WL 2485734, at *3-4 (W.D. Pa. Aug. 12, 2009); *United States v. Carter*, 2009 WL 2578958, at *2 (W.D. Va. Aug. 18, 2009); *United States v. Luck*, No. 04-CR-047, 2009 WL 2462192, at *2 (W.D. Va. Aug. 10, 2009).

131. See, e.g., *United States v. Brewer*, 624 F.3d 900, 909 (8th Cir. 2010) (affirming a sentence where the sentencing court applied the Guidelines as written).

132. See, e.g., *id.* at 910 (Bright, J., concurring in part and dissenting in part) (commenting on this point).

133. See Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us that It Is Time to Restore the Balance*, 16 FED. SENT'G REP. 87, 87, 89 (2003) ("[T]he situation of crack and crack markets has changed considerably [since 1986]. The demand for crack by new users has declined appreciably, the activity in street markets has correspondingly declined since the older, addicted users can be served privately, and the level of violence associated with crack has diminished."). By 2009, crack cocaine was no longer being described as a distinct drug or substance but as "a method of packaging powder cocaine." REP. CONYERS, FAIRNESS IN COCAINE SENTENCING ACT OF 2009, H.R. REP. NO. 111-670, pt. 1, at 2 (2009).

134. See, e.g., 2009 SOURCEBOOK, *supra* note 123, tbl.34 (identifying 79% of defendants sentenced for crimes involving crack cocaine as black, while identifying 53.2% of defen-

of initiatives (coming from both sides of the legislative aisle) perceived the power-crack disparity as a problem to be fixed, though the preferred approach varied; and (6) judges had recently gained, and begun to exercise, the authority to reject the 100:1 ratio in a variety of circumstances. Congress also signaled a newly flexible attitude toward the powder-crack disparity by declining to disapprove of a Guidelines amendment, promulgated in 2007, that modestly reduced the Guidelines ranges that would apply to defendants convicted of trafficking in crack.¹³⁵

While none of these facts, taken individually or collectively, mandated revision of the 100:1 ratio, they offered a compelling argument for reconsideration of the penalties attached to crimes involving crack cocaine. What remained was for Congress to agree on the appropriate terms of reform and the explanation that would accompany the action.

Of these, the latter was more easily developed: it was agreed that the erroneous 100:1 powder-crack ratio resulted from the flawed information about the perils of crack that Congress had received back in 1986, together with the unusually pressing need to pass drug legislation that year that prevented a more probing review of the claims that were being made about the alleged crack “epidemic.”¹³⁶ In hearings on the powder-crack disparity held in 2002,¹³⁷ then-Senator Joseph Biden said that in 1986, “[m]ore

dants sentenced for crimes involving powder cocaine over that span as Hispanic).

135. Previously, the base offense levels for defendants with no criminal history were set such that a defendant involved with the minimum amount of crack necessary to implicate a mandatory minimum sentence was subject to a sentencing range with a “floor” set just above the mandatory minimum. See 2007 USSC SENTENCING REPORT, *supra* note 22, at 3 & n.11. The amendment, effective November 1, 2007, reduced the base offense levels for defendants involved with crack by two, such that, inter alia, defendants possessing precisely the amount of crack necessary to implicate the mandatory minimum were subject to sentencing ranges with *ceilings* set just above the mandatory minimums. U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1, 5A (2007). The net result was to reduce the powder-crack weight ratio, as related throughout the Guidelines, to between 25:1 and 80:1, depending on the amounts involved. *Id.* at 228 supp. to app. For a discussion of this change, see HUTCHISON ET AL., *supra* note 93, at 453, and also see Kimbrough v. United States, 552 U.S. 85, 106 (describing the amendment).

136. As early as 1995, congressmen who sought reform of the powder-crack disparity pitched their proposals as efforts to fix an “inadvertent” anomaly in the nation’s drug laws. *E.g.*, 132 CONG. REC. S14,780 (daily ed. Sept. 29, 1995) (statement of Sen. Kennedy) (observing that in the rush to pass anti-drug legislation, Congress may have “inadvertently” created an injustice with the powder-crack disparity).

137. *Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the Comm. on the Judiciary*, 107th Cong. 2–3 (2002) [hereinafter *Federal Cocaine Sentencing Hearings*].

than a dozen bills were introduced to increase the penalties for crack. But because we knew so little about it, the proposals were all over the map.”¹³⁸ Biden added, “[T]he fact of the matter was that our intentions were good. But in the rush to legislation, we may not have gotten it right.”¹³⁹ Senator Jeff Sessions chimed in, “I think that the trigger points that we had 16 years ago may have made sense at the time. But based on our experience, they do not make sense today, and they are not rational, such that we can defend them.”¹⁴⁰ A few years later, it was suggested by one member of the House of Representatives that Congress would have been regarded as racist had it *not* treated crack as far worse than powder cocaine back in 1986, for to have regarded the drugs as comparable at that time would have suggested an indifference to a phenomenon that was disproportionately affecting inner-city neighborhoods.¹⁴¹

The precise terms of the legislation that would address the discrepancy were somewhat more difficult to devise. Eventually, however, it was agreed that (1) the threshold quantity of crack necessary to implicate the five-year mandatory minimum would be increased to twenty-eight grams, or approximately one ounce (effectively creating an 18:1 powder-to-crack ratio);¹⁴² (2) a similar upward adjustment would be made to the quantity of crack necessary for a defendant to receive a ten-year minimum term;¹⁴³ (3) the five-year mandatory minimum sentence applicable to mere

138. *Id.* at 2 (statement of Sen. Biden).

139. *Id.* at 3.

140. *Id.* at 9 (statement of Sen. Sessions). Eight years later, advocates of the Fair Sentencing Act took care not to portray the disparity as racially motivated. During a floor debate, Representative Scott, a longtime advocate for a 1:1 ratio at the levels set for powder cocaine, explained, “We are not blaming anybody for what happened in 1986.” 156 CONG. REC. H6202 (daily ed. July 28, 2010) (remarks of Rep. Scott). Instead, he said, “[W]e have had years of experience and have determined that there is no justification for the 100-to-1 ratio.” *Id.* Representative Paul observed that the law “was designed to help people, especially the minorities that were using crack cocaine, and they thought this was terrible, and it turned out that its law backfired. It actually hurt minorities, didn’t [sic] help them.” *Id.* at H6203 (remarks of Rep. Paul).

141. *Cracked Justice Hearing*, *supra* note 66, at 3 (statement of Rep. Gohmert) (“[O]ne of the Members who was on the Committee back during debate of this matter 20 years ago recalled that some Members of Congress were individually challenged that failure to pass the bill with the tougher sentences for crack would potentially be racist for not caring enough about African American communities to make the penalty for spreading such poison in their midst far tougher than powder cocaine.”).

142. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (to be codified at 21 U.S.C. §§ 841(b)(1), 960(b)).

143. *Id.*

possession of crack would be abolished;¹⁴⁴ and (4) more severe penalties would apply to drug crimes involving violence, threats of violence, or other aggravating circumstances.¹⁴⁵ Retention of *some* disparity between crack and powder cocaine was essential to passage of the Act, because many members of Congress continued to believe (with some justification)¹⁴⁶ that given its customary methods of distribution and administration, crack was at least somewhat more powerful, more addictive, and more closely tied to violent crime than powder cocaine was.¹⁴⁷ To these Senators and Representatives, these differences supported some distinction between powder and crack cocaine—just not a 100:1 discrepancy.¹⁴⁸ By adopting an 18:1 ratio, instead of equalizing the penalties attached to crack and powder cocaine, the measure that would become the Fair Sentencing Act assuaged these concerns and facilitated its enactment into law.

V. CONSEQUENCES AND IMPLICATIONS

The differences between powder and crack cocaine seemed immense in 1986, when the mandatory-minimum quantities that produced the 100:1 powder-crack ratio were first adopted. At the time, prevailing wisdom held that crack was marketed differently than powder cocaine, used differently than powder cocaine, had different effects than powder cocaine, and produced more ancillary crime than powder cocaine. Powder cocaine was a known, if somewhat disreputable, quantity; crack was not. In this environment, the penalties associated with crack cocaine could be rat-

144. *Id.* § 3, 124 Stat. at 2372 (to be codified as amended at 21 U.S.C. § 844(a)). Significantly, in fiscal year 2009, only thirty-two persons were sentenced under the Guidelines for mere possession of crack. 2009 SOURCEBOOK, *supra* note 123, tbl.33.

145. § 6, 124 Stat. at 2373 (to be codified at 28 U.S.C. § 994 note).

146. The Commission's reports on cocaine sentencing policy consistently noted the existence of grounds for distinguishing between powder and crack cocaine. *E.g.*, 2007 USSC COCAINE REPORT, *supra* note 22, at 36 ("Violence continues to occur more often in crack cocaine cases than in powder cocaine cases."); *id.* at 62 ("[T]he risk of addiction and personal deterioration may be greater for crack cocaine than for powder cocaine because of their different methods of usual administration."); 1995 USSC COCAINE REPORT, *supra* note 22, at xiii ("[I]mportant distinctions [between powder and crack cocaine] may warrant higher penalties for crack than powder.").

147. *See* REP. CONYERS, FAIRNESS IN COCAINE SENTENCING ACT OF 2009, H. REP. NO. 111-670, pt. 1, at 15–19 (2009) (dissenting views).

148. *See* 156 CONG. REC. H6202 (daily ed. July 28, 2010) (remarks of Rep. Lungren) (reconciling his support of Senate Bill 1789 with his opposition to a proposal that would reduce the powder-crack ratio to 1:1).

ched upward without much accompanying notice to the punishment provisions affixed to crimes involving cocaine powder. As time passed and the so-called crack “epidemic” faded, the differences between powder and crack cocaine no longer seemed so great,¹⁴⁹ with one enormous exception: the vast majority of persons charged with and sentenced for crimes involving crack were African-American, while most individuals involved with crimes involving powder cocaine were Caucasian or Latino.¹⁵⁰ Accordingly, as soon as the anti-drug furor of the late 1980s and early 1990s dissipated, those who supported lessened penalties for crimes involving crack cocaine could logically point to the vastly higher quantity thresholds applicable to powder cocaine as the proper standard for all forms of the drug.

Other crimes, and punishments, lack similarly provocative foils. Drug trafficking crimes involving methamphetamine offer a case-in-point. Today, defendants charged with trafficking actual methamphetamine or methamphetamine in “ice” form are subject to a sentencing scheme that mirrors the provisions that formerly applied to crack.¹⁵¹ But the Fair Sentencing Act does not signal

149. *See, e.g.*, H. REP. NO. 111-670, at 12 (additional views of Rep. Maffei) (“Based upon the information available [in 1986], it was believed that crack and powder cocaine were different substances and that they did in fact have a different impact. We know now, however, that as far as substances are concerned, they are basically the same.”).

150. Although the racial disparity between prosecutions for crimes involving powder cocaine on the one hand and offenses implicating crack cocaine on the other likely catalyzed widespread recognition and condemnation of a powder cocaine-to-crack “ratio,” it would prove too much to attribute the Fair Sentencing Act to this factor alone. Back in 2002, Senator Jeff Sessions of Alabama said that reform of the powder-to-crack ratio was necessary in order to avert “contempt for the law.” Senator Sessions stated, “When there is an obvious and overwhelming disparity, regardless of the intention, no matter how well-intentioned it was, if that disparity exists, it breeds in whole communities the notion that the law is deliberately directed at them, that the law is deliberately directed at discriminating against them.” H.R. REP. NO. 111-670, at 10. If taken seriously, this principle demands a resurvey of large tracts of the criminal law, including but not limited to application of the death penalty. *Cf. McClesky v. Kemp*, 481 U.S. 279 (1987). No such reassessment is likely to occur anytime in the near future. Accordingly, the Fair Sentencing Act must be attributed at least in part to a reassessment of whether the best available knowledge regarding other differences between crack and powder cocaine, such as their relative addictiveness, health consequences, and association with violent crime, continued to justify the 100:1 ratio.

151. The cohort of federal defendants convicted of trafficking crack have, overall, tended to receive longer sentences than those imposed on defendants convicted of federal crimes involving methamphetamine. 2009 SOURCEBOOK, *supra* note 123, fig.J (indicating an average sentence length of 114.8 months and median sentence length of 96 months for defendants convicted of federal drug trafficking crimes involving crack cocaine in fiscal year 2009, as compared to an average sentence length of 96.5 months and a median sentence length of 72 months for defendants convicted of similar crimes involving metham-

that Congress is now willing to reconsider the penalties affixed to methamphetamine. The nation still considers itself in the midst of a methamphetamine epidemic, which makes legislative reduction of the punishments tied to the drug a political nonstarter. Also, unlike the penalties attached to crack, the punishments for methamphetamine crimes lack a backstory that accommodates and explains a good-faith error in penalty assignment. Instead, the sentencing provisions that apply to methamphetamine represent the product of several distinct decisions to impose severe punishment upon persons convicted of crimes involving the drug. Finally, and perhaps most importantly, methamphetamine cannot be juxtaposed against another substance that carries a lesser penalty quite as readily as crack cocaine can.¹⁵² Crack had powder cocaine, a different form of the same basic substance, and over time the lesser penalties attached to powder cocaine pulled the punishments affixed to crack downward. Methamphetamine seems to lack a comparable analog; crimes and punishments in-

phetamine during this period). Yet even before the Fair Sentencing Act came into effect, less actual methamphetamine (or, for that matter, “ice”) than crack was needed to trigger a given base offense level under the Guidelines. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2009). In other words, first-offender defendants convicted of trafficking a *given amount* of actual methamphetamine or “ice” have been subject to longer sentences than those applicable to defendants convicted of trafficking equivalent amounts of crack, at least if they cannot avail themselves of a “safety valve” for low-level offenders authorized by Congress back in 1994. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985 (codified at 18 U.S.C. § 3553(f) (2006)); 2009 SOURCEBOOK, *supra* note 123, tbl.42.; see also U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2010) (incorporating the safety valve into the Guidelines). Pursuant to the “safety valve,” a defendant will be sentenced according to the Guidelines, without reference to a statutory mandatory minimum, if certain prerequisites are satisfied that relate to both the offense and the offender. More methamphetamine defendants than crack defendants qualify for the safety valve. 2009 SOURCEBOOK, *supra* note 123, tbl.44. On the other hand, the Guidelines prescribe certain sentencing enhancements that apply specifically to methamphetamine, and not to any form of cocaine. *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(10)(B)–(D) (2010).

152. In its most recent report to Congress on cocaine sentencing policy, the Commission briefly commented on the penalties that adhered to methamphetamine, but did not dwell on them. 2007 USSC COCAINE REPORT, *supra* note 22, at 3–6. When, back in 2002, a witness before Congress testified about the strict penalties applicable to methamphetamine trafficking, Senator Biden quickly transformed the observation into an explanation why the powder-crack disparity lacked discriminatory intent. *Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the Comm. on the Judiciary*, 107th Cong. 45 (2002) (remarks of Sen. Biden) (“I think the point that Mr. Otis makes is worth making again. I guess the reason I am making it is, since I am the guy who drafted the law, I want to make it clear, which I hope everyone understands in any community, that it was not meant to be discriminatory.”).

volving this substance cannot be as readily connected to another offense or penalty, at least within the legislative imagination.

That said, the Fair Sentencing Act may support a more indirect route to reform: broader judicial recognition and scrutiny of a powder cocaine-to-methamphetamine ratio, as adopted throughout the Guidelines. In identifying the sentences attached to powder cocaine as a standard for determining the reasonableness of the penalties associated with crack, Congress implied that the powder cocaine provisions have some bearing on the propriety of the sentences that apply to other controlled substances. While powder and crack cocaine are today more readily juxtaposed than powder cocaine and methamphetamine are, it must be remembered that powder cocaine and crack were once regarded as being as different as diamonds and coal. The notion of a powder-to-crack ratio took time to develop, and it is altogether possible that, over time, an increased emphasis will be placed on the similarities between methamphetamine and powder cocaine, instead of their differences.

Recognition and review of a 100:1 powder cocaine-methamphetamine ratio, as embraced within the Guidelines, now lies within the proper scope of judicial authority. As discussed, the Guidelines are now advisory, except to the extent that they merely parrot sentences assigned by statute; judges may deviate from the Guidelines upon a principled, reasoned disagreement with a specific policy determination embedded therein.¹⁵³ In the specific context of federal drug laws, judges must impose statutory mandatory minimum sentences as appropriate, but otherwise they may consider whether rote application of the Guidelines would produce a term of incarceration that is “greater than necessary” to achieve the purposes of sentencing,¹⁵⁴ and impose a shorter sentence on that basis. It follows that judges have discretion to inquire more closely into whether the 100:1 powder cocaine-to-methamphetamine quantity disparity, as adopted throughout the Guidelines as a policy determination by the Commission, is “greater than necessary” to accomplish the aims of sentencing as to a specific defendant or defendants generally, as compared to a smaller ratio that would still recognize the ar-

153. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

154. 18 U.S.C. § 3553(a) (2006); *Kimbrough*, 552 U.S. at 101.

guably greater perils associated with methamphetamine relative to powder and crack cocaine.¹⁵⁵

Of course, courts could scrutinize and ultimately disagree with the Commission's policy decision to use the mandatory minimum quantity thresholds for methamphetamine as benchmarks for sentences for crimes involving other quantities of the drug, without reference to any powder cocaine-to-methamphetamine ratio. As with crack cocaine, however, framing the discussion in terms of a ratio, with the penalties tied to powder cocaine as a basis for comparison, helps fill in what is otherwise a missing element in the analysis: to wit, a standard for what the "proper" penalties for a drug trafficking offense should be, in light of the perils associated with the substance.

Were courts to undertake this review, they might well conclude that the 100:1 ratio is excessive, either categorically or as to a specific defendant. Powder cocaine and methamphetamine, both stimulants,¹⁵⁶ involve roughly similar dosages; indeed, the average dose of methamphetamine is heavier than the average dose of powder cocaine, which if anything points toward a *lower* powder cocaine-to-methamphetamine quantity ratio.¹⁵⁷ Furthermore,

155. Arguably, in directing the Commission to "provide for increased penalties for unlawful manufacturing, importing, exporting, and trafficking of methamphetamine" back in 1996, at a time when the Guidelines already incorporated quantity thresholds that produced a 50:1 powder cocaine-to-methamphetamine ratio, Congress made a legislative determination that constrains courts' authority to increase the quantities of methamphetamine needed to implicate a given base offense level under the Guidelines. Comprehensive Methamphetamine Control Act of 1996, § 301, Pub. L. No. 104-237, 110 Stat. 3099, 3105. One could interpret this provision as endorsing quantity thresholds for methamphetamine that are no higher than those found in the Guidelines at the time. On the other hand, the measure did not expressly adopt the Guidelines quantities (or lower figures), and could be construed as soliciting only specific enhancements that would increase the penalties for certain subsets of methamphetamine crimes (and thus permitting the categorical recognition of quantity ratios of 50:1 or less), or as permitting the more lenient treatment of small-scale offenders, provided that more substantial traffickers receive greater punishment. More fundamentally, a congressional directive to the Commission to adopt a Guideline is not treated as the equivalent of a statute that relates a sentence subsequently incorporated into a Guideline, *see* United States v. Corner, 598 F.3d 411, 414-16 (7th Cir. 2010) (en banc) (observing that a Guideline qua Guideline is not legally binding, even if Congress has directed the Commission to promulgate the Guideline), a principle that suggests that an implicit congressional endorsement of an existing Guideline will not elevate an otherwise advisory Guideline to mandatory status. Finally, even if the 1996 law means that courts cannot recognize a ratio of less than 50:1, nothing within the measure prevents recognition of ratios such as 75:1 or 60:1.

156. NAT'L INST. ON DRUG ABUSE, METHAMPHETAMINE ABUSE AND ADDICTION 4 (2006).

157. One source relates that, with methamphetamine, "[c]ommon abused doses are 100-1000 mg/day, and up to 5000 mg/day in chronic binge use whereas with cocaine,

while methamphetamine use is obviously inadvisable and destructive, evolving research suggests that use of the drug does not invariably lead to significant, immediate health problems, or an inability to function as a productive member of society.¹⁵⁸ Also, many years after the first cries of a methamphetamine “epidemic,” it is still the case that far fewer people report use of methamphetamine than admit abuse of powder cocaine.¹⁵⁹ In other words, if we are in the midst of a methamphetamine epidemic, it is a remarkably slow-spreading plague. Undeniable differences do exist between the two drugs and their respective effects.¹⁶⁰ These differences are significant, but then, powder and crack cocaine also differ in respects that bear upon the assignment of properly calibrated punishment.¹⁶¹ Furthermore, while methamphetamine prosecutions do not, as a whole, present the same disparate-impact concerns associated with the powder-crack disparity, a reasonable policy disagreement with the Guidelines can be premised on a variety of considerations, not merely matters sounding in race. It is at least possible that eventually, the similarities—or at least, the lack of tremendous differences—between powder cocaine and methamphetamine may prove sufficiently compelling

“[c]ommonly abused doses are 10-120 mg.” *Compare* Nat’l Highway Traffic Safety Admin., *Drug and Human Performance Fact Sheets: Methamphetamine (and Amphetamine)*, NHTSA.GOV, <http://www.nhtsa.gov/people/injury/research/job185drugs/methamphetamine.htm> (last visited Mar. 2, 2011), *with* Nat’l Highway Traffic Safety Admin., *Drug and Human Performance Fact Sheets: Cocaine*, NHTSA.GOV, <http://www.nhtsa.gov/people/injury/research/job185drugs/cocain.htm> (last visited Mar. 2, 2011).

158. *E.g.*, Richard A. Rawson, M. Douglas Anglin & Walter Ling, *Will the Methamphetamine Problem Go Away?*, 21 *J. ADDICTIVE DISEASES* 5, 8 (2001) (“These socially acceptable/promoted functions of methamphetamine are quite effective for extended periods of time. Unless users begin injecting the drug, it is possible for many individuals to take methamphetamine for a period of years before intolerable negative consequences of the drug begin to occur.”).

159. U.S. DEPT’ OF HEALTH AND HUMAN SERVS. ET AL., RESULTS FROM THE 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH: VOLUME I. SUMMARY OF NATIONAL FINDINGS 15 (2010) (reporting that an estimated 502,000 persons aged twelve or older used methamphetamine within a one-month span in 2009, as opposed to an estimated 1.6 million persons aged twelve or older who used cocaine during this period).

160. Some studies show that methamphetamine has a more prolonged stimulant effect than powder cocaine. *E.g.*, METHAMPHETAMINE ABUSE AND ADDICTION, *supra* note 156, at 4. Studies also show that methamphetamine has a more damaging (or at least different) effect on the mind and body than powder cocaine. *E.g.*, Sara L. Simon et al., *Cognitive Performance of Current Methamphetamine and Cocaine Abusers*, 21 *J. ADDICTIVE DISEASES* 61, 61 (2002).

161. For example, many observers remain firmly of the view that crack is by far the more dangerous form of cocaine. *See* REP. CONYERS, FAIRNESS IN COCAINE SENTENCING ACT OF 2009, H.R. REP. NO. 111-670, at 15–19 (2009) (dissenting views).

as to convince some judges that the 100:1 powder cocaine-to-methamphetamine ratio bears reconsideration.

VI. CONCLUSION

The purity of trafficked methamphetamine continues to increase,¹⁶² meaning that less and less of this substance is required to implicate the mandatory minimum terms assigned by statute.¹⁶³ This trend means that the fairness of the penalty provisions applicable to methamphetamine will probably be litigated more often in the coming years. In these cases, a few judges may break from the pack and espy in the powder cocaine-methamphetamine gap problems similar to those that afflicted the penalty scheme that applied to crack.¹⁶⁴ But it would be foolhardy to expect the same response by Congress. Having said “sorry” once with the Fair Sentencing Act, a repeat performance seems highly unlikely.

162. Methamphetamine in 2010, *supra* note 123.

163. In 1998, only 134 cases implicating Guideline section 2D1.1 involved “ice.” METHAMPHETAMINE REPORT, *supra* note 112, at 14 n.39. The precise number of “ice” prosecutions today is unknown, but the increasing purity of seized methamphetamine means both that the number is likely increasing and that the ice-methamphetamine mixture distinction is of decreasing importance, since much of the methamphetamine mixture that does not qualify as “ice” is nevertheless sufficiently pure as to implicate very low quantity thresholds for mandatory minimum terms.

164. Perhaps auguring changes to come, at least one post-*Kimbrough* court has declined to follow the Guidelines in a situation involving low-level trafficking in methamphetamine mixtures, albeit on policy grounds different from those discussed in the text above. *United States v. Ortega*, No. 09-CR-400, 2010 WL 1994870, at *7 (D. Neb. May 17, 2010). *Ortega* involved a defendant charged with selling small quantities of methamphetamine of approximately forty percent purity to a cooperating witness. *Id.* at *6. The sentencing judge concluded that the 10:1 quantity ratio between methamphetamine mixtures and actual methamphetamine within the Guidelines no longer reflected the realities of modern methamphetamine production and sales, in which low-level participants often came into control of high-purity methamphetamine. *Id.* Accordingly, the judge sentenced the defendant outside of the Guidelines range applicable to the quantity of methamphetamine involved. *Id.* at *7.