



April 2014

Equal Protection in a Mean World: Why Judge Cahill Was Right in *United States v. Clary*

Melissa C. Brown

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjlepp>

Recommended Citation

Melissa C. Brown, *Equal Protection in a Mean World: Why Judge Cahill Was Right in United States v. Clary*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307 (1997).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol11/iss1/15>

This Note is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

EQUAL PROTECTION IN A MEAN WORLD: WHY JUDGE CAHILL WAS RIGHT IN *UNITED STATES v. CLARY*

MELISSA C. BROWN

CONTENTS

Introduction	307
I. The Case Against the 100:1 Disparity: The 1995 Sentencing Commission Report	311
<i>Findings of the United States Sentencing Commission: 1995 Special Report to Congress</i>	313
II. Judicial Resistance to Imposing Sentences Embodying the 100-to-1 Disparity	318
A. Media Influence on Legislative Debate	322
B. Equal Protection: Levels of Scrutiny	325
C. <i>United States v. Clary</i>	326
D. Appellate Response to <i>Clary</i>	339
III. The Racial Bias "Our Law Does Not See"	340
A. How the Media Narrated the Story of Crack Cocaine	341
B. The Opportunity Missed in <i>United States v.</i> <i>Armstrong</i>	343
IV. Conclusions and Recommendations	346

INTRODUCTION

On October 18, 1995, the House of Representatives voted 332 to 83 to reject a Federal Sentencing Commission proposal.¹ Federal prison inmates in four prisons responded with a rampage, breaking windows, torching mattresses, injuring prison staff, and racking up millions of dollars in property damage.² The sudden burst of violence was so alarming that officials quickly locked down federal prison populations nationwide.

B.A., 1977, Grand Valley State University; M.S.J., 1990, Ohio University; J.D., 1997, Notre Dame Law School; Thomas J. White Scholar, 1995-97. I thank Professor John Robinson and my fellow White Scholars for their help with this article. I also thank Professor Edward J. Baum, my husband, for his insightful questions and comments.

1. *U.S. Clamps Down After Prison Rebellions*, MONTREAL GAZETTE, Oct. 22, 1995, at B1, 1995 WL 6987648.

2. *Id.*

What caused such rage?³ Congress's refusal to allow a Sentencing Commission proposal to take automatic effect on November 1, 1995. The proposal would have erased sentencing disparities embedded in federal statutes, characterized by some as "Draconian federal crack laws,"⁴ that punish possessors of crack cocaine far more harshly than those who possess the same drug in powder form.⁵

To many observers,⁶ this disparity and its disproportionately harsh effect on young black men is proof of underlying racial bias in the war on drugs. In 1993, a typical year, blacks accounted for 88.3 percent of federal crack cocaine distribution convictions, Hispanics for 7.1 percent, and whites for just 4.1 percent; the racial breakdown for powder cocaine offenses, in contrast, was 27.4 percent black, 39.3 percent Hispanic, and 32 percent white.⁷ According to a United States Sentencing Commission's Special Report to the Congress, released in February of 1995, these and other data lead to "the inescapable conclusion that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine."⁸ The Commission quickly added that their research did not reveal evidence of discriminatory intent in the design of the harsh crack-cocaine penalties, but it concluded:

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

3. According to the Chicago Tribune: "The inmates said they were trying to send a message to the U.S. government," said Jim Hough, a Greenville corrections officer, referring to the inmates who rioted. "They said the law is racially motivated." Gary Marx, *Violence Now a Fact of Federal Prison Life; Congress' Crackdown on Crime Puts Younger Inmates Behind Bars*, CHI. TRIB., North Sports Final Edition, Oct. 24, 1995, at 1.

4. Paul M. Barrett, *FBI's Antiviolence Campaign in Los Angeles is Again Raising Issue of Racial Discrimination*, WALL ST. J., Feb. 1, 1996, at A22.

5. The Anti-Drug Abuse Act of 1986 established a sentencing scheme that punishes a person convicted of selling 5 grams of crack cocaine with a five-year minimum sentence. It takes 500 grams of powder cocaine to trigger the same minimum; thus, the Act established "what has come to be known as a 100-to-1 quantity ratio between the two forms of cocaine." UNITED STATES SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at 1 (1995), hereinafter SENTENCING COMMISSION REPORT.

6. Typical of this view are the statements of Jesse Jackson at the October 1995 "Million Man March." Rev. Jackson denounced the 100:1 disparity as "wrong," "unfair," "racist," and "ungodly," according to Jefferson Morley, *Crack in Black & White*, WASH. POST, Nov. 19, 1995, at C1.

7. SENTENCING COMMISSION REPORT at xi.

8. *Id.*

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 disproportionate effect on one segment of the population, it is particularly important that sufficient policy bases exist in support of the enhanced ratio.⁹

As Jesse Jackson reportedly pointed out to President Clinton in a face-to-face meeting, "[p]owdered cocaine is the source of crack."¹⁰ Where wholesalers of powder cocaine often get probation, while dealers of even small amounts of crack receive harsh mandatory minimum sentences, and where approximately ninety percent of the people who end up in prison as a result are black, this is "obviously racist,"¹¹ Jackson said.

But does enforcement of this facially neutral sentencing scheme really constitute racism? Some commentators argue that vigorous pursuit of crack offenders, who are often associated with well-heeled and well-armed gangs terrorizing whole neighborhoods, benefits the black community. Randall Kennedy argues that enforcing stiff penalties for drug offenders actually helps the black community, even if blacks receive a disproportionate share of the tough sentences:

This argument [that the federal crack laws are racist because of their racially disparate impact] assumes that it burdens the black community to sentence crack dealers to long prison terms. But does it? What about the neighbors — probably also black — of those who violate the crack laws? They may well be *helped* by the long absence of offenders who, but for prison terms, might continue to corrupt their streets and children. Those who portray crack dealers as representatives of the entire black community, a status to which Marion Barry, Mike Tyson, and O.J. Simpson were also elevated during their brushes with the law, do law-abiding African Americans a disservice.

Conservatives are *right* when they argue that blacks, especially the poorest and most vulnerable, have more to fear from a lenient or indifferent criminal justice system than from one that punishes offenders too harshly.¹²

9. *Id.* at xii.

10. Gary Marx, *Crack Time vs. Cocaine Debate Lingers on Sentencing*, CHI. TRIB., Oct. 31, 1995, at A1.

11. *Id.*

12. Randall Kennedy, *Is Everything Race?*, NEW REPUBLIC, Jan. 1, 1996, at 20.

In the words of one resident of south-central Los Angeles, "If anyone, white, black, green or purple, [endangers] my family, I want done whatever is legally feasible to remove that person from the community."¹³

Clouding discussion of the crack/powder disparity is the larger, highly polarized societal struggle with the semantics of racism. What is racism — is it something so ingrained in our culture as to be inescapable? Is it a sin of the nation's past requiring present-day atonement, or ancient history with no place in present-day policy? At one pole of the debate is the claim that racism is yesterday's problem, perpetuated today by a civil rights establishment "which has a vested interest in making exaggerated accusations of racism" in order to "cajole and intimidate whites into acquiescing in programs which financially and politically benefit the civil rights establishment."¹⁴ In this view, the main problem facing blacks today is their own behavior:

[E]xcessive reliance on government, conspiratorial paranoia about racism, a resistance to academic achievement as "acting white," a celebration of the criminal and outlaw as authentically black, and the normalization of illegitimacy and dependency.¹⁵

At the other pole is the everything-is-racism view, one which sees virtually every bad thing that happens to a black individual as evidence of systemic racism.¹⁶ In such a polarized climate, every discussion of race, racism, and racism's real or imagined impacts becomes politicized.

"Racism," in short, is an emotionally loaded word that has wildly different meanings to different people in our society, meanings that can lead to different conclusions in both politics and policy. Individual understandings of what racism means and what (if any) causal connection it has to present-day problems are shaped by each person's experiences, assumptions, vantage point, beliefs, and prejudices — and these understandings are shaped not only by direct experience but also by the powerful stories we have been told in words and pictures by the media. These understandings, in the aggregate, become what we call

13. Barrett, *supra* note 4, quoting Cleve Freeman, an African-American.

14. DINESH D'SOUZA, *THE END OF RACISM* 23 (1995).

15. *Id.* at 24.

16. See, e.g., Floyd Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 56 (1994); the author cites black males' higher rates of prostate cancer and AIDS, "unhealthy eating habits, smoking, [and] a lack of physical exercise" as part of a larger discussion of the effects of racism, relating these effects back to the criminal justice system.

public opinion, and public opinion has a powerful impact on legislation.

If the political pressures of public opinion drive legislators to make decisions that embody racial anxieties, and if those decisions result in significantly increased burdens on black Americans, it is the responsibility of the judiciary to scrutinize the resulting laws more closely, despite their facial neutrality. In *United States v. Clary*,¹⁷ District Judge Cahill concluded that the 100:1 ratio between crack and powder cocaine sentences is the result of exactly that sort of political pressure, embodying racial anxieties and leading to a disparate impact so significant that it "shocks the conscience of the Court."¹⁸ He painstakingly traced media narratives at several turning points in our history, documenting how such narratives have overtly or subtly played on racial fears and resulted in harsh drug laws aimed at disempowered minorities. In this article, I will connect Judge Cahill's analysis to the work of mass communications researchers who have traced the interaction between media narratives and public perceptions of reality. I will argue that the current mandatory crack-cocaine penalties, though facially neutral, embody racial anxieties traceable to media narratives of the crack cocaine story. I will also argue that current equal-protection analysis, with its focus on "discriminatory purpose,"¹⁹ simply misses the sophisticated²⁰ and unconscious forms of racism most likely to become embodied in law today.

I. THE CASE AGAINST THE 100-TO-1 DISPARITY: THE 1995 SENTENCING COMMISSION REPORT

*History teaches us that there have been but few infringements of personal liberty by the state which have not been justified . . . in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities.*²¹

17. 846 F. Supp. 768 (E.D. Mo. 1994).

18. *Id.* at 770.

19. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1509 (2d ed. 1988).

20. See, e.g., the discussion of presidential campaign advisor Lee Atwater's cynical use of convicted black rapist Willie Horton to inflame racial fears during the 1988 presidential campaign, in MICHAEL TONRY, *MALIGN NEGLECT* 11; see also *infra* note 178.

21. *Minersville School District v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting).

Crack cocaine seemed to emerge out of nowhere to become a national crisis in the mid-1980s.²² Alarmed at its rapid spread, inflamed by media reports of ferocious gang wars, and frightened at the perceived spread of crack use out of the inner city, the public created enormous pressure on Congress to *do something* about crack.²³ The urgency of public concern converged with two tracks of legislation favoring determinative sentences; together, these factors produced the disparate sentencing schemes that exist today.

The first legislative initiative was the passage of the Sentencing Reform Act of 1984,²⁴ designed to make criminal sentences "more certain, less disparate, and sufficiently punitive."²⁵ With this Act, the Sentencing Commission was formed and directed to "promulgate a system of detailed, mandatory sentencing guidelines to assure more uniform federal court sentencing decisions. In addition, the Act abolished parole for defendants sentenced under the sentencing guidelines."²⁶ The guidelines set minimum and maximum penalties for various crimes, but they also allow judges to take aggravating and mitigating factors into account, permitting deviation from the guidelines when "there is a [sic] unusual factor present in the case that is not taken into consideration by the guidelines."²⁷

The second legislative direction was a series of initiatives incorporating statutory minimum penalties for specific offenses. The Anti-Drug Abuse Acts of 1986²⁸ and 1988²⁹ set mandatory minimums for a variety of drug and firearms crimes. The 1986 Act established five-year and ten-year minimum sentences for first-time drug traffickers, with the minimums triggered by the quantity and type of drug involved in the offense. The Act also set up the distinction between "cocaine base" and other forms of cocaine and established the 100:1 quantity ratio.³⁰

22. SENTENCING COMMISSION REPORT at 122: "Crack cocaine was first mentioned in the media by the Los Angeles Times on November 25, 1984. . . ."

23. *Id.* at 121: "Congressional urgency is chronicled in the legislative history."

24. Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987 (1984) (codified at 18 U.S.C. §§ 991-998 (1994 & Supp. I 1995)).

25. SENTENCING COMMISSION REPORT at 115.

26. *Id.*

27. *Id.* at 116.

28. Pub. L. No. 99-570, 100 Stat. 3207-190 (1986) (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., and 31 U.S.C. (1994)).

29. Pub. L. No. 100-690, 102 Stat. 4181-4545 (1988) (codified as amended in scattered sections of 21 U.S.C., 42 U.S.C., and 49 U.S.C. (1994)).

30. SENTENCING COMMISSION REPORT at 116.

The Sentencing Commission's guidelines for drug offenses, written after the Anti-Drug Abuse Act of 1986, followed the five- and ten-year mandatory minimums established in the Act. As outlined by the Sentencing Commission,³¹ the penalties for first-time offenders are:

*Five-year mandatory
minimum*

- Crack: 5 grams
- * Value: \$225 to \$750
- * Number of doses: 10-50 or more.
- Powder: 500 grams
- * Value: \$32,500 to \$50,000
- * Number of doses: 2,500 to 5000³²

*Ten-year mandatory
minimum*

- Crack: 50 grams or more.
- Powder: 5,000 grams or more.

Judges can impose sentences below the statutory minimums only on motion of the government indicating that the defendant has "substantially assisted in the prosecutions of other persons."³³

The existence of the 100:1 powder/crack disparity presents questions as to the purpose of the extraordinarily harsh treatment of crack offenses. Is crack really 100 times more dangerous than cocaine in powder form — which is, after all, the source of crack?³⁴ Or is there something especially insidious in the nature of the crack cocaine trade that warrants such disparate treatment? As the Sentencing Commission report concluded, a sound policy rationale for such a steep differential is hard to find.

*Findings of the United States Sentencing Commission:
1995 Special Report to Congress*

The rationales for the 100:1 disparity that emerge from the legislative history of the Anti-Drug Abuse Act of 1986 fall into five categories, according to the Sentencing Commission's research. First, "legislators thought crack to be 'intensely addictive,' and

31. *Id.* at iii.

32. "Viewed another way, the 500-gram quantity of powder cocaine that can send one powder distributor to prison for five years can be distributed to up to 89 different street dealers who . . . could make enough crack to trigger the five-year penalty for each defendant." *Id.* at 175.

33. *Id.* at 116.

34. Testifying at the Sentencing Commission's 1993 hearings, John J. Brennan of the District of Columbia Metropolitan Police Department illustrated the problem: "[I]t takes fifteen minutes to turn powder cocaine into crack cocaine — a box of baking soda, a pot of water, and a microwave or a stove, and you have crack cocaine." *Id.* at 201.

'quite possibly the most addictive drug on Earth.'³⁵ Second, members of Congress saw crack cocaine as causing an increase in serious crime.³⁶ Third, members believed there was a substantive difference in physiological effects of crack versus other forms of cocaine.³⁷ Fourth, members were acting on the belief that young people were especially at risk of becoming crack users, given the portability and low price of doses of crack.³⁸ And fifth, Congress thought the totality of factors characteristic of crack — its low cost, purity and potency, and ease of manufacture and distribution — were leading to widespread use.³⁹

Examining these rationales, the Sentencing Commission found little support for the 100:1 disparity.

First, the Commission concluded, though cocaine is not physiologically addictive, using the drug in any form can create psychological addiction.⁴⁰ Addiction is more likely to result from casual use of crack than from casual use of powder cocaine, but "[t]hat this is so, however, is not due to the difference in the chemical makeup of the two substances, but instead results from the method of administration associated with each."⁴¹ The use of cocaine creates essentially the same physiological response no matter what form the drug takes. But the intensity and duration of the effects differ based on the form, and smoking crack cocaine creates more intense, shorter effects than does use of powder cocaine. "[T]he greater the intensity of these effects and the shorter their duration, the greater the likelihood cocaine use will lead to dependence and abuse."⁴²

35. *Id.* at 180.

36. *Id.*

37. *Id.* at 181.

38. *Id.*

39. *Id.*

40. *Id.* at 24-25: "Unlike some drugs, cocaine is not physiologically addicting," but because of its euphoric effects, "[c]ocaine exhibits powerful reinforcing properties that cause users compulsively to misuse the drug resulting in psychological addiction." In other words, cessation of cocaine abuse will not cause the physiological symptoms of withdrawal (anxiety, fever, chills, and so forth) associated with nicotine or opiates, which are deemed physically addictive; but the euphoric effects of the drug are so powerful that users tend to increase frequency and quantity of use in order to continue to experience the euphoria the drug produces. "Once the individual seeks treatment for dependence, the distinction between physiological and psychological dependence becomes irrelevant . . ." *Id.* at 25-26.

41. *Id.* at 181.

42. *Id.* at 182.

But powder cocaine can always be easily converted into crack,⁴³ making it difficult to establish a punishment enhancement based on form. "[T]he higher addictive qualities associated with crack combined with its inherent ease of use can support a higher ratio for crack over powder," the Commission concluded, but "determining the precise magnitude of that ratio based on the available evidence is difficult."⁴⁴

Next, the Commission evaluated the correlation between crack and crime, both violent and non-violent, cited in the legislative history as a reason for the disparity. The Commission applied a tripartite framework developed by Dr. Paul Goldstein of the University of Illinois School of Public Health, classifying drug-related crimes as "systemic crime, psychopharmacologically driven crime, and economically compulsive crime."⁴⁵ Systemic crime is associated with turf wars, violent competition between rival criminal hierarchies, and economic regulation and control in illicit markets. As one expert testified at a Sentencing Commission hearing, in an "underground economy, you can't sue. So you use violence to enforce your breaches of contract or perceived breaches of contract."⁴⁶ This appears to be the form of crime most closely connected to the crack cocaine industry, for two reasons: "First, crack selling was concentrated in neighborhoods where social controls have been weakened by intensified social and economic dislocations Second, the rapid development of new drug-selling groups, following the introduction of crack, brought with it competition."⁴⁷

The second form of crime, psychopharmacologically driven offenses, is the result of irrational behavior or violence due to the effect of the drug. The "limited evidence to date suggests that [this type of crime] may be least important in explaining the association between crime and both crack and powder cocaine,"⁴⁸ according to the Sentencing Commission's research.

43. "Crack cocaine . . . is derived from powder cocaine. . . . The powder cocaine is simply dissolved in a solution of sodium bicarbonate and water. The solution is boiled and a solid substance separates from the boiling mixture. This solid substance, crack cocaine, is removed and allowed to dry. . . . One gram of pure powder cocaine will convert to approximately 0.89 grams of crack cocaine." *Id.* at 14.

44. *Id.* at 183.

45. *Id.* at 94.

46. *Id.* at 95.

47. *Id.* at 97, quoting a 1990 study by Jeffrey Fagan and Ko-lin Chin, *Violence as Regulation and Social Control in the Distribution of Crack*, in *DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES*, M. de la Rosa *et al.* eds., (1990).

48. *Sentencing Commission Report* at 99.

Data on the third form, economically compulsive crime, which is criminal behavior undertaken to finance personal drug use, indicate that approximately forty-eight percent of male and sixty-two percent of female crack cocaine users have committed an average of one petty property crime such as shoplifting per week, but that most of the economically compulsive crimes related to crack tend to be either retail crack cocaine sales or increased involvement in prostitution.⁴⁹ These crimes, however, are also associated with powder forms of cocaine, as well as other illicit drugs. The Commission, noting that crack defendants tend to have worse criminal records than powder cocaine defendants, concluded:

While these numbers show that crack defendants typically have more serious criminal records than other drug defendants, the guidelines already increase an offender's sentence based on the severity and recency of his/her record. As a result, some offenders are punished further under the guidelines for behavior previously considered by Congress in setting an increased ratio for crack offenses.⁵⁰

A third reason cited in Congressional debate for the 100:1 disparity was the assumed higher correlation between crack use and psychosis or death. This assumption was fueled, in part, by the intense media coverage of the death of college basketball star Len Bias. During the Senate hearing on crack cocaine use, Bias's June, 1986, death was cited numerous times in connection with crack, in spite of the fact that the cause of his death was use of powder cocaine, not crack.⁵¹ Reliable statistics on the incidence of psychosis or death related to crack are scarce, partly because medical data collection efforts either do not or cannot distinguish between different forms of the same chemical substance. However, the majority of drug-related deaths involve combinations of drugs; cocaine use "concurrent . . . with alcohol is the most deadly combination," and one study of medical examiners' data indicates that "injecting powder accounts for three times as many deaths as smoking crack."⁵² Thus, the Commission concluded, while crack use clearly can be life-threatening, the danger is comparable to use of cocaine in other forms, and available

49. *Id.* at 101-02.

50. *Id.* at 187.

51. *Id.* at 123; the report notes that about a year later, at the trial of the man accused of supplying Bias with cocaine, another basketball player testified that he and Bias and others had been snorting powder cocaine over a four-hour period before Bias died; by this time, though, the "crack cocaine overdose death of Len Bias" had become fixed in many minds.

52. *Id.* at 184.

medical statistics do not support the 100:1 crack/powder sentencing disparity.

Fourth was the concern that young people are more easily drawn into use and distribution of crack. Available data show that powder cocaine is more popular in all age brackets, but that a higher proportion of young people who use cocaine use crack.⁵³

[The] DEA cites the crack cocaine phenomenon as responsible in large part for the increase in juvenile involvement in drug trafficking. . . . Indeed, the street level sale of crack requires little sophistication and lends itself to the use of young people in a way that larger scale and more "sophisticated" drug trafficking activities might not.⁵⁴

This suggests that the population most likely to encounter the harshest penalties for cocaine distribution may be the very people Congress sought to protect: younger people drawn into street-level distribution.

Finally, members of Congress expressed concern about the relationship between crack use and its affordability and ease of transport. Ironically, media coverage of comedian Richard Pryor's injuries from freebasing cocaine (Pryor suffered third-degree burns over his torso and face)⁵⁵ was effective free advertising for the crack industry: powder cocaine can be converted to crack and smoked without the dangerous, flammable solvents required to free-base cocaine, thus reducing the risk of such accidents. Crack is easier to transport in street-level quantities, easier and safer to use, and salable in small, relatively inexpensive units. Like toothpaste in a stand-up tube or individually sized portions of food products, the invention of crack represented a marketing innovation. Crack was a new way for cocaine distributors to package their product and present it at a lower price point, and it came along just in time to revitalize flagging interest and expand cocaine use into new markets:

[A]s a glut of powder cocaine developed in the early to mid-1980s, prices for both powder cocaine and crack cocaine fell Consequently, retail crack cocaine distributors developed new marketing strategies, the most signifi-

53. *Id.* at 187. The Commission's research revealed that of cocaine users in the year surveyed (1991), 26.7% of 12- to 17-year-olds used crack, compared to 13% of 18- to 25-year-olds, 15.7% of 26- to 34-year-olds, and 21.4% of cocaine users 35 or older.

54. *Id.*

55. *Id.* at 188.

cant of which involved selling crack in single-dosage units, in plastic vials or baggies, weighing between 0.1 and 0.5 grams apiece, affordably priced from \$5 to \$20. In contrast, powder cocaine was sold typically by the gram — between five and ten doses — for less affordable prices (\$65-\$100). The affordability of crack cocaine expanded its consumer base to lower income individuals.⁵⁶

Converting powder cocaine to crack and selling it in smaller amounts made the drug available to a broader customer base, thus making use of the drug more pervasive. But this packaging technique typically comes into play at the tail end of the drug distribution chain. The conversion of powder cocaine to crack, which can be accomplished by "anyone with access to baking soda and water," most often takes place in the neighborhoods in which the drug will be marketed, in a "breakthrough [that] decentralized the manufacturing process for crack cocaine and permitted demand to be met by retail dealers or even consumers themselves."⁵⁷

It is illogical to attempt to halt the spread of crack cocaine by punishing low-level retail or street dealers, who can be immediately replaced, more harshly than the mid-level retail or wholesale dealers who bring the drug to the point of sale in powder form. More to the point, the tough-sounding mandatory sentences passed in the mid-1980s have not reduced the drug trade. Hundreds of millions of dollars have been spent to stop the flow of cocaine, yet "distribution remains so successful that wholesale cocaine prices are actually lower than they were in the early 1980s."⁵⁸

II. JUDICIAL RESISTANCE TO IMPOSING SENTENCES EMBODYING THE 100-TO-1 DISPARITY

Many federal judges, both in district and appellate courts, have responded to the 100:1 sentencing disparity with reluctant enforcement of mandatory sentences or outright refusal to sentence defendants in accordance with the guidelines or statutory minimums.

In Pittsburgh, District Judge Donald E. Ziegler called the harsh crack-cocaine penalties under the Sentencing Commission guidelines "arbitrary and capricious" and refused to apply them in the case of Darnell Lee Alton, considered to be a "heavy crack

56. *Id.* at 188-89.

57. *Id.* at 76.

58. Linnet Myers, *Decade of Destruction: Losing a Generation of Youths to Crack*, CHI. TRIB., Dec. 31, 1995 (Perspective), at 1.

cocaine trafficker.”⁵⁹ Judge Ziegler sentenced Alton to ten years in prison followed by five years of parole, a sentence that comported with guidelines for powder cocaine, not crack. He justified the departure by pointing out that Congress had reconsidered the rationality of the 100:1 ratio, that the Sentencing Commission acted in an arbitrary and capricious manner in setting the crack cocaine penalties, and that the Commission did not adequately consider the potential for racially disparate impact when developing the guidelines.⁶⁰

In Omaha, District Judge Lyle Strom departed from the guidelines in sentencing two crack-cocaine defendants, justifying his departure by the racially disparate impact of the guideline-mandated sentences. Reversing, the appellate court stated that a “downward departure is not justified” simply because the Sentencing Commission did not consider the potential for racially disparate impact in setting the crack cocaine penalties.⁶¹

In the District of Columbia, District Judge Harold H. Greene railed against sentencing guidelines in general, as well as police power to “manipulate these statutes and guidelines so as to achieve ends that may not be consistent with justice,”⁶² in connection with the case of Sharon Shepherd. Shepherd had offered an undercover officer a quantity of powder cocaine, but the officer asked the defendant to convert it into crack because he wanted to trigger the harsher crack-cocaine penalties. The sentencing guidelines mandated a sentence of 120 to 135 months once the cocaine was converted to crack, as compared to a sentence of sixty months had the drugs remained in powder form.⁶³ Judge Greene wrote:

This case demonstrates that, because of the mandatory minimum sentences and the rigid sentencing guidelines, effective control of sentencing — from time immemorial in common law countries a judicial function — has effectively slipped, at least in some cases, not only to the realm

59. *United States v. Alton*, 60 F.3d 1065, 1066 (3rd Cir. 1995); the Third Circuit vacated the sentence imposed by Judge Ziegler, remanding for resentencing within the guideline ranges and deferring “to Congress and the Sentencing Commission to address the related policy issues and to consider the wisdom of retaining the present sentencing scheme.” *Id.* at 1071.

60. *Id.* at 1067 *et seq.*

61. *United States v. Majied*, 25 F.3d 1389, 1400 (8th Cir. 1994).

62. *United States v. Shepherd*, 857 F.Supp. 105, 107 (D.C. Cir. 1994), *remanded*, 102 F.3d 558 (D.C. Cir. 1996). The appellate court remanded the case with instructions to vacate Shepherd’s judgment of conviction, allow her to enter a plea, and be resentenced; the lower court had rejected a mid-trial plea bargain.

63. *Id.* at 106.

of the prosecution but even further to that of the police. This development denies due process and is intolerable in our Constitutional system.⁶⁴

In Atlanta, U.S. District Judge J. Owen Forrester called his own chemistry experts to testify at an evidentiary hearing, then found that "the penalty provisions of § 841 set out a scientifically meaningless distinction between cocaine and cocaine base, and that the heightened penalty provision for cocaine base must be ignored by operation of the rule of lenity."⁶⁵ Judge Forrester, characterized as a "Reagan appointee with a reputation for tough sentences,"⁶⁶ found that "cocaine and cocaine base are synonymous terms referring to the same substance having the same molecular structure, molecular weight and melting point."⁶⁷ Looking at the legislative history of § 841, he noted that "the statutory provisions that are at issue . . . were passed with much fanfare and little debate"⁶⁸ and concluded that "there is no rational basis for having heightened penalties for cocaine or cocaine base derived only by one means of manufacture, when it is clear beyond doubt that all forms of cocaine are equally smokable and, therefore, equally dangerous."⁶⁹

In the Eighth Circuit, Senior Circuit Judge Gerald W. Heaney concurred in affirming the sentence of Carl Travis Netter, who pleaded guilty to possession with intent to distribute both cocaine and cocaine base (crack), triggering the statutory minimum sentence.⁷⁰ But Judge Heaney's concurrence suggested that Congress had no rational basis in establishing the crack cocaine penalties:

I concur in the court's opinion, but only because I am bound by our prior decisions. I continue to believe that Congress did not have a rational basis to treat one gram of crack cocaine as equivalent to 100 grams of powder cocaine. [Citations omitted.] What makes matters worse is that the crack laws have a disparate impact on blacks. Until our court en banc or the Supreme Court overrules our prior cases, however, I must concur.⁷¹

64. *Id.* at 105.

65. *United States v. Davis*, 864 F. Supp. 1303, 1309 (N.D.Ga. 1994).

66. *Judge Rejects Basis for Crack Sentences*, NAT'L L. J., Sept. 12, 1994, at A10.

67. 864 F. Supp. at 1306.

68. *Id.*

69. *Id.* at 1309.

70. *United States v. Netter*, 977 F.2d 586 (8th Cir. 1992).

71. *Id.*

Senior District Judge Howard F. Sachs, in a sentencing memorandum from the Western District of Missouri, expressed similar frustration:

Federal judges appear to be uniformly appalled by the severe crack cocaine punishments, particularly as compared with the more moderate punishments mandated for transactions in ordinary, powdered cocaine. If Justice Anthony Kennedy is correctly quoted in a current AP dispatch, he has just advised a Congressional Appropriations Committee that, "I simply do not see how Congress can be satisfied with the results of mandatory minimums for possession of crack cocaine." *New York Times*, March 10, 1994. Even if this wording is inexact, I am aware of no federal judge who does not share the sentiment expressed. . . . Seeing the wholesale commitment of African American defendants to extraordinarily long terms of imprisonment for crack cocaine trafficking, where severe but less shocking sentences are imposed on others for trafficking in powdered cocaine in comparable amounts, rubs many judicial nerves raw.⁷²

And in Manhattan, Second Circuit Judge Guido Calabresi, though concurring with the court's rejection of a challenge based on both equal protection and double-counting in the sentencing of Manuel Then, added:

The unfavorable and disproportionate impact that the 100-to-1 crack/cocaine sentencing ratio has on members of minority groups is deeply troubling. [Citations omitted.]

. . . But what is known today about the effects of crack and cocaine, and about the impact that the crack/cocaine sentencing rules have on minority groups, is significantly different from what was known when the 100-to-1 ratio was adopted. As a result, constitutional arguments that were unavailing in the past may not be foreclosed in the future.

[New statistical information] might change the constitutional status of the current ratio. If Congress . . . were nevertheless to act affirmatively and negate the Commission's proposed amendments to the Sentencing Guidelines . . . subsequent equal protection challenges based on claims of discriminatory purpose might well lie.⁷³

Attorney Lloyd Epstein, a New York criminal law practitioner, summarized the situation: "All of us who practice regu-

72. *United States v. Conard*, 1994 WL 90356, at *2-3 (W.D.Mo. 1994).

73. *United States v. Then*, 56 F.3d 464, 467-68 (2d Cir. 1995).

larly in the federal courts, including prosecutors and probation officials, have become frustrated with the harshness and irrationality of the crack cocaine Sentencing Guidelines."⁷⁴

A. Media Influence on Legislative Debate

*White fear, real or imagined, impinges mightily on black reality. What's more, white fear and the myths that accompany it; myths such as blacks' supposed penchant for violence, blacks' supposed lack of intellect, and blacks' alleged moral depravity are why many whites presume that the face of everything they fear - violence, losing their jobs, or not getting into college - is black.*⁷⁵

The Sentencing Commission's research shows that the various rationales on which the crack cocaine penalties were based may justify some disparate treatment of crack offenders, but they do not provide a rational basis for the 100:1 disparity. How, then, did Congress decide that crack cocaine was 100 times more dangerous than the same drug in powder form? Did elements of media stereotyping and unconscious racial fear taint the legislative process?

In a complicated and diverse society, most of us form our impressions of the nationwide social reality based on what we learn from watching television, listening to the radio, reading newspapers and magazines — in other words, from the media. The stories presented in news programming, talk shows, entertainment programs, and print media are necessarily distillations of actual events. Every story that appears on the nightly news represents one or more reporters' perceptions as to what details are relevant, what background is significant, and what is superfluous. A story's presence in the news lineup represents the programming and gatekeeping decisions of editors. And every story that makes the front page or the six o'clock news, by its very presence, squeezes out other possible stories, other views of what is important. News gathering and news reporting are human functions that reflect a chain of decisions filtering, selecting, interpreting, and omitting.

Harold Lasswell, a political science and communications scholar who wrote extensively on the media, public relations, propaganda, and the role of public opinion in preserving democ-

74. Lloyd Epstein, *Crack Cocaine Sentencing Guidelines Challenged*, N.Y. L. J., Apr. 27, 1995, "Outside Counsel," at 1.

75. Betty Winston Baye, *Talking with the President About Race*, LOUISVILLE COURIER-JOURNAL, Nov. 9, 1995, at 13A, available in 1995 WL 2340111.

racy,⁷⁶ noted three functions of the mass media: "surveillance of the environment, the correlation of the parts of society in responding to the environment, and the transmission of the social heritage from one generation to the next."⁷⁷ Surveillance includes deciding what is news or worth presenting as entertainment; correlation involves selecting and interpreting information; transmitting culture involves communicating and modeling values and norms. But in addition to such neutral core functions, the media may also have dysfunctions, or effects that are undesirable for society.⁷⁸

George Gerbner, University of Pennsylvania professor and dean emeritus of the Annenberg School of Communication, has conducted long-term research that documents ways in which television, in particular, shapes our perceptions of what, out there, is "real." According to Gerbner, we live in a world created by narratives; our notion of reality is "put together from the stories we hear."⁷⁹ And the stories we hear today, from both news and entertainment programming, are rough indeed, delivered with immediacy and visual impact impossible before the advent of television and movies. As Gerbner sees it:

Humankind may have had more bloodthirsty eras, but none as filled with images of violence as the present. We are awash in a tide of violent representations the world has never seen. Of course, there is blood in fairy tales, gore in mythology, murder in Shakespeare. Violence is a legitimate cultural expression, even necessary to show the consequences of deadly conflicts and lethal compulsions. But the historically limited, individually crafted and selectively used symbolic violence of great drama and good journalism, often conveying a tragic sense of life essential for human compassion, has been swamped by "happy violence": no pain, no permanent damage, just swift, effective, sanitized entertainment leading to happy endings. . . . And in nearly all of us, but especially in heavy TV users, lifelong exposure to images of violence generates a sense of insecurity and a demand for repression (more jails, more executions, more global policing) as long as it can be justified as

76. See, e.g., HAROLD D. LASSWELL, *DEMOCRACY THROUGH PUBLIC OPINION* (1941).

77. WERNER J. SEVERIN & JAMES W. TANKARD, JR., *COMMUNICATION THEORIES: ORIGINS, METHODS, AND USES IN THE MASS MEDIA*, 293 (3rd ed. 1988).

78. *Id.* Severin and Tankard point out that a single act "may be both functional and dysfunctional," as well.

79. Charles M. Madigan, *Crime Report*, PITTSBURGH POST-GAZETTE, Dec. 26, 1993, at B1.

enhancing our security. . . . For the first time in history, most of the stories in our society are being told not by parents, schools, churches or communities with something to tell, but increasingly by global conglomerates with something to sell.⁸⁰

Often, the face we see on television linked with drug use, crime, or the criminal justice system, is black.⁸¹ And that image is less frequently counter-balanced with images of the constructive, non-criminal activities of blacks. Consider "the walk:"

Staged with varying frequency by area police departments and broadcast routinely on local TV newscasts, the walk is a kind of law-and-order photo opportunity designed to provide television with moving pictures of captured criminals. The police notify the media when the criminals will be walked, and photographers are dispatched to get footage for evening newscasts or the next edition of the newspaper.

"If they walk 'em," WWL [New Orleans] News Director Joe Duke said, "we shoot 'em. It's that simple. If you live in this town, that is the rule. That has always been."

But this parade of criminals, the majority of them poor and black, does more social harm than journalistic good, critics charge. It perpetuates an image of the savage black man and generates among white viewers racist feelings and fear.

Those feelings are exacerbated by the comparatively few images of black people engaged in constructive, non-criminal activity, said George Gerbner. . . . "It is a combination of the invisibility of well-rounded black life and the high-crime visibility"⁸²

Gerbner, over the course of two decades, has tracked what he dubs the "mean world" effect.⁸³ Among those who are catego-

80. George Gerbner, *Road Runner Begets Rambo*, NEWSDAY, Feb. 26, 1993, at 54.

81. *Together. . . Apart: The Myth of Race*, TIMES-PICAYUNE, Sept. 13, 1993, at A9.

82. *Id.*

83. Gerbner and co-investigator Larry Gross began tracking television violence in 1967, producing a "TV Violence Profile" of the prevalence, rate, and characterizations of violence on television programs. Consistently, they found that "[h]eavy viewers revealed a significantly higher sense of personal risk, of law-enforcement, and of mistrust and suspicion than did light viewers in the same demographic groups, exposed to the same real risks of life. The results also showed that TV's independent contributions to the cultivation of these conceptions of a 'mean world' and other aspects of social reality are not significantly altered by sex, age, education, income, newspaper reading, and

rized as heavy television viewers, the "mean world" effect is "an exaggerated sense of insecurity and vulnerability":

They believe, incorrectly, that it is riskier to ride the elevated train or the subway than it is to ride in a car. Even in their homes in communities that are not threatened by the violence they read, view and hear about, they feel unsafe. Unfortunately, this syndrome also plays its part in public policy because it helps create a "demand" from politicians for "solutions" to the "problem." "There is a demand for more hard-nosed judges," Gerbner said. "For more prisons. For more capital punishment. For more of the things that have never worked."⁸⁴

Gerbner sees abundant evidence that what lawmakers "actually attacked [in anti-crime measures] was not the causes of crime, but public perceptions about crime."⁸⁵

The story-telling power of the media can create a perception of reality tilted by bias, even when, operating with the best of motives, journalists narrate stories intended to reveal neglect and suffering in society. That narrative power — the power to describe and thereby define the world we live in — can create powerful public anxieties⁸⁶ that find their way into legislative policy.

B. *Equal Protection: Levels of Scrutiny*

Virtually all government actions or regulations classify something or someone on some basis. The Court currently analyzes equal protection questions, whether they arise under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment,⁸⁷ by three tests:

church attendance." GEORGE GERBNER, ET AL., VIOLENCE PROFILE NO. 8, 1 (Annenberg School of Communications, March 1977).

84. Madigan, *supra* note 79.

85. *Id.*

86. Heavy television viewers in particular tend to harbor perceptions that reflect the way the world is presented on TV. For example, when asked what they think their chances are of being involved in some type of violence in any given week, heavy television viewers are more likely to approach the answer that would be suggested by TV programming (10 percent) rather than the correct answer of 1 percent or less. Asked "Can people be trusted," heavy TV viewers are more likely to respond with an answer such as "Can't be too careful." Gerbner's research indicates that heavy TV viewers in particular gain a heightened sense of risk and threat, leading to greater insecurity — the perception that it's a "mean world" out there. SEVERIN & TANKARD, *supra* note 77, at 249.

87. The Fourteenth Amendment is limited by its terms to actions by state governments. But the Court has held that most actions by the federal

"'rational basis' scrutiny, intermediate scrutiny, or strict scrutiny."⁸⁸ Under rational basis review, a classification is valid if it is rationally related to a constitutionally permissible government interest; under intermediate scrutiny, a classification will be held impermissible unless it is substantially related to an important government interest; and under strict scrutiny, a classification will be held to violate equal protection unless it is necessary to promote a compelling government interest. All racial classifications, "imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. . . [and must be] narrowly tailored measures that further compelling governmental interests."⁸⁹

Washington v. Davis holds that in order to invalidate a statute under strict scrutiny, a court must find that the statute was designed with a specifically discriminatory purpose or intent.⁹⁰ But insistence on an overtly discriminatory purpose overlooks the powerful influence of unconscious racism. Where a racially disparate impact of clear significance emerges, as has happened in the case of the penalties for crack cocaine,⁹¹ courts need to be empowered to look more deeply into the causes of the disparity. Courts need an analytical structure that allows exploration of the potential for unconscious racism either in the legislative process or in the public sentiment behind legislative choice.

District Judge Clyde S. Cahill of the Eastern District of Missouri, in *United States v. Clary*,⁹² applies such an analytical approach. His decision is a meticulous study of the effects of racially stereotypical media coverage of crack cocaine as related to the timing of the Anti-Drug Abuse Act of 1986.

C. *United States v. Clary*

In January of 1994, Edward James Clary, an 18-year-old black man with no prior convictions,⁹³ was sentenced for possession with intent to distribute 67.76 grams of crack cocaine.⁹⁴ He had entered a guilty plea pursuant to 21 U.S.C. § 841(b)(1)(A)(iii)

government that would be similar denials of equal protection are deprivations of liberty in violation of the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

88. *United States v. Virginia*, 116 S. Ct. 2264, 2269 (1996) (Scalia, J., dissenting).

89. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995).

90. 426 U.S. 229 (1976); see also *infra* text accompanying note 129.

91. Morley, *supra* note 6.

92. 846 F. Supp. 768 (E.D. Mo. 1994).

93. *Id.* at 797.

94. *Id.* at 770.

(the anti-drug abuse statutory section relevant to crack cocaine), but then challenged the statute's mandatory ten-year minimum sentence and sentence enhancements as a violation of his equal protection rights.⁹⁵ Under these provisions, a person convicted of possession with intent to distribute fifty grams or more of crack cocaine receives no less than ten years in prison; the amount of powder cocaine necessary to trigger the same sentence is 5000 grams, or 4932.24 more grams of cocaine than Clary possessed. This provision, according to Judge Cahill, "has been directly responsible for incarcerating nearly an entire generation of young black American men for very long periods, usually during the most productive time of their lives" while their white counterparts, who are more likely to be associated with powder cocaine, are punished far less harshly.⁹⁶ The impact of this statute, he wrote, "is so significantly disproportional that it shocks the conscience of the Court and invokes examination."⁹⁷ As a result, he sentenced Clary under the guidelines for powder cocaine, departing upwards for the aggravating factors of forethought and planning. The result was a prison sentence of four years, followed by three years of supervised release.⁹⁸

Judge Cahill's thoroughly researched decision was in part a reply to a challenge from the Eighth Circuit in *United States v. Marshall*.⁹⁹ In *Marshall*, the Court of Appeals reversed a downward departure from the sentencing guidelines in a case involving a marijuana grower, but the appellate court's distaste for the task was evident:

We are compelled to reverse for resentencing, although we acknowledge skepticism about the rationale used by the Sentencing Commission. Disagreement with the Guidelines does not justify a departure. [Citations omitted.] An impression that an arbitrary and capricious factor has become embedded in the Guidelines may well, however, justify further consideration, on remand, of the constitutional validity of the Guideline provision¹⁰⁰

In a footnote, the court acknowledged that it had rejected, in *United States v. Buckner*,¹⁰¹ a challenge based on a cruel-and-unusual-punishment argument to the "more extraordinary disparity" between sentences for cocaine powder and cocaine base.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 797.

99. 998 F.2d 634 (8th Cir. 1993).

100. *Id.* at 635.

101. 894 F.2d 975 (8th Cir. 1990).

The court then noted how troubling such sentencing disparities have become, inviting a deeper inquiry into the issues:

With so much at stake, however, in this and other cases, we are reluctant to say that full exploration of the issues is unwarranted, either in this case or in connection with the crack cocaine punishments, which continue to perplex many sentencing judges. We do not invite mere repetition of prior rejected arguments, without new facts or legal analysis.¹⁰²

Judge Cahill set out to present this new legal analysis in *Clary*.¹⁰³ The core of his argument is that "race rather than conduct was the determining factor"¹⁰⁴ when Congress established the 100:1 disparity. This happened because the public and (through public pressure) Congress were influenced by a barrage of media attention to the sudden surge of crack cocaine use, overwhelmingly portraying young black males as the source of spreading violence and danger. Through a steady "drum beat" of crime news and dramatizations of violent crime, creating such public fear and rage that the public "is prepared — no, anxious — to pay *any* price to control crime even to the abandonment of traditional constitutional safeguards,"¹⁰⁵ Congress was pressured into moving with unusual haste and insufficient reflection. The pressure on legislators, said Judge Cahill, led to "a feeding frenzy of responses from lawmakers of every stripe and political persuasion, so that both Congress and state legislators fill the hoppers with proposed bills designed to curtail crime (each one more restrictive or Draconian than those before) in the misguided hope of reducing crime, but in the certainty that, effective or not, it will gain votes."¹⁰⁶ Concluding that the pertinent sections of 21 U.S.C. § 841 violate equal protection, Judge Cahill held that *Clary* had been the victim of race-based prosecutorial selection as well.¹⁰⁷

Judge Cahill's analysis recognizes the powerful perceptions that are created in the public mind by the story-telling role of the media. These public perceptions, even when they are based on erroneous or incomplete information, can nevertheless create such pressure on legislators that neutrality is unknowingly abandoned, and unconscious bias creeps into the law.

102. 998 F.2d at 635.

103. 846 F. Supp. at 771.

104. *Id.* at 770.

105. *Id.* at 771.

106. *Id.* at 772.

107. "Prosecution based on race is obviously discriminatory even if it is occasioned by *unconscious* racism," Judge Cahill wrote. *Id.* at 797.

At the outset, Judge Cahill sought to defuse the inevitable criticism that his decision would be portrayed as "soft on crime:"

[L]et this be perfectly clear. This Court does not condone crime in any form or by any class or group This Court recognizes that the control of crime is the most important goal of sentencing, and a firm and certain punishment must be the major goal in criminal justice. However, such punishment must be fair; it must fit the particulars of the offense and must acknowledge characteristics of individuals.¹⁰⁸

Overt racism on the part of lawmakers may be a thing of the past, Judge Cahill wrote, but punishment that so manifestly falls on blacks, even though facially neutral, harms "the credibility of government among black citizens," eroding their faith that "equal justice is for all."¹⁰⁹

Equal protection analysis traditionally reserves strict scrutiny for legislative classifications involving presumptively suspect factors, such as race, or fundamental liberties. The difficulty the court faces in a case such as this, where the statute is facially neutral, yet clearly has a disparate impact, is to determine if the statute was "enacted for racial reasons."¹¹⁰ Judge Cahill invoked *Arlington Heights v. Metropolitan Housing Development Corporation*,¹¹¹ in which officials of a predominantly white, upper-middle-class suburb of Chicago opposed a plan for construction of low-income housing by refusing to rezone the proposed site to allow multi-family units. Though the Supreme Court ultimately rejected the black plaintiffs' equal protection claim on the grounds that they failed to prove conscious discriminatory intent, the Court did outline a methodology for inquiring into "such circumstantial evidence of intent as may be available."¹¹² *Arlington* sets forth these factors: "the presence of disparate impact, the overall historical context of the legislation, the legislative history of the challenged law, and departures from the normal legislative process." Precedent also exists for adding criteria such as foreseeability of the consequences of the legislation.¹¹³

Evaluating the sentencing disparities embodied in 21 U.S.C. § 841 in the light of these factors, Judge Cahill found that consideration of each factor revealed problems.

108. *Id.* at 772.

109. *Id.* at 773.

110. *Id.*

111. 429 U.S. 252 (1977).

112. *Id.* at 266.

113. 846 F. Supp. at 773.

Judge Cahill began by tracing the history of the media's role in creating climates of crisis that have led lawmakers in different eras to enact drug-control legislation that disparately affected minorities:

Prior to the civil rights era, Congress repeatedly imposed severe criminal sanctions on addictive substances once they became popular with minorities. Historically, a consortium of reactionary media and a subsequently inflamed constituency have combined to influence Congress¹¹⁴

For example, he wrote, the 1909 Smoking Opium Exclusion Act¹¹⁵ was a response to public opinion that had been inflamed over the years by lurid media accounts of the supposed spread of opium smoking beyond the Chinese community.¹¹⁶ The Harrison Act of 1914,¹¹⁷ the first federal law prohibiting distribution of cocaine and heroin, was "passed on the heels of overblown media accounts depicting heroin-addicted black prostitutes and criminals in the cities." It followed Congressional debate in which the sponsor explained that he included coca leaves in the bill because the leaves make Coca-Cola and Pepsi-Cola "and all those things are sold to Negroes all over the South."¹¹⁸ It was supported by an official report that warned Congress about drug-crazed southern blacks whose drug habits threatened to infect "the higher social ranks of the country."¹¹⁹ The Marijuana Tax Act¹²⁰ was enacted in 1937 after a successful media campaign waged by the then-Commissioner of the Treasury Department's Bureau of Narcotics, who used the media as a forum to depict "insane violence which he alleged resulted from marijuana use."¹²¹

Yet when cocaine use first began to spread again in the 1970s and 1980s, no new laws were enacted. "The social history is clear that so long as cocaine powder was a popular amusement

114. *Id.* at 775.

115. 21 U.S.C. §§ 176-185 (1909) (repealed 1970).

116. For example: "[T]he Chinaman has impoverished our country, degraded our free labor, and hoodlumized our children. He is now destroying our young men with opium." 846 F. Supp. at 775, quoting the *SAN FRANCISCO POST*, Mar. 1, 1879.

117. 26 U.S.C. §§ 211, 691-707 (1914) (repealed 1970).

118. 846 F. Supp. at 775 (quoting Rep. Francis Harrison, author of the Harrison Act).

119. *Id.*

120. Ch. 553, 50 Stat. 551 (1937).

121. 846 F. Supp. at 775.

among young, white professionals, law enforcement policy prohibiting cocaine was weakly enforced,"¹²² Judge Cahill wrote.

Then came the mid-1980s. Judge Cahill painted the backdrop against which the spread of crack cocaine occurred:

The smoke-stack industries which furnished considerable highly paid employment to many persons with limited formal education were dead, dying, or moving elsewhere [in the mid-1980s]. . . . [A] pervasive opinion grew that government had to curtail spending . . . [l]ocal and state governments were getting less and less money returned . . . community projects such as hospitals, playgrounds, emergency shelters, and food pantries were closed . . . [u]nemployment reached levels as high as 8 percent nationally but in the inner cities it hovered around 20 percent and in some cases soared to 50 to 60 percent among young black men.¹²³

In this climate, he argued, many young black men lost hope and motivation. Crack cocaine gave them instant access to cash. It was an easy option to young men with few choices in life.¹²⁴

"It must be noted," Judge Cahill wrote, "that in the early years of the drug war few paid attention to the escalating violence among these competing gangs because they were then only killing each other or an occasional hapless victim who lived nearby." When the violence associated with competition for share of the crack market began to expand out of the inner cities, government acted. But even then, law enforcement concentrated on confining the violence to inner cities. Judge Cahill cited a 1987 incident in which police tried to isolate residents of the predominantly black East St. Louis, Illinois, by blocking the bridge across the Mississippi connecting it to St. Louis, Missouri, thus preventing them from reaching a Fourth of July celebration across the river.¹²⁵

Unconscious racism has replaced the overt racism of Jim Crow days, according to Judge Cahill:

Picture a city where it is easier to buy cocaine than it is to purchase a loaf of bread. Imagine a town that discour-

122. *Id.*

123. *Id.* at 777.

124. Some drug gangs control a greater cash flow than many Fortune 500 companies: for instance, the "DEA estimates that the Jamaican Posses [a street gang originally composed of Jamaican immigrants but now containing a mix of Hispanic and black youth as well] gross \$1 billion in drug proceeds annually." SENTENCING COMMISSION REPORT at 87.

125. 846 F. Supp. at 778.

ages those who could be role models by denying them mortgages and loans to improve their homes. Think of a community where mothers, barely more than children themselves, serve as one-parent heads of households in a world without fathers. . . . Remember the children who rarely see a doctor, lawyer, or teacher as a neighbor and whose only source of inspiration is a chain bedecked drug peddler.

These portraits of misery and degradation are the daily world of the inner city resident and are all, part and parcel, products of unconscious racism. . . . The terror of long prison terms has little deterrence for [those who live there] — their life is already a prison of despair.¹²⁶

Intentional discrimination may have disappeared or gone underground, but "benign neglect for the harmful impact or fallout upon the black community that might ensue from decisions made by the white community for the 'greater good' of society has replaced intentional discrimination."¹²⁷ This is the kind of unconscious, unintentional racism that is patently evident in the crack cocaine statutes.

Again, narratives woven by the media contributed to forming public perceptions of social reality:

[A] fearful white class afraid to encounter a black man results from [whites] never being exposed to positive images of black America. Given the racially segregated nature of American economic and social life, the media has played an important role in the construction of a national image of black male youth as "the criminal" in two significant respects which serve to enhance penalties for crack cocaine violators: 1) generating public panic regarding crack cocaine; and 2) associating black males with crack cocaine. Ergo, the decision maker who is unaware of this selection perception will believe that his actions are not motivated by racial prejudice.¹²⁸

If we are to unearth this kind of buried racial motivation, Judge Cahill argued, traditional equal protection analysis is inadequate. Without a mechanism by which to consider the effects of deeply buried, unconscious racial stereotyping, the strict scrutiny requirement of a finding of discriminatory intent becomes an impossible burden of proof.

126. *Id.* at 778.

127. *Id.* at 779.

128. *Id.* at 781.

Judge Cahill employed a process of equal protection analysis that considered the effects of unconscious racism, arguing that "[r]acial influences which unconsciously seeped into the legislative decision making process are no less injurious, reprehensible, or unconstitutional" than discriminatory intent.

Equal protection demands that similarly situated parties be treated alike. Judge Cahill's launching point was *Washington v. Davis*,¹²⁹ a 1976 class action in which black applicants for jobs as police officers challenged a written test on the basis of its disparate impact on minorities. "Test 21" was developed by the Civil Service Commission to test verbal ability, vocabulary, reading, and comprehension.¹³⁰ Yet it yielded four times as many black failures as white failures, and administrators offered no evidence to correlate performance on the test with success in police training or subsequent performance on the job.¹³¹ Though the Court, applying strict scrutiny, found no discriminatory purpose behind Test 21, the majority nevertheless noted that racially discriminatory purpose need not be express on the face of a statute, nor is disproportionate impact irrelevant: "[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."¹³²

Washington v. Davis' requirement of discriminatory purpose for invalidation of legislation focuses on the mental state of the lawmaker, asking whether his or her intent was to discriminate. Thus it has been described as introducing a "perpetrator perspective" on equal protection analysis: "In essence, *Washington v. Davis* announced that henceforth every lawsuit involving constitutional claims of racial discrimination directed at facially race-neutral rules would be conducted as a search for a bigoted decision-maker."¹³³ But as Judge Cahill noted, *Washington* says that even without demonstrating that an individual or group overtly harbored discriminatory intent, a challenger can make a prima facie case for discrimination by showing that the totality of relevant facts *implies* a discriminatory purpose. Whether the challenger should prevail then becomes an inquiry into the specifics of the case and the available evidence of discriminatory intent. "With a prima facie case made out, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and

129. 426 U.S. 229 (1976).

130. *Id.* at 234-35.

131. *Id.*

132. *Id.* at 242.

133. Tribe, *supra* note 19, at 1509.

procedures have produced the monochromatic result."¹³⁴ In other words, where a significant racially disparate impact has been shown, and where there are other factors to suggest that racial discrimination may have been a factor, the State can be required to prove that a challenged statute or practice is neutral.

Judge Cahill then returned to the factors outlined in *Arlington* in order to conduct his inquiry into the totality of relevant circumstances: 1) adverse racial impact of the official action, 2) historic background, 3) the sequence of events that led up to the challenged actions, 4) any departures from normal decision-making processes, 5) substantive departures from routine decisions, 6) statements made by decision-makers contemporary to the decision, and 7) the foreseeability of the consequences.

The advent of crack cocaine was accompanied by saturation coverage of crack in the media, coverage which connected crack cocaine to black, inner-city youths and which generated enormous public fear and outrage.¹³⁵ Against this background, the sequence of events leading to passage of the crack cocaine statutes was anything but normal:

Crack cocaine eased into the mainstream . . . about 1985 and immediately absorbed the media's attention. . . . Many of the stories were racist. Despite the statistical data that whites were prevalent among crack users, rare was the interview with a young black person who had avoided drugs and the drug culture, and even rarer was any media association with whites and crack. . . . The media created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society. These stereotypical descriptions of drug dealers may be accurate, but not all young black men are drug dealers. The broad brush of uninformed public opinion paints them all the same.¹³⁶

Did this media-drawn image of crack dealers as young black men incite racial fears, resulting in sufficient public pressure to taint lawmakers' decision-making process with racial bias? Judge Cahill found evidence that it did: "Legislators used these media accounts as informational support for the enactment of the crack statute."¹³⁷ Members of Congress read article after article into the *Congressional Record*, accounts that consistently portrayed

134. 426 U.S. 229 at 241 (1976) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

135. SENTENCING COMMISSION REPORT at 121-23.

136. 846 F. Supp. at 783.

137. *Id.*

crack use as a surging epidemic and stereotyped crack dealers as young black males and gang members.¹³⁸ Some reports contained language "that was either overtly or subtly racist, feeding white fears that the 'crack problem' would spill out of the ghettos."¹³⁹

In reaction to the pressure of public opinion generated by this volume of reporting (over 400 broadcast reports by NBC News alone in 1985 and 1986),¹⁴⁰ Congress departed significantly from its normal deliberative process. Tracking the "extraordinarily hasty and truncated" process involved in the 1986 Act, Judge Cahill quoted Eric Sterling, counsel to the House Subcommittee on Crime during 1986, in testimony at hearings held in 1993 by the Sentencing Commission:

[In August of 1986] Speaker O'Neill returned from Boston after the July 4th district work period where he had been bombarded with constituent horror and outrage about the cocaine overdose death of NCAA basketball star Len Bias after signing with the championship Boston Celtics. The Speaker announced that the House Democrats would develop an omnibus anti-drug bill, easing the reelection concerns of many Democratic members of the House by ostensibly preempting the crime and drug issue from the Republicans who had used it very effectively in the 1984 election season. The Speaker set a deadline . . . five weeks away.

The development of this omnibus bill was extraordinary. Typically Members introduce bills which are referred to a subcommittee, and hearings are held . . . [c]omment is invited . . . [a] markup is held on a bill, and amendments are offered to it. For this omnibus bill much of this procedure was dispensed with. The careful deliberative practices of the Congress were set aside for the drug bill.¹⁴¹

With few facts and little research to go on, the House Crime Subcommittee released a bill with a crack-to-powder ratio of 50:1. This was doubled to 100:1 before passage, to emphasize the seriousness of Congress's intent.¹⁴² In the Senate, despite the warnings of some Senators alarmed at the fast-track path of the bill,

138. *Id.* at 783-84.

139. *Id.*

140. SENTENCING COMMISSION REPORT at 122; both Time and Newsweek wrote five cover stories on crack, and "Newsweek referred to crack as the biggest news story since Vietnam and Watergate (June 16, 1986)." *Id.*

141. 846 F. Supp. at 784.

142. *Id.*

just a single hearing of under four hours was held.¹⁴³ Thus these four *Arlington* factors — sequence of events leading up to the legislation, departures from normal decision-making processes, substantive departures from routine decisions, and contemporaneous statements by decision-makers — suggest that the 100:1 sentencing disparity was the result of a suspect process. As a consequence of these deviations from normal legislative processes, Judge Cahill concluded, the 100:1 crack-to-powder ratio was the “direct result of a ‘frenzied’ Congress that was moved to action based upon an unconscious racial animus.”¹⁴⁴

Regarding the foreseeability of the racially disparate impact of the 100:1 sentencing disparity, Judge Cahill cited *Columbus Board of Education v. Penick*,¹⁴⁵ which addressed foreseeability of disparate impact in the context of school desegregation. In *Penick*, the appellate court affirmed a district court’s finding that schools in Columbus, Ohio, were racially segregated. The continuance of this segregated arrangement, after *Brown v. Board of Education* had established an affirmative duty to desegregate schools,¹⁴⁶ was found to be the result of “purposefully segregative practices”¹⁴⁷ in spite of the school administrators’ protestations that they had no intent to discriminate:

[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose Adherence to a particular policy or practice, “with full knowledge of the predictable effects of such adherence on racial imbalance . . . may be considered by a court in determining whether an inference of [discriminatory] intent should be drawn.”¹⁴⁸

143. Sen. Chaffee warned of the “sanctimonious election stampede, a stampede that [had] trampled the Constitution” in the House; Sen. Mathias warned of the danger of “forgetting fundamental principles” where there was so little opportunity to study a bill that “did not emerge from the crucible of the committee process tempered by the heat of debate,” and “committees are important because, like them or not, they do provide a means by which legislation can be put through a filter, can be exposed to public view and public discussion If we are contemplating changes to individual freedoms, if we are about to alter major social commitments, then those modifications simply must be discussed fully . . . the consequences must be anticipated.” Sen. Quayle expressed “reservations about aspects of this proposal and the rapid processes used to develop it.” *Id.* at 784 n.51.

144. *Id.* at 784.

145. 443 U.S. 449 (1979).

146. 347 U.S. 483 (1954).

147. 443 U.S. at 466.

148. *Id.* at 464-65.

The Supreme Court rejected the school administrators' argument that this result was based on a misapplication of the purpose requirement established in *Washington v. Davis*, saying that given the affirmative duty to desegregate, perpetuation of a system that results in foreseeable, measurable disparate impact can be evidence of discriminatory purpose.

The connection between foreseeability of disparate impact in a case involving segregated schools, where a clear affirmative duty to desegregate exists, and disparate impact in a facially neutral criminal statute, is tenuous. Yet Judge Cahill extended the foreseeability argument of *Penick* to *Clary*. Again referring to racial imagery of the "legions" of newspaper and magazine exhibits introduced into the *Congressional Record*, Judge Cahill concluded:

To keep crack out of suburbia meant to keep crack users and dealers out of suburban neighborhoods. While it may not have been intentional, it was foreseeable that the harsh penalties imposed upon blacks would be more clearly disproportionate to the far more lenient sentences given whites for use of the same drug — cocaine.¹⁴⁹

The consequences, Judge Cahill concluded, were foreseeable. And the racially disparate result was unquestionable: Edward Clary introduced evidence that 98.2 percent of defendants convicted of crack cocaine charges in the Eastern District were black,¹⁵⁰ and that all defendants sentenced for simple possession of crack were black. Further, while national statistics indicated that blacks were four times as likely as whites to be arrested on drug charges, local statistics showed that they were eight times as likely to be arrested on such charges in the Eastern District of Missouri.¹⁵¹ As far back as *Yick Wo v. Hopkins*,¹⁵² Judge Cahill pointed out, the Supreme Court ruled:

[T]he effect of a law may be so harsh or adverse in its weight against a particular race that an intent to discriminate is not only a permissible inference, but a necessary one This appears to be the effect of the crack statute challenged in this court.¹⁵³

Reviewing statistics on arrests and prosecution for crack cocaine offenses, Judge Cahill also found ample evidence of discriminatory prosecutorial selection on the basis of race. Harsh

149. 846 F. Supp. at 785.

150. *Id.* at 786.

151. *Id.*

152. 118 U.S. 356 (1886).

153. 846 F. Supp. at 787.

penalties, in theory, were designed to target drug kingpins. But both locally and nationally, the data did not show that enforcement was reaching the upper echelons. "Out of 57 convictions in the Eastern District of Missouri," Judge Cahill recounts, "55 of the defendants were black, one was white, one was Hispanic, and not one kingpin among them Even a disinterested inquirer would wonder why the tremendous expense of federal prosecution and subsequent incarceration should be wasted on relatively minor offenders."¹⁵⁴

Given all of this — the extreme racial disproportionality in outcome, the foreseeability of that disparate impact, the highly unusual fast-track legislative process, the country's history of racism and racially motivated drug laws — what is the appropriate standard by which to review legislation that may have been tainted by unconscious racism? Judicial deference to legislative decisions is ordinarily appropriate, "[b]ut once there is proof that a discriminatory motive is afoot," Judge Cahill wrote, "judicial deference is no longer justified."¹⁵⁵ A law that so clearly burdens a racial minority disproportionately and that is traceable to racial considerations (even if unconscious) "warrants the most rigorous scrutiny:"

Such a law can survive only if the classification which is suspect is narrowly tailored to further a compelling governmental interest. [Citations omitted.] Consistent with the history of criminalizing behavior among minority groups in this country, at the very least, the crack statute in its application has created a "de facto suspect classification" to which strict scrutiny must apply.¹⁵⁶

Under strict scrutiny, Judge Cahill wrote, the crack statute must fail. Congress had no medical or other evidence that crack was 100 times more addictive or dangerous than powder cocaine. "[I]f young white males were being incarcerated at the same rate as young black males," Judge Cahill concluded, "the statute would have been amended long ago."¹⁵⁷ The record shows no reasonable basis for punishing a derivative drug more harshly than its principal source; the statute is not narrowly tailored, and therefore, Judge Cahill concluded, it is invalid.

Judge Cahill's decision has been criticized for his "failure to recognize and respect the genuine and important differences

154. *Id.* at 788.

155. *Id.* at 791 (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977)).

156. *Id.* at 791.

157. *Id.* at 792.

between crack and powder cocaine."¹⁵⁸ There is some validity to this criticism. Judge Cahill's emphatic assertion that "COCAINE IS COCAINE"¹⁵⁹ overlooks important facts. Crack cocaine is typically marketed to a younger, more vulnerable, and poorer customer base than is powder cocaine. Because it is smoked rather than snorted, crack affects the user more quickly than does powder cocaine.¹⁶⁰ But his fundamental criticism of the 100:1 crack/powder sentencing disparity — that legislative processes leading to the harsh crack cocaine penalties were infected with unconscious racism — is right on target. An equal protection analysis that demands evidence of demonstrated, overt racism is virtually obsolete as a judicial tool at this juncture in the nation's history.

D. *Appellate Response to Clary*

Seven months after Judge Cahill's ruling, the Eighth Circuit Court of Appeals vacated his downward departure in sentencing Clary,¹⁶¹ brushing past the thorough discussion of unconscious racism and emphasizing precedent.

The district court's opinion was painstakingly crafted, wrote Senior Circuit Judge John R. Gibson, "undoubtedly present[ing] the most complete record on this issue" to date.¹⁶² But the case should have been decided on precedent, he wrote, citing 17 recent cases from the circuit.¹⁶³ In *United States v. Lattimore*, for example, the court applied the rule that a facially neutral law disproportionately affecting a minority is unconstitutional only if it can be traced to a discriminatory purpose.¹⁶⁴ In *United States v. Buckner*, the court looked to legislative history and, citing statements by five Senators on the dangers of crack, decided that the more severe penalties for crack were not arbitrary or irrational.¹⁶⁵ And *Arlington* itself makes it clear that impact alone is not determinative.¹⁶⁶

Unpersuaded by Judge Cahill's argument that the *Arlington* factor-analysis suggested a discriminatory motive at play, and thus that strict scrutiny was required, the appellate court stated that "[t]he [district] court's reasoning [regarding unconscious

158. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1306 (1995).

159. 846 F. Supp. at 793.

160. SENTENCING COMMISSION REPORT at 29.

161. 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1172 (1995).

162. *Id.* at 713.

163. *Id.* at 712.

164. 974 F.2d 971, 975 (8th Cir. 1992).

165. 34 F.3d at 712.

166. *Id.* at 713.

racism] . . . simply does not address the question whether Congress acted with a discriminatory purpose."¹⁶⁷ Holding to the "perpetrator" interpretation of *Washington v. Davis*,¹⁶⁸ the appellate court wrote that Judge Cahill's reasoning did not support the conclusion that the crack statutes were passed because of, not in spite of, their adverse and disproportionate impact on minorities:

It is too long a leap from newspaper and magazine articles to an inference that Congress enacted the crack statute because of its adverse effect on African American males, instead of the stated purpose of responding to the serious impact of a rapidly-developing and particularly-dangerous form of drug use.¹⁶⁹

Accordingly, the appellate court remanded the case for resentencing.¹⁷⁰

On remand, Clary was sentenced to 151 months imprisonment by Judge Hamilton, Chief Judge of the Eastern District of Missouri.¹⁷¹ He appealed, challenging the 100:1 ratio on two arguments. First, echoing Judge Forrester's analysis in *United States v. Davis*, Clary argued that the rule of lenity should render the crack-cocaine penalty provisions of § 841 inoperable on the grounds that there is no scientific difference between crack and powder forms of cocaine. Second, he argued that Congress's rejection of the Sentencing Commission's recommendation to amend the guidelines constituted evidence of discriminatory purpose. The appellate court affirmed Clary's sentence, holding that his equal protection and rule-of-lenity arguments were foreclosed by precedent.¹⁷²

III. THE RACIAL BIAS "OUR LAW DOES NOT SEE"

. . . [T]here are certain important dimensions of racial injustice that our law does not see.¹⁷³

The Eighth Circuit, reversing *Clary*, applied rational basis analysis and missed the truth.¹⁷⁴ It is demonstrably *not* a long

167. *Id.*

168. *Washington*, *supra* note 129.

169. 34 F.3d at 713.

170. *Id.* at 714.

171. 97 F.3d 1457 (8th Cir. 1996).

172. *Id.*

173. Sklansky, *supra* note 158, at 1284.

174. Commenting on the Supreme Court's May 13, 1996, decision in *United States v. Armstrong*, 116 S.Ct. 1480 (1996), the editorial writers of the Los Angeles Times wrote of the current drug sentencing scheme: "Putting aside the defendants' race, the blatant inequality exercised under these laws now

leap from magazine articles, newspaper accounts, and television coverage to the inference that Congress, swayed by racial biases embedded in public opinion, brushed aside normal legislative procedures designed to produce fair and rational legislation.

If the goal of mandatory minimum sentences for drug-related crimes is to stem drug traffic by cracking down on traffickers and kingpins,¹⁷⁵ then the 100:1 disparity is patently illogical. It imposes the harshest penalties on street-level dealers, the people at the tail end of the drug distribution chain who are the most easily replaced.

Racial fears and stereotypes were clearly central to creating perceptions of the nature and urgency of the crack-cocaine problem, and it is equally clear that they played a part in Congress's design of the solution.

A. *How the Media Narrated the Story of Crack Cocaine*

George Gerbner and other communications researchers have documented how the words and pictures we see, via mass media, form our understanding of social reality. It would be impossible to have any reasonably realistic concept of a complex society without the aid of mass media in selecting and correlating what goes on around us. But it is easy to forget that the people who fulfill this function are human beings, selecting information, weaving narratives, and, simply because of the nature of the task of choosing relevant detail, excluding what doesn't fit the story line.

As Judge Cahill demonstrated in *Clary*, the Anti-Drug Abuse Act of 1986 was hurried through the legislative process at the crest of a wave of media attention to the crack "epidemic." By the Sentencing Commission's tally:

In the months leading up to the 1986 elections, more than 1,000 stories appeared on crack in the national press, including five cover stories each in *Time* and *Newsweek*. NBC news ran 400 separate reports on crack (15 hours of airtime). *Time* called crack the "Issue of the Year" (September 12, 1986). *Newsweek* called crack the biggest news story since Vietnam and Watergate (June 16, 1986).¹⁷⁶

Ironically, the devices of effective journalism — personalizing issues with the stories of real-life people, communicating the

looms large, seen by all but acknowledged by few." *Court Ruling on Crack Leaves the Fairness Issue Hanging: Disparity Question Has Validity, and It Won't Go Away*, L.A. TIMES, at B, May 15, 1996, available in 1996 WL 5269348.

175. Sklansky, *supra* note 158, at 1297.

176. SENTENCING COMMISSION REPORT at 122.

human dimensions of stories through the use of detail and specificity in both words and pictures — may have worked to feed racial fears and prejudices. Consider these often-quoted examples of media personification of the crack trade, read into the Congressional Record:

A relatively early series of articles about crack in the Palm Beach Post and Evening Times . . . noted that “[l]ess than a block from where unsuspecting white retirees play tennis, bands of young black men push their rocks on passing motorists, interested or not.” And when a Newsweek cover story, also reprinted and applauded in the Congressional Record, warned of “ominous signs that crack and rock dealers are expanding well beyond the inner city,” it accompanies that warning with photographs of two crack dealers, both black males, and offered the following description of a third: “One of the boldest dealers on the street is ‘Eare,’ a big-shouldered Trinidadian wearing gold chains and a diamond-studded bracelet with his name engraved in it Eare operates as brazenly as a three-card-monte dealer, waving fistfuls of bills around as he deals his drugs at the corner of 42nd and Seventh.”¹⁷⁷

Just two years after the passage of the Anti-Drug Abuse Act of 1986, George Bush’s campaign strategist Lee Atwater used exactly the same type of stereotype to gain political advantage. Atwater designed a negative television advertisement portraying the menacing face of convicted murderer Willie Horton, a black man, to play to racial anxieties while ostensibly attacking Democratic Presidential candidate Gov. Michael Dukakis’s record on crime control.¹⁷⁸

177. Sklansky, *supra* note 158, at 1293-94.

178. As described by Michael Tonry:

Willie Horton’s is a terrible story, but it shows the cynicism of racial politics. Horton, [a black man] who in 1975 had been convicted of the 1974 murder of a seventeen-year-old boy, failed to return from a June 12, 1986 [prison] furlough. In April of the following year, he broke into an Oxon Hill, Maryland, home where he raped a woman and stabbed her companion.

Lee Atwater . . . decided in 1988 to make Willie Horton a “wedge” issue for the Republicans. Atwater reportedly told a group of party activists that Bush would win the election “if I can make Willie Horton a household name.”

Atwater at first denied making this and another statement, to the effect that he would make Willie Horton Dukakis’s “running mate,” but later, dying of cancer, admitted the comments and said, “I am sorry for both statements.” MICHAEL TONRY, *MALIGN NEGLECT* 11 (1995).

The 1986 deluge of media reports on crack firmly fixed an equally threatening image in the public mind: the picture of young black males as the source of a spreading, dangerous, and destructive new drug problem. To believe that this manner of covering the crack-cocaine story did not excite racial fears is comparable to believing the Willie Horton ads were about crime and not race. Anxiety and prejudice as bases of public opinion translate into constituent pressures on Congress; from there it is a very short step to the embodiment of what Judge Cahill characterizes as "unconscious racism" in law.

Federal courts are trapped in the conflict: the inequities of the crack-cocaine statutes are apparent, yet current equal protection analysis is no help in eliminating them. As David Sklansky points out, black defendants have challenged the crack-cocaine penalties in all of the federal courts of appeals, with consistent results: "the defendants always have lost, and the opinions generally have been both unanimous and short."¹⁷⁹ Yet, as illustrated by the comments of jurists such as District Judges Cahill, Ziegler, Strom, Greene, Forrester, and Sachs, and Circuit Judges Heaney and Calabresi,¹⁸⁰ widespread recognition exists within the judiciary that these sentences are not just.

B. *The Opportunity Lost in United States v. Armstrong*

In *United States v. Armstrong*,¹⁸¹ the Supreme Court had an opportunity to address the 100:1 crack/powder sentencing disparity. Christopher Lee Armstrong and four others were arrested in 1992 and charged with conspiracy to possess and distribute more than fifty grams of crack cocaine under 21 U.S.C. §§ 841 and 846, as well as federal firearms charges.¹⁸² They responded by filing a motion for discovery or dismissal, claiming that they were victims of racially motivated selective prosecution.¹⁸³ The government opposed the discovery motion on the ground that there was no evidence or allegation of unfair action on the government's part. When the District Court granted the defendants' discovery motion, the government moved for reconsideration, presenting affidavits and other evidence to support the argument that race was not a factor in prosecutorial selection, that Jamaican, Haitian, and black street gangs dominate the manufacture and distribution of crack, and that other circum-

179. Sklansky, *supra* note 158, at 1303.

180. *See supra* notes 59-73.

181. 116 S.Ct. 1480 (1996).

182. *Id.* at 1483.

183. *Id.*

stances of the case justified the prosecution of Armstrong and his codefendants.¹⁸⁴ The District Court denied the government's motion for reconsideration, and the government refused to comply with the discovery order; the District Court then dismissed the case.¹⁸⁵

A divided three-judge panel of the Ninth Circuit Court of Appeals reversed, holding that the proof requirements for a selective-prosecution claim required the defendants to provide a colorable basis for their assertion that others similarly situated received different treatment.¹⁸⁶ The Ninth Circuit then voted to rehear the case en banc; the en banc panel affirmed the District Court's dismissal on the grounds that a defendant is not required to demonstrate that the government has chosen not to prosecute others who are similarly situated.¹⁸⁷

The Supreme Court, however, concluded that the defendants had not satisfied the requirement of a threshold showing of selective prosecution.¹⁸⁸ Chief Justice Rehnquist wrote for the Court, noting that neither the District Court nor the Court of Appeals referred to Federal Rule of Criminal Procedure 16, which governs discovery in criminal cases.¹⁸⁹ Holding that Rule 16 "authorizes defendants to examine Government documents material to the preparation of their defense against the Government's case-in-chief, but not to the preparation of selective-prosecution claims,"¹⁹⁰ the Court reversed, noting that extensive discovery would impose significant costs on the government and divert prosecutorial resources.¹⁹¹ "The vast majority of the Courts of Appeals," Justice Rehnquist noted, "require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted but were not . . . ;"¹⁹² the evidence submitted by Armstrong *et al.* "recounted hearsay and reported personal conclusions based on anecdotal evidence,"¹⁹³ he concluded. Two Justices wrote short concurrences,¹⁹⁴ and Justice Breyer concurred in part and in the judgment.¹⁹⁵

184. *Id.* at 1484.

185. *Id.*

186. *Id.*

187. *Id.* at 1484-85.

188. *Id.* at 1485-88.

189. *Id.* at 1485.

190. *Id.*

191. *Id.* at 1488.

192. *Id.*

193. *Id.* at 1489.

194. *Id.*

195. *Id.* at 1489-92.

Justice Stevens was the sole dissenter. He was also the only Justice who addressed the core issues underlying the harsh crack-cocaine penalties. This case required more than construction of a procedural rule, Justice Stevens said; it required analysis of the broader context in which it arose:

The District Judge's order [to dismiss] should be evaluated in the light of three circumstances that underscore the need for judicial vigilance over certain types of drug prosecutions. First, the Anti-Drug Abuse Act of 1986 and subsequent legislation established a regime of extremely high penalties for the possession and distribution of so-called "crack cocaine." . . . These penalties result in sentences for crack offenders that average three to eight times longer than sentences for comparable powder offenders. . . . Second, the disparity between the treatment of crack cocaine and powder cocaine is matched by the disparity between the severity of the punishment imposed by federal law and that imposed by state law for the same conduct. . . . For example, if respondent Hampton is found guilty, his federal sentence might be as long as a mandatory life term. Had he been tried in state court, his sentence could have been as short as 12 years Finally, it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. . . . The extraordinary severity of the imposed penalties and the troubling racial patterns of enforcement give rise to a special concern about the fairness of charging practices for crack offenses.¹⁹⁶

The District Judge, Justice Stevens concluded, acted well within her discretion when calling for development of facts that would illuminate the government's choice of forum for such offenses.¹⁹⁷

Armstrong challenged the disparate impact of the crack cocaine penalties as an issue of selective prosecution. Despite Justice Stevens's allusions to the need for "careful scrutiny" of any colorable claim of discriminatory enforcement of the harsh crack-cocaine penalties,¹⁹⁸ the majority took the narrow view, confining its discussion primarily to the issues of required evidentiary thresholds and construction of Rule 16. It will be of little help in resolving the frustration felt by federal judges who are required to apply penalties so many feel are fundamentally unjust.

196. *Id.* at 1492-94.

197. *Id.* at 1494.

198. *Id.* at 1495.

IV. CONCLUSIONS

. . . *I think we can prove and have been able to prove what works: punishment for the career criminal, punishment for the young offender who commits a violent act, but punishment that's fair, that fits the crime.*¹⁹⁹

Where racial biases have inappropriately seeped into legislation, as they have in the case of the 100:1 crack/powder cocaine sentencing laws, judges need a decision-making methodology that takes such factors into account.

Courts and commentators have proposed a variety of solutions to the "paradigmatic case of unconscious racism"²⁰⁰ represented by the federal crack penalties. Judge Cahill would take unconscious racism into account where a disparate impact is so obvious that it shocks the conscience of the court, abandoning judicial deference to legislative decisions in such cases and applying strict scrutiny even where a law is facially neutral. Judge Calabresi's comments suggest that though Congress may not have been consciously motivated by racial animus at the time the penalties became law, Congressional *failure* to act, knowing what we know now, may undermine the validity of the crack cocaine penalties.

The Minnesota Supreme Court, in *State v. Russell*,²⁰¹ applied a more stringent approach to equal protection, based on the Minnesota constitution, in considering a challenge to disparate sentencing for crack offenders. Distinctions that produce different sentences must not be "manifestly arbitrary or fanciful," the state high court wrote. Classifications must be genuine and relevant to the purpose of the law, and the purpose must be one that the state can legitimately attempt to achieve.²⁰² By that standard, the court held that a Minnesota statute imposing harsher penalties for crack offenses than for powder-cocaine offenses failed "for lack of a genuine and substantial distinction."²⁰³ The legislature, said the court, had based its distinction on anecdotal evidence and had no substantive proof that crack cocaine is more addictive or dangerous than the same drug in powder form.²⁰⁴

199. Statement of Attorney General Janet Reno, news briefing, FEDERAL DOCUMENT CLEARING HOUSE POLITICAL TRANSCRIPTS, Sept. 7, 1995.

200. Sklansky, *supra* note 158, at 1308.

201. 477 N.W.2d 886 (Minn. 1991); at issue was a state law that enhanced crack cocaine penalties by a 10-to-3 ratio.

202. *Id.* at 888.

203. *Id.* at 889.

204. *Id.*

David Sklansky, pointing out that current equal protection doctrine was developed primarily in non-criminal contexts, proposes that we give up "our insistence on a unified doctrine" and agree to tolerate a disaggregated concept of equal protection:

It matters, to begin with, that the sanctions are criminal. When a law imposes long periods of incarceration — instead of, say, allocating employment opportunities — inequalities attributable to race are especially intolerable. Locking someone up in a cage for a period of years is singularly serious business.²⁰⁵

Courts could also, he suggests, apply the concept of burden-shifting: "when a federal sentencing rule is shown to have a seriously disproportionate impact on black defendants . . . the government should be required to rebut the inference of conscious or unconscious racism by providing an alternative explanation for the rule."²⁰⁶ This is not only sensible, it is supported by precedent. Burden-shifting "based on a showing of disproportionate impact is well established . . . in cases involving statutory claims of discrimination, constitutional challenges to jury selection, and remedial challenges to school desegregation."²⁰⁷ Isolating one out of three young black men within the criminal justice system²⁰⁸ is at least as serious a problem as segregating a school system, and extension of burden-shifting to cases of disparate impact resulting from criminal prosecutions is warranted.

Insistence on finding a racially discriminatory *purpose* overlooks what Lee Atwater knew for a fact: racial fears can drive political decision-making, whether such fears are excited by intentional manipulation or unintentionally. Facially neutral laws, in some circumstances, can embody racial fears, the same way a negative, racially inflammatory, Willie-Horton-style campaign ad can influence who occupies the White House.

Cocaine is destructive. Crack cocaine, because of its easy appeal to more vulnerable potential users, is a particularly insidious form of the drug. But the 100:1 crack/powder ratio has no rational scientific or epidemiological basis, nor is it rationally

205. Sklansky, *supra* note 158, at 1316.

206. *Id.* at 1319.

207. *Id.* at 1318.

208. According to the New York Times, data gathered by the Justice Department and assembled by The Sentencing Project show that one out of three black men in their 20s are imprisoned, on probation, or on parole. A study released in 1994 reported that one in four young black men were under the control of the criminal justice system. Fox Butterfield, *More Blacks in Their 20's Have Trouble With the Law*, N.Y. TIMES, Oct. 10, 1995, at A-18.

related to any coherent strategy to inhibit the distribution of cocaine.

Because crack is typically marketed to younger, poorer, and more vulnerable victims than is powder cocaine, and because the organizations that market crack pose special problems for the communities they dominate, additional penalties for crack distribution may be justified. But enforcing the arbitrarily selected distinction embodied in the 100:1 disparity does much to erode confidence in the criminal justice system, even while it diverts legislative attention from the harder questions: the causes of crime, and how to heal a society in which one out of every three young black men is under the supervision of the criminal justice system.²⁰⁹

More to the point, the harsh penalties are not working. "In the end," according to Glenn Loury, "the anti-drug strategy has had a negligible impact on the supply of cocaine and heroin, but it has caused a major increase in the supply of black convicts."²¹⁰ Meanwhile, public attitudes toward the court system are on a slide downward: in 1994, fifty-three percent of whites and blacks held unfavorable views of the court system. Just two years later, in 1996, sixty-three percent of whites and fifty-six percent of blacks viewed the system unfavorably.²¹¹ Signs of corrosion in fundamental elements of the system are appearing: as the percentages of young black men in prison rise, some black jurors "are choosing to disregard the evidence, however powerful, because they seek to protest racial injustice and to refrain from adding to the already large number of blacks behind bars."²¹²

At present, Congress is considering a variety of measures to either end or lessen the crack/powder sentencing disparity. Some propose implementing a 1:1 ratio. Others would raise penalties for possession of powder cocaine, creating a new ratio of, for example, 20:1.²¹³ Some proposals suggest increasing the penalties for possession of powder cocaine to the same level as those for crack cocaine.²¹⁴ What impact such a move would have on

209. Sklansky, *supra* note 158, at 1316.

210. Glenn Loury, *The Impossible Dilemma: Between Black Crime and Judicial Racism*, NEW REPUBLIC, Jan. 1, 1996, at 23.

211. Public opinion data collected by Pew Research Center for the People & The Press; personal correspondence, Feb. 1, 1996.

212. Benjamin A. Holden *et al.*, *Race Seems to Play An Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at 1.

213. Lee Otis, staff researcher for Sen. Spencer Abraham; telephone interview, Jan. 24, 1996.

214. See, e.g., H.B. 332, submitted jointly to House Committees on Judiciary and Commerce on January 1, 1997, or S.B. 209, submitted to the Senate Judiciary Committee.

prosecutorial resources or federal prison populations remains to be seen.

Even if Congress adjusts the current powder/crack sentencing disparity, however, the crack laws have exposed a serious gap in current equal protection analysis. Insisting on finding a *discriminatory purpose* behind this particular legislative scheme, which has such a clear and significant racially disparate impact, ignores what every advertising or public relations practitioner knows for a fact: our perceptions of what's going on in society are largely formed by the explicit and implicit messages we see and hear through the media.

Racially disparate impact doesn't prove that improper racial considerations influenced the design of a legislative scheme. But its presence should be seen as a suggestion that unconscious racial attitudes or beliefs may have influenced the process. The powder/crack legislative scheme is a perfect example: even members of Congress complained that the fast-track, abbreviated process was a "sanctimonious election stampede" that could lead to "forgetting fundamental principles."²¹⁵

Where important liberty interests are at stake, and where evidence of racially disparate impact is clear and compelling, courts should employ a level of scrutiny that allows examination of hidden factors that may have improperly influenced the design of the legislative solution. In such cases, the burden should shift to the government to establish that there is in fact a fit between the means selected and the end the legislature hoped to achieve.

215. *Supra* note 143.

