University of Richmond Law Review

Volume 40
Issue 4 *Allen Chair Symposium: State of the Chesapeake Bay in the Twenty-First Century*

Article 8

5-1-2006

Adding Fuel to the Fire: United States v. Booker and the Crack versus Powder Cocaine Sentencing Disparity

Briton K. Nelson
University of Richmond School of Law

ADDING FUEL TO THE FIRE: *UNITED STATES V. BOOKER* AND THE CRACK VERSUS POWDER COCAINE SENTENCING DISPARITY

I. INTRODUCTION

The sentencing structures for crack and powder cocaine have been dramatically different since the Anti-Drug Abuse Act of 1986[1] established a 100:1 ratio as the penalty differential between the two drugs, and set the same punishment for five grams of crack as for five hundred grams of powder cocaine.[2] The ratio was followed in the Federal Sentencing Guidelines (the "Sentencing Guidelines") and has evoked considerable criticism over the past twenty years.[3] Litigants have challenged the ratio in courts, judges have expressed their displeasure with the ratio, and the United States Sentencing Commission (the "Sentencing Commission" or the "Commission") has issued three reports to Congress disapproving of the ratio.[4] Still, offenders have been consistently sentenced according to the once mandatory Sentencing Guidelines following the ratio.

In January 2005, the Supreme Court handed down its decision in *United States v. Booker*,[5] effectively rendering the Sentencing Guidelines advisory instead of mandatory, as they once were.[6] Although the 100:1 ratio lives on in the mandatory minimums, the Sentencing Guidelines would often provide for a sentence harsher than the mandatory minimum. Now, courts have the flexibility to depart from the Sentencing Guidelines when dealing with the

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

2. § 1002, 100 Stat. 3207-3.

3. *See* Editorial, *Crack Cocaine Sentencing Inequity*, N.J. L.J., Aug. 1, 2005 ("A chorus of voices from commentators, courts, and the Sentencing Commission itself has criticized the grossly unequal sentences.").

4. *See* discussion *infra* Part II.D.

5. 543 U.S. 220 (2005).

6. *Id.* at 245–46.

crack/powder disparity.[7] The courts may use a lower ratio, as the Sentencing Commission and numerous scholars and judges have suggested, provided that they still abide by the mandatory minimum set forth in 18 U.S.C. § 3553(a).[8]

In order to understand fully where the *Booker* decision leaves us with respect to the crack/powder debate, it is necessary to understand the background of cocaine and the history leading up to *Booker*. To that end, Part II of this comment will discuss the history and background of cocaine, including a brief history of drug use, a comparison of crack and powder cocaine, the formation of the 100:1 ratio, and responses to the ratio's formation since 1986. Part III will analyze the topic of sentencing without guidelines, sentencing after the imposition of the Sentencing Guidelines, and the erosion of the Guidelines leading up to *Booker*. Part IV will then combine the two broad topics and analyze the impact that the *Booker* decision will likely have on the ongoing debate over the penalties for crack and powder cocaine. It will explain how the decision adds more momentum to the debate, and argue that it adds enough fuel to the fire to encourage changes to the current penalty structure.

II. COCAINE BACKGROUND

A. *History*

To understand the current drug laws and the debate over how crack cocaine and powder cocaine offenses are punished, it is helpful to briefly look at the history of drug use in America and the reasons that people turn to drugs. The "national crisis of the first order"[9] surrounding the crack "epidemic"[10] that prompted the

7. *See* Editorial, *supra* note 3 ("United States district courts are no longer bound to impose the extraordinarily harsh Guideline sentences on sellers of crack cocaine.").

8. *See infra* Part IV.

9. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1286 (1995); *see also* RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, SENTENCING WITH DISCRETION: CRACK COCAINE SENTENCING AFTER *BOOKER* 8 (2006), *available at* http://www.sentencingproject.org/pdfs/crackcocaine-afterbooker.pdf (explaining that media coverage portraying crack cocaine as a "plague," "epidemic," and "crisis" provided the atmosphere for the passage of the Anti-Drug Abuse Act of 1986).

10. *E.g.*, U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, UNITED STATES SENTENCING COMMISSION 121 (1995), *avail-*

strict mandatory minimums found in the Anti-Drug Abuse Act of 1986[11] did not just come out of nowhere and take the nation by surprise; rather, the beginnings became apparent shortly after World War II, largely with heroin use.[12] In the years following the war, heroin had been "embraced," and "[t]he drug scene had become the arena of 'happening' America."[13]

The current American drug problem does not have only one cause, but is rooted in complex conditions that lead to drug use.[14] Likewise, the spread of the drug problem is the result of a number of factors taken together.[15] The escalation of the drug crisis largely took place in the 1980s—the "age of crack."[16] Cocaine was President Ronald Reagan's primary target in his initiative against drugs, which, owing to the drug-related deaths of Len Bias and Don Rogers,[17] was largely influenced by the increased visibility of a national drug problem.[18]

Four models have been suggested to explain why people may turn to drugs, and why, in the 1980s, the United States experienced the crack epidemic: the status model, the coping model, the structure model, and the saturation model.[19] The status model reflects a "fascination" with the crack lifestyle;[20] the coping model

---

able at http://www.ussc.gov/crack/exec.htm [hereinafter 1995 REPORT].

11. Pub. L. No. 99-570, 100 Stat. 3207; *see* Sklansky, *supra* note 9, at 1286 (referring to the penalties as "the stiffest, in many respects, in the history of American narcotics laws").

12. *See* ELLIOT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE 36 (1993) ("The American drug crisis didn't suddenly spring up, full-blown with the cocaine epidemic of the eighties."); *see also* JAMES A. INCIARDI, THE WAR ON DRUGS 23 (1986) (commenting that in the early 1950s, the image of a drug user was a heroin addict in the urban ghetto).

13. INCIARDI, *supra* note 12, at 28.

14. *See* CURRIE, *supra* note 12, at 67 (explaining the roots of drug use as a response to complex, "multilayered" conditions including unemployment, and poverty, especially relative poverty).

15. *See id.* at 76 (citing "deepening poverty, declining labor markets" and "eroding families" all "within a context of widening inequality, government retrenchment, and a spreading culture of predatory consumerism" as key factors).

16. *Id.* at 75.

17. *See* 1995 REPORT, *supra* note 10, at 121. Len Bias and Don Rogers were two well-known sports figures, and so their deaths received much media attention and caused public concern.

18. *See* DAVID BOYUM & PETER REUTER, AN ANALYTIC ASSESSMENT OF U.S. DRUG POLICY 7 (2005).

19. CURRIE, *supra* note 12, at 104.

20. *Id.* at 110.

connects the idea that daily life is tougher in deprived communities with drug use;[21] the structure model views drug use as providing "structure and purpose" to the lives of those who may lack that elsewhere;[22] and the saturation model presents the perhaps bleak view that drug use may become so common that it is no longer "planned or consciously chosen."[23] The policies that were in place in the 1970s and 1980s had the effect of creating some communities with no opportunities for jobs and income, encouraging increased drug use during this time period.[24]

Drug use has not always been viewed as a crisis. America's drug history illustrates that there have been periods of tolerance followed by periods of intolerance. Since the 1970s, however, public tolerance of drug use has declined.[25] For example, while the 1930s saw a fight against marijuana, the 1940s ignored the drug problem; then in the 1950s, heroin increased in visibility, becoming the most feared drug throughout the 1960s; and "by the close of the 1960s, all hallucinogenic drugs had been placed under strict legal control."[26] In the mid-1970s, it seemed that heroin use was declining, and public interest in drug policy correspondingly decreased.[27] Most recently, however, public interest in drug abuse has again intensified and has entered a new period of intolerance spurred by the Reagan Administration's "War on Drugs."[28] As some of the effects of cocaine became more well known, there was a growing sense of intolerance of the drug.

---

21. *See id.* at 113.

22. *Id.* at 116.

23. *Id.* at 119–20.

24. *See id.* at 142; *see also id.* at 146 ("[S]ocial and economic deprivation and a sense of exclusion from the 'good life' breed drug abuse; but we have consciously chosen policies that have spread and deepened poverty and widened the gap between the deprived and the affluent.").

25. *See* Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 37 (1994).

26. INCIARDI, *supra* note 12, at 23, 28, 31.

27. *See* BOYUM & REUTER, *supra* note 18, at 6.

28. *See id.* at 7.

B. *Crack and Powder—The Cocaine Epidemic*

1. Cocaine Generally

Cocaine is derived from coca leaves found in the Andes Mountains in South America.[29] The first form of cocaine use, now nearly four thousand years old, was chewing coca leaves.[30] Coca was not considered a dangerous drug by any means. In fact, "[t]he Incas regard coca as a gift from the gods intended to improve human life. Coca leaves are sacred . . . . They equate dedication to coca chewing to spirituality and higher pursuits."[31] The potency of the coca leaves used by South American Indians, though, is much lower than the potency of the drug used in America today.[32]

Reports indicated that cocaine was introduced to Europe as early as the sixteenth century.[33] A German chemist was able to isolate cocaine from coca by 1860, and thus began the interest in the pure alkaloid rather than the plant.[34] Cocaine was used in the nineteenth century largely for medicinal purposes—as a remedy for illnesses and as an anesthetic.[35] Coca wines and elixirs were another popular mode of cocaine use in the late 1800s.[36] These liquids, though, were still not as potent as the drug that is used

---

29. William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1238 (1996) (stating that the two species of plants that yield enough of the cocaine alkaloid to "justify mass cultivation" are found mainly in Peru, Bolivia and Columbia).

30. *See id.* (explaining the process of mixing lime with the leaves that South American Indians would use to make chewing the leaves more enjoyable).

31. *Id.* at 1238–39; *see also* INCIARDI, *supra* note 12, at 6 ("[C]hewing coca leaves for their mild stimulant effect had been a part of Andean culture for perhaps a thousand years.").

Even today, chewing coca leaves is looked upon as beneficial: "Bolivia's new foreign minister, David Choquehuanca, said the 'sacred leaf' is so nutritious it should be on school menus . . . . [a] spokesman for Peruvian presidential candidate Ollanta Humala said ground coca leaf could be baked into schoolchildren's bread. In Venezuela, President Hugo Chavez also embraced the idea of coca bread. 'Coca isn't the same as cocaine,' Chavez said. 'Coca is tremendously nutritional.'" Frank Bajak, *Coca Eradication Way Down Under Morales*, *at* http://news.yahoo.com/s/ap/20060330/ap_on_re_la_am_ca/bolivia_coca_flourishes (last visited Apr. 3, 2006).

32. Spade, *supra* note 29, at 1239 (citing the potency of the leaves as being only one percent of the potency of the drug used today).

33. *See id.*

34. *See id.* at 1240. *But see* INCIARDI, *supra* note 12, at 7 (stating that there is contradiction regarding who first isolated cocaine and when).

35. *See* Spade, *supra* note 29 at 1240; *see also* INCIARDI, *supra* note 12, at 7 (discussing the use of cocaine on Bavarian soldiers due to its ability to suppress fatigue).

36. *See* Spade, *supra* note 29, at 1240.

today; the amount present in wine, for example, was similar to the amount ingested by the coca leaf chewers.[37] Coca drinks—including Coca-Cola—were advertised as "invigorating Beverage[s] . . . a valuable Brain Tonic, and a cure for all nervous affections."[38]

When the availability of cocaine became more widespread, the use of coca declined; however, a respective increase in medical and nonmedical abuses occurred due to the higher potency of the drug.[39] Intranasal, injection, and inhalant methods of administration likewise increased.[40] During this time, cocaine was used for multiple purposes, administered in varying ways, and used more frequently. Cocaine also gained a certain amount of credibility. Sigmund Freud, for example, referred to cocaine as a "magical drug,"[41] published an essay about its benefits, and encouraged friends to use the drug until the late 1880s when reports were published about compulsive use and side effects.[42] Despite the negative reports, the medical industry in the United States promoted the drug as a home remedy to cure alcoholism, venereal disease, and addiction to other medicines.[43] Cocaine has also been advertised with respect to sexual enhancement due to its reputation as an aphrodisiac.[44] This use, though, has considerable dangers.[45]

As the harmful effects of cocaine became more well-known, public perception of the drug changed.[46] Legislative efforts to curb cocaine abuse in the United States began in 1914 with the Harri-

---

37. *See id.*

38. INCIARDI, *supra* note 12, at 8 (reproducing an advertisement for Coca-Cola Syrup and Extract).

39. *See* Spade, *supra* note 29, at 1241.

40. *See id.*

41. INCIARDI, *supra* note 12, at 7.

42. *See id.*; *see also* Spade, *supra* note 29, at 1242 (describing the first documented addict who "became so addicted to the drug that, on one occasion, she pried loose one of her gold teeth with a pair of scissors, and, with blood streaming down her face and drenching her clothes, pawned the tooth for eighty cents in order to buy her daily dose").

43. INCIARDI, *supra* note 12, at 8–9.

44. *See id.* at 78, 80 ("A sprinkle of cocaine on the clitoris or just below the head of the penis will anesthetize the tissues and retard a sexual climax . . . with persistent stimulation, the drug will ultimately promote an explosive orgasm."); Spade, *supra* note 29, at 1241 ("By 1894, cocaine was being used topically on the penis as well as rectally and vaginally. It was believed to cause sexual arousal and to improve sexual performance.").

45. *See* INCIARDI, *supra* note 12, at 81 (explaining that the drug can either dry out the urethral membranes or absorb so quickly that an overdose may occur).

46. Spade, *supra* note 29, at 1242.

son Narcotic Drug Act,[47] and between 1930 and 1960 recreational use was at an all-time low.[48] Cocaine abuse rebounded in the 1960s, though, and crack cocaine was first manufactured in the United States in the early 1970s.[49] By the early 1980s, "crack use had exploded,"[50] and the United States was in the midst of the crack cocaine epidemic.[51]

2. Crack and Powder Compared

Although this comment focuses primarily on powder and crack, simply because those are the forms governed by the 100:1 penalty structure, it will also provide a brief analysis of how the different forms are made. Based on chemical substance, pharmacology, and distribution, crack and powder are not substantially different drugs.[52] From its initial form in the coca leaf,[53] cocaine can take many different forms: coca paste, cocaine hydrochloride (powder), freebase cocaine, and cocaine base (crack).[54] Coca paste is an intermediary product used largely in South America.[55] Cocaine powder is made by treating coca paste with hydrochloric acid and a solvent; it is generally sniffed, but can also be injected.[56] Freebase cocaine is made by treating the hydrochloride with an alkali and can be smoked.[57] Crack is provided to the consumer in a ready-to-use format; it is made by dissolving the powder in warm water and adding an alkali.[58] Thus, pharmacologically, the forms of cocaine differ only in the amount in which they are manufactured.

---

47. Pub. L. No. 223, 38 Stat. 785.

48. *See* Spade, *supra* note 29, at 1243.

49. *Id.*

50. *Id.*

51. *See id.* at 1243–44 (describing the epidemic as a "broad-based phenomenon that simultaneously arose in several cities and was driven by drug dealers of different nationalities, races and ethnic groups").

52. *See* Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?* 45 WASH. U. J. URB. & CONTEMP. L. 121, 149 (1994).

53. *See* Spade, *supra* note 29, at 1256 (stating that "[a]ll forms of cocaine are derived from the coca leaf").

54. *See id.* at 1257–58.

55. *See id.* at 1257. "Smoking coca paste produces an intense euphoria, but is also highly damaging." *Id.*

56. *Id.*

57. *Id.* at 1258.

58. *Id.*; *see also* CURRIE, *supra* note 12, at 335 (comparing the freebasing process to crack: "Crack is produced through a far simpler, less dangerous, and less costly process, which helps account for its appeal.").

The general effects of cocaine use are the same whether the drug is smoked, snorted, or injected.[59] The various methods of use, however, have differences in the onset, intensity and duration of the physiological and psychotropic effects.[60] Physiologically, cocaine produces alertness and increases energy, motor activity, heart rate, and blood pressure.[61] The most rapid increases are produced by the most efficient methods of absorption—inhaling crack and injecting powder.[62] The psychotropic effects of cocaine include "a sense of euphoria, decreased anxiety and social inhibitions, and heightened sexuality."[63] As with the physiological effects, the faster the cocaine reaches the brain, the more intense these effects are perceived—again, inhaling crack and injecting powder are the most efficient.[64]

Heavy cocaine use produces "a definite 'abstinence syndrome,'" including a high followed by a "crash" that is associated with feelings of depression, agitation, fatigue, and anxiety.[65] This phase may also be followed by a withdrawal phase.[66] Feelings of addiction and psychological dependence are often stronger for crack users than powder users.[67] The drug has a reinforcing effect that forces the user back to the drug.[68] The feelings of anxiety and depression that a user may experience will be stronger for the methods that deliver the cocaine most rapidly to the brain since they provide the highest levels of psychotropic effects.[69]

Crack also differs from powder in its accessibility. Crack comes in smaller, more affordable forms that are ready to use, in addi-

---

59. *See* Lowney, *supra* note 52, at 150.

60. *See* Spade, *supra* note 29, at 1259.

61. *See id.* (explaining the effects of cocaine on the central nervous system and the cardiovascular system).

62. *Id.*

63. *Id.* at 1260 (discussing why cocaine causes these effects).

64. *See id.*

65. CURRIE, *supra* note 12, at 334 (explaining the effects of frequent cocaine use—physically and psychologically).

66. *Id.*

67. *See* Spade, *supra* note 29, at 1261–62.

68. *See id.* at 1262 (describing the reinforcing effect as one causing the user to seek the high again, but since subsequent highs are less intense, it causes a sense of unhappiness that reinforces the desire to use the drug again).

69. *Id.* at 1261–62; *see also* CURRIE, *supra* note 12, at 335 ("[C]rack's effects are even more short-lived than those of powder cocaine, as well as more intense [so] the urge toward repeated use is particularly powerful . . . .").

tion to producing a more intense high.[70] Crack, then, made cocaine available to a wider variety of markets that now included the poor and the young.[71] Because of the ease with which crack can be found, it has done the most damage to low-income areas.[72] Crack markets bring with them societal harms—including crack houses, gang violence, and the recruitment of children to distribute the drug.[73] Researchers have also suggested that crack is found in a "'subculture of violence,'" and that while crack use is not the cause of violence, crack use and violence are highly correlated.[74]

Due to these characteristics, it has been said that crack is the most dangerous form of cocaine.[75] The question that arises is whether the differences between crack and powder are substantial enough to justify a 100:1 penalty ratio.

C. *The Creation of the 100:1 Ratio*

Anti-drug legislation surrounding cocaine began in 1914 with the Harrison Narcotic Drug Act.[76] The Harrison Act, which was passed using racial politics, prohibited the non-medical use of cocaine.[77] The cocaine supply was reduced after this Act was passed, and cocaine did not re-emerge as a problem until the 1960s.[78] Following the re-emergence of the problem, the Comprehensive Drug Abuse Prevention and Control Act of 1970[79] ("the Act of 1970") was passed and eliminated mandatory minimums.[80]

---

70. *See* Spade, *supra* note 29, at 1263.

71. *Id.* (analyzing the crack market).

72. *See* CURRIE, *supra* note 12, at 80–81 ("[C]rack has struck hardest at the poorest of the poor . . . . Crack sales and use were not dispersed evenly . . . but were concentrated almost exclusively in 'isolated pockets of the community.'").

73. *See* Spade, *supra* note 29, at 1263–65.

74. CURRIE, *supra* note 12, at 174.

75. *See* Spade, *supra* note 29, at 1266 (citing four reasons: crack is the most compelling type of cocaine addiction; the crack trade is difficult for law enforcement agencies to break up; crack addiction preys on the young and the poor; and crack leads to "paranoid, disorganized thinking"). *But see* Lowney, *supra* note 52, at 151 ("Although crack and cocaine produce some different effects, including intensity of the high and plasma levels, there is no pharmacological evidence indicating that crack is more dangerous than powder cocaine.").

76. Pub. L. No. 223, 38 Stat. 785.

77. *See* Spade, *supra* note 29, at 1246 (discussing the origins of the Harrison Act).

78. *Id.* at 1247.

79. Pub. L. No. 91-513, 84 Stat. 1236.

80. Spade, *supra* note 29, at 1247.

Mandatory minimums were brought back to life in the 1980s as part of the War on Drugs.[81] More specifics on sentencing, and sentencing reforms will be discussed in Part III.

The Anti-Drug Abuse Act of 1986[82] ("the Act of 1986") is primarily responsible for the current sentencing structure for cocaine.[83] Crack had "come to symbolize . . . the entire problem of illicit narcotics in America."[84] Members of Congress were concerned that crack opened the market up to the poor and juveniles, and that it might spread outward from the inner city confines.[85] The Act of 1986 was expedited through Congress based on a feeling that the nation was "under siege from crack."[86] It, therefore, did not get the amount of discussion that legislation under normal circumstances generally receives.[87] Beyond showing that different ratios were considered, the legislative history does not explain why Congress rejected or accepted any one ratio in particular.[88]

The Act of 1986, then, is "the major legislative response to the dramatic changes during the 1980s in public attitudes toward drug abuse."[89] It established "stiff" mandatory minimums for narcotics trafficking, most of which were set to quantities of the drug that were indicative of large-scale offenders.[90] Interestingly, the

---

81. *See id.* at 1249.

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

83. Elizabeth Tison, Comment, *Amending the Sentencing Guidelines for Cocaine Offenses: The 100-to-1 Ratio Is Not as "Cracked" Up As Some Suggest*, 27 S. ILL. U. L.J. 413, 416 (2002).

84. Sklansky, *supra* note 9, at 1292.

85. *See id.* at 1295 (discussing the cocaine related deaths that occurred in late June of 1986; these two deaths of well-known athletes built on the fear that crack was not just a threat for minority communities, but for everyone).

86. Spade, *supra* note 29, at 1251.

87. *See id.* at 1253. The hearing on the 100:1 ratio lasted less than four hours, and the passing of the legislation in the "frenzied panicked atmosphere" has been compared to a poker game. A former Judiciary Committee staff member described the environment in the following way: "I'll see your five years and I'll raise you five years. It was the crassest political poker game." *Id.* at 1255.

88. *See id.* at 1252. The history shows that the legislators seemed to believe that crack was more addictive, causes crime, has more dangerous physiological effects, that the young are particularly prone to use it, and that the low cost would lead to more widespread use. *Id.*; *see also* 1995 REPORT, *supra* note 10, at 185 (listing the reasons that Congress considered crack more dangerous than powder).

89. Sklansky, *supra* note 9, at 1286.

90. *See id.* at 1286–87 (discussing that Congress wanted to punish kingpins most heavily, and so provided a ten-year mandatory minimum for quantities believed to be associated with major traffickers, and five-year minimums for those quantities thought to be

threshold for crack was set by simply dividing the threshold for powder by 100, thus establishing the 100:1 ratio.[91] The main justifications for this ratio were that crack is associated with systemic crime, that it is more widely available to the young and the poor, and that it produces more intense physiological and psychotropic effects.[92] One year later, the Sentencing Commission introduced Sentencing Guidelines that mirror the 100:1 ratio.[93] In 1988, Congress created a mandatory minimum penalty for simple possession of crack, again distinguishing the two forms of cocaine.[94]

D. *Criticisms and Responses*

The 100:1 ratio has been criticized for a number of reasons,[95] and the Sentencing Commission itself has attempted to encourage Congress to change it on three separate occasions.[96] It is perhaps this element of federal sentencing that has received the most analysis over the past twenty years.[97] It is also an intensely litigated element of federal sentencing, having been frequently challenged in courts for a number of reasons.[98] Judges have expressed disagreement with the ratio and looked for ways to avoid its application,[99] have refused to hear cases where they would

---

associated with middle-level dealers).

91. *Id.* at 1287. Thus, fifty grams instead of five thousand would carry a ten-year mandatory minimum. *See id.*

92. *See* Tison, *supra* note 83, at 417 (citing the 1995 REPORT, *supra* note 10, at 118).

93. *See* Sklansky, *supra* note 9, at 1287.

94. *See* 21 U.S.C. § 844 (2000).

95. *See* discussion *infra* Part II.D.1.

96. *See* 1995 REPORT, *supra* note 10, at 195–96; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9 (1997), *available at* http://www.ussc.gov/r_congress/newcrack.pdf [hereinafter 1997 REPORT]; U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 104 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm [hereinafter 2002 REPORT]. For further explanation on the reports, see *infra* Part II.D.2.

97. KING & MAUER, *supra* note 9, at 8.

98. *See, e.g.*, Cristian M. Stevens, Note, *Criticism of Crack Cocaine Sentences Is Not What It Is Cracked Up to Be: A Case of First Impression Within the Ongoing Crack vs. Cocaine Debate*, 62 MO. L. REV. 869, 876–77 (1997) (citing cases challenging the ratio on theories of selective prosecution, equal protection, due process, void for vagueness, cruel and unusual punishment, and disparity not taken into consideration by the Sentencing Commission); *see also* Andrew N. Sacher, Note, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149, 1156 (1997) (noting that the ratio has been challenged in every circuit and citing cases from each circuit with a specific challenge).

99. *See generally* Sacher, *supra* note 98, at 1159 (discussing a letter written by

have to apply it, and have even resigned.[100] This section will first address the major criticisms of the ratio and then discuss how the Sentencing Commission and Congress have responded to these criticisms.

1. Major Criticisms

The most prominent criticism of the ratio is that it has a discriminatory impact.[101] Other criticisms are that it fails to achieve the goal of targeting the major traffickers;[102] that targeting street dealers actually perpetuates the violence that Congress seemed so concerned about;[103] and that crack is essentially the same drug as powder.[104]

Before the full implementation of the Sentencing Guidelines, people of different races received similar sentences. After implementation, differences among the races in sentencing became more pronounced.[105] A number of reasons have been offered for this impact: (1) crack is typically used in black communities; (2) crack is usually dealt in the inner city; and (3) police may pay more attention to crack dealing in those neighborhoods.[106] Crack is often used and dealt in inner-city communities, in part because of a lack of access to legitimate employment.[107] With respect to

---

twenty-seven judges "expressly call[ing] for a reduction between the disparity in the penalties for crack and cocaine"); Spade, *supra* note 29, at 1279–83.

100. *See* Spade, *supra* note 29, at 1281–82.

101. *See* MARC MAUER, RACE TO INCARCERATE 143 (1999) ("[N]o policy has contributed more to the incarceration of African Americans than the 'war on drugs.'"); Sklansky, *supra* note 9, at 1289 ("The particularly harsh federal penalties for trafficking in crack cocaine thus have a particularly disproportionate impact on black defendants."); Spade, *supra* note 29, at 1266–71 (explaining the disparate impact that the ratio has on blacks). *But see* Stevens, *supra* note 98, at 886 (stating that the evidence to show "that blacks are unfairly . . . affected by the crack statute is scarce and inconclusive").

102. *See, e.g.*, Spade, *supra* note 29, at 1271–73 (discussing the ways that the ratio fails to target dangerous offenders).

103. *See, e.g.*, Sacher, *supra* note 98, at 1180.

104. *See, e.g.*, *id.* at 1189–90 (noting that the principal source should be targeted, since "[c]rack is no more than a tragic derivative of the much larger cocaine market").

105. *See* Spade, *supra* note 29, at 1266.

106. *See* Sklansky, *supra* note 9, at 1289 (discussing these three reasons for the disproportionate impact); KING & MAUER, *supra* note 9, at 9 ("The 100-to-1 ratio has had a disproportionate impact on defendants of color, primarily as the result of differential practices by law enforcement.").

107. *See* MAUER, *supra* note 101, at 166–67 ("For many, drug dealing was not a full-time occupation but, rather, a means of earning extra income at times when their earnings from legitimate employment were down.").

the third reason for the discriminatory impact, inner-city crack dealing takes place outside, where it is easier for police to observe, while in upper-class neighborhoods drug deals usually take place behind closed doors. Therefore, it is easier for the police to identify offenders in the inner-city neighborhoods.[108] This effect has also been referred to as a "vicious circle," perpetuating the problems that we see with the discriminatory impact of the 100:1 ratio.[109]

An additional criticism is that the 100:1 ratio's distinction between crack and powder does not catch the kingpins that Congress attempted to target throughout the rest of the Act of 1986.[110] Instead, it targets low-level dealers, both in the quantity of the drug necessary to trigger the mandatory minimum, and also because it is the low-level dealers that generally convert the powder received from high-level dealers into crack.[111] In fact, the ratio can, in some situations, have the opposite effect and actually target the low-level dealers, sentencing the small dealers who buy powder and convert it into crack to longer terms than the wholesale dealer would receive.[112]

Another criticism of the 100:1 ratio is that it does not adequately take into account the fact that crack cocaine and powder cocaine are basically the same drug. Without powder, there would be no crack because "[c]rack is not cultivated or imported independently from cocaine."[113] As discussed above, crack is formed by

---

108. *See* MAUER, *supra* note 101, at 148; William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1799 (1998). According to Professor Stuntz, "participants in street markets are more easily caught, making them better targets for police attention than their counterparts in upperclass markets." *Id.* at 1816. Furthermore, "[l]ooking in poor neighborhoods tends to be both successful and cheap." *Id.* at 1820.

109. *See* Stuntz, *supra* note 108, at 1832. Stuntz explains that it becomes a vicious circle when the system targets street markets (because of the social harm and because it is easier). The targeting undermines the normative power of the drug laws in those neighborhoods (often predominantly black communities) and the system then responds by raising the frequency and level of punishment. This increases the proportion of black men in prison, undermining the normative power even more. *Id.*

110. *See, e.g.*, Sacher, *supra* note 98, at 1189 ("Few drug kingpins are ever prosecuted."); Spade, *supra* note 29, at 1272 ("[I]f the purpose of the 100:1 ratio is to exact the harshest punishment on 'serious' or 'major' drug traffickers . . . statistics show that it is not accomplishing its purpose.").

111. *See* Sklansky, *supra* note 9, at 1288 ("Defendants caught trafficking in crack thus are almost always the street-level retailers of the cocaine trade, not the wholesalers.").

112. *See* Spade, *supra* note 29, at 1273 (providing an example of a case where the 100:1 ratio had the ironic effect of sentencing the retail crack dealer to a longer term than the wholesale powder distributor who supplied the powder).

113. Sacher, *supra* note 98, at 1189; *see id.* at 1190 (explaining that drug laws should

dissolving powder and treating it with an alkali such as baking soda.[114] "Crack and cocaine powder are the same drug, prepared and packaged differently. The same is true of liquor and beer."[115] While the two may have some different effects and crack may give rise to more dangers, the fact remains that they are essentially the same drug.[116]

Based largely on the above arguments and criticisms, the Sentencing Commission has made three separate attempts to change the ratio.

2. Sentencing Commission Responses

In February of 1995, the Sentencing Commission issued an extensive report about crack and powder sentencing, stating that "those factors Congress considered in distinguishing crack from powder cocaine lead[] to mixed conclusions and few clear answers,"[117] and ultimately recommended against a 100:1 ratio.[118] The Sentencing Commission was not at that point ready to recommend another specific ratio, but said that it would focus on a model that provided sentencing enhancements for those defendants that engage in the most dangerous behavior.[119]

Three months later, the Sentencing Commission presented twelve amendments to the Sentencing Guidelines to Congress.[120] Amendment Five proposed that the distinction be eliminated, and that crack and powder cocaine be treated equally.[121] Congress rejected the Sentencing Commission's amendment, however, and

---

reflect the practical reality that crack and powder are just two forms of the same drug).

114. *See* discussion *supra* Part II.B.2.

115. Stuntz, *supra* note 108, at 1806.

116. *See* Sacher, *supra* note 98, at 1176 (citing a district court decision finding cocaine and crack to be synonymous, and any distinction to be "'scientifically meaningless'"). *But see* Stevens, *supra* note 98, at 887 (arguing that the same drug argument ignores the "'real-world differences'").

117. 1995 REPORT, *supra* note 10, at 195.

118. *See id.* at 198.

119. *See id.* ("[T]he Commission will focus on a model that maximizes the development of offense- and offender-specific guideline enhancements addressing as many of the discrete, substantial harms associated with crack offenses as reasonably can be handled in a guideline system."). Enhancements would better fulfill the goal at targetting dangerous kingpins.

120. *See* Tison, *supra* note 83, at 424 (citing the twelve amendments proposed at 60 Fed. Reg. 25,074 (1995)).

121. *Id.*

directed them to make further recommendations.[122] Even though Congress rejected Amendment Five and the recommendations made in the Sentencing Commission's 1995 report, "it recognized that momentum for change had to be maintained because of the injustice resulting from application of the 100-to-1 ratio."[123]

The Sentencing Commission followed up in 1997, reiterating that they were unanimous in their original findings "that, although research and public policy may support somewhat higher penalties for crack than for powder cocaine, a 100-to-1 quantity ratio cannot be justified. The Commission is firmly and unanimously in agreement that the current penalty differential for federal powder and crack cocaine cases should be reduced. . . ."[124] The Commission again recognized that while crack and powder are both dangerous, crack is more dangerous, and that should be reflected in the sentencing structure.[125] The Commission recommended reducing the quantity trigger-level for powder cocaine from 500 grams to somewhere within the range of 125 to 375 grams, and reducing the level for crack to a number within the range of 25 to 75.[126] Also in 1997, the Clinton Administration publicly proposed reducing the ratio.[127]

In December 2001, the Drug Sentencing Reform Act was proposed, which would have reduced the disparity to 20:1.[128] In May 2002, the Sentencing Commission came out with another report again concluding that the ratio should be reduced.[129] The 2002 report recognized that some of the conclusions reached in 1986 to justify the ratio may no longer be accurate.[130] Recommending a 20:1 ratio,[131] the Sentencing Commission made clear that it

122. *Id.* at 425. The recommendations were to recognize that a sentence for crack should exceed the sentence imposed for a similar quantity of powder, that major traffickers should receive longer sentences, and that a powder trafficker should be sentenced as though he were a crack dealer if he knew that the substance would be converted into crack. *Id.*

123. Tison, *supra* note 83, at 426.

124. 1997 REPORT, *supra* note 96, at 2.

125. *See id.* at 4.

126. *See id.* at 9.

127. *See* Tison, *supra* note 83, at 427. The administration effectively called for a ratio of 10:1, but no bill was ever introduced. *Id* at 427–28.

128. KING & MAUER, *supra* note 9, at 10 (citing S.1874, 107th Cong. (2001)).

129. *See generally* 2002 REPORT, *supra* note 96, at 90–112 (discussing the report's findings, evaluating the current penalty structure, and recommending changes).

130. *See id.* at 91.

131. *See id.* at 107.

"firmly and unanimously" believed the current ratio to be unjustified,[132] while recognizing that there are differences in the harms and dangers which should be reflected in the penalty structure.[133] Reviewing the criticisms of the ratio, it recommended a three-pronged approach for revising the sentencing policy, which would (1) increase the threshold quantity to trigger a five-year mandatory minimum for crack offenses to at least twenty-five grams; (2) provide for sentencing enhancements; and (3) maintain the mandatory minimum thresholds for powder at their current levels.[134] Still, the original structure remains in place.

III. SENTENCING BACKGROUND

Despite the unsuccessful challenges in court, the unnoticed criticisms by judges, and the ignored Sentencing Commission Reports, there may still be hope for the critics of the ratio in light of the recent Supreme Court decision in *Booker*.[135] First, though, a brief background on the history of sentencing leading up to the Sentencing Guidelines and their ensuing breakdown is useful.

A. *Pre-Guideline Sentencing*

The process of sentencing has changed over time, varying between a discretionary process where judges have substantial leeway in tailoring a particular sentence for an individual and a determinate process where decision-making is more mechanical. At the outset, a general recognition of the reasons why we punish is helpful, because different methods of punishment tend to accomplish different goals.[136] Some of the justifications for punishment are retribution, deterrence, incapacitation, rehabilitation and restoration.[137] Prior to the Sentencing Reform Act of 1984 ("the

132. *Id.* at 91.

133. *See id.* at 92.

134. *Id.* at 104 (describing the three-pronged approach).

135. *See* KING & MAUER, *supra* note 9, at 6 ("The decision in *Booker* changed these mechanics of sentencing. Judges are now instructed to consider a host of relevant conduct factors.").

136. *See* CASSIA C. SPOHN, HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 6 (2002).

137. *Id.* at 6–7 (discussing the goals underlying each of these justifications).

SRA"),[138] rehabilitation was the primary goal, and judges acted under a system of indeterminate sentencing[139] where they considered many different factors to tailor a sentence to fit an individual offender.[140]

Starting as early as 1933,[141] lawmakers began to notice disparities resulting from the discretion afforded judges; their concerns escalated into a reform movement in the 1970s.[142] Criticisms came from advocates of prisoners' rights, the psychiatric community, conservatives and liberals.[143] It was hoped that the reforms would eliminate disparities and discretion in sentencing[144] so that factors like race, gender, and class would no longer play a role in sentencing decisions.[145] Judge Marvin Frankel from New York was a key player in the sentencing reform movement; he believed that the discretion afforded to judges led to "'lawlessness.'"[146] He called for the formation of a sentencing commission that would create solid rules that judges would have to follow.[147]

B. *The Guidelines*

The bill including the SRA was signed into law on October 12, 1984, with broad, bipartisan support.[148] Three objectives of the

---

138. Pub. L. No. 98-473, § 211, 98 Stat. 1837, 1987 (codified at 18 U.S.C. § 3551 (2000)).

139. Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1473 (2000).

140. *See* SPOHN, *supra* note 136, at 118 (stating that "judges [could] consider the harm done by the crime, the blameworthiness and culpability of the offender, and the offender's potential for reform and rehabilitation").

141. Froyd, *supra* note 139, at 1473.

142. *See* SPOHN, *supra* note 136, at 219 ("Concerns about disparity, discrimination, and unfairness in sentencing led to a 'remarkable burst of reform' that began in the mid-1970s . . . ." (quoting SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990, at 112 (1993))).

143. *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: FEDERAL GUIDELINES IN THE FEDERAL COURTS 30–31, 39 (1998).

144. *See* SPOHN, *supra* note 136, at 222.

145. *See* Froyd, *supra* note 139, at 1473.

146. SPOHN, *supra* note 136, at 223. Frankel believed that judges were not trained to sentence appropriately and that they were given too much discretion, leading to arbitrariness and disparity. *Id.*; *see also* STITH & CABRANES, *supra* note 143, at 35–37 (referring to Frankel's criticisms of judicial sentencing discretion as the most influential, and discussing his contributions to the sentencing reform debate).

147. SPOHN, *supra* note 136, at 223. These reform suggestions resulted in the Sentencing Commission discussed *supra* in Part II.D.2.

148. STITH & CABRANES, *supra* note 143, at 48.

SRA were to provide certainty and honesty, uniformity, and proportionality in sentencing.[149] In order to achieve these goals, Congress decided to impose a determinate sentencing system and established the United States Sentencing Commission to create that system.[150] The Sentencing Commission established a policy it hoped would ensure parity among similar offenders by placing the emphasis on the offense instead of the offender.[151] In order to do this, it came up with a set of guidelines that went into effect in 1987.[152]

The Sentencing Guidelines are based on the seriousness of the offense and the offender's prior record.[153] Using a sentencing table with offense levels (1–43) vertically and criminal history categories (I–VI) horizontally, a judge determines the offense level and the criminal history category, follows the grid, and is given a range within which the defendant must be sentenced.[154] Following the new system of the Sentencing Guidelines, a judge no longer had the discretion to determine which factors were most relevant and then weigh all of the relevant circumstances; the new process was "substantially more mechanical."[155] The process of sentencing under the Sentencing Guidelines has drawn criticism with opponents saying that "we cease to judge at all. We process individuals according to a variety of purportedly objective criteria."[156]

In addition to reducing disparities through the SRA, in the 1980s, Congress also established a number of mandatory mini-

149. *See* Froyd, *supra* note 139, at 1476.

150. *See id.* at 1476–77.

151. *See id.* at 1478.

152. *See* SPOHN, *supra* note 136, at 232.

153. *See id.*

154. *See, e.g., id.* at 232–33 (reproducing the federal sentencing grid). For an example of how the Sentencing Guidelines work in practice, see generally, Jonathan Chiu, Comment, United States v. Booker: *The Demise of Mandatory Federal Sentencing Guidelines and the Return of Indeterminate Sentencing*, 39 U. RICH. L. REV. 1311, 1317–18 (2005).

155. SPOHN, *supra* note 136, at 236 (explaining that a judge can only depart from the guideline range if there are aggravating or mitigating circumstances that justify such a departure); *see* STITH & CABRANES, *supra* note 143, at 72 (highlighting that departures, especially downward departures, are discouraged); *see also id.* at 30 (mentioning some benefits of discretionary sentencing: "[d]iscretionary sentencing provided some opportunity . . . to correct or adjust any untoward consequences of the closed, formal rules governing the previous stages of the process").

156. STITH & CABRANES, *supra* note 143, at 82.

mum sentences for drug offenses.[157] These penalties also had retribution as a primary goal—Congress was looking for predictable and severe punishments.[158] The Sentencing Guidelines, like mandatory minimum statutes, have been criticized for their inflexibility—essentially turning a judge into a "sentencing machine[ ]."[159] It should be noted, however, that the Sentencing Guidelines build on mandatory minimums, and thus, often require more than the mandatory minimum.[160]

The issue of whether or not the Sentencing Guidelines have fulfilled the goal of reducing disparities in sentencing has been debated, and conclusions, "to put the most positive spin on it, [are] 'mixed.'"[161] Additionally, reviewers have found that sentencing reforms have not eliminated unwarranted racial disparities.[162] Regardless of the criticisms regarding the lack of discretion, the Supreme Court held the Sentencing Guidelines to be constitutional in 1989 in *Mistretta v. United States*.[163]

C. *The Breakdown of the Mandatory Guidelines*

The *Mistretta* decision, though, was not the end of constitutional challenges to the Sentencing Guidelines.[164] Three cases were decided by the Supreme Court that eventually led to the demise of mandatory sentencing under the Sentencing Guidelines: *Apprendi v. New Jersey*,[165] *Blakely v. Washington*,[166] and fi-

157. *See* Froyd, *supra* note 139, at 1485–86.

158. *See id.* at 1488. During the 1980s, there was growing public concern about crime; therefore, the mandatory minimum penalties and the Sentencing Reform Act were consistent with a "get tough" attitude. *See* STITH & CABRANES, *supra* note 143, at 43.

159. SPOHN, *supra* note 136, at 241. The Sentencing Guidelines, when promulgated, incorporated the same 100:1 ratio for cocaine offenses that is seen in the mandatory minimums. *See supra* Part II.C.

160. *See* STITH & CABRANES, *supra* note 143, at 125. As will be seen in Part III, *infra*, now that the Guidelines are advisory rather than mandatory, judges have departed from the 100:1 ratio in the Guidelines, imposing lesser sentences, but still abiding by the mandatory minimum.

161. SPOHN, *supra* note 136, at 290.

162. *See id.* at 293; *see also supra* Part II.D (discussing the racially disparate impact of cocaine sentencing under the guidelines).

163. 488 U.S. 361, 412 (1989).

164. *See generally* Chiu, *supra* note 154, at 1320–41 (noting that the Supreme Court reheard the issue multiple times following its holding in *Mistretta*).

165. 530 U.S. 466 (2000).

166. 542 U.S. 296 (2004).

nally, *United States v. Booker*.[167] *Booker* will be discussed separately, as it is the decision that will directly affect the cocaine sentencing debate.

While *Apprendi* did not deal with the Sentencing Guidelines, its rule, if read broadly, threatened the Guidelines' validity.[168] The case dealt with two New Jersey criminal law statutes. One of the statutes imposed a sentencing range of five to ten years and the second allowed the trial judge to double the sentence if, by a preponderance of the evidence, he determined that there was a biased purpose.[169] The trial judge used the second statute and determined that Apprendi acted with racial bias, sentencing him to twelve years.[170] The Supreme Court held that the sentence should be vacated because aside from a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be . . . proved beyond a reasonable doubt [to the jury]."[171] Though the Court, in a footnote, reserved judgment on the constitutionality of the Sentencing Guidelines for another day,[172] Justice Sandra Day O'Connor, in her dissent, cautioned that *Apprendi* would lead to the invalidation of the Sentencing Guidelines.[173] In the short-term, *Apprendi* did not have the effect feared by Justice O'Connor, but rather merely shifted more fact-finding authority to the jury.[174]

Blakely, however, "[dashed a]ny hope that the Sentencing Guidelines would survive."[175] *Blakely*, while still not concerning the Sentencing Guidelines directly, came closer with its consideration of the Washington Sentencing Reform Act.[176] The trial judge did not follow the State's recommendation of a presumptive sentence, and instead imposed an "exceptional" sentence of ninety

167. 543 U.S. 220 (2005).

168. *See* Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 704–06 (2005).

169. *Apprendi*, 530 U.S. at 468–69.

170. *Id.* at 471.

171. *Id.* at 490.

172. *See id.* at 497 n.21.

173. *See id.* at 550–51 (O'Connor, J., dissenting).

174. *See* Klein, *supra* note 168, at 706 ("[T]he *Apprendi* decision significantly affected state and federal criminal law practice in shifting fact-finding authority from judge to jury.").

175. *Id.* at 709.

176. *See* Blakely v. Washington, 542 U.S. 296, 299 (2004).

months.[177] In imposing this sentence, the trial judge relied on a statutorily enumerated ground, but Blakely argued that after *Apprendi*, the aggravating fact should have been submitted to the jury and proven beyond a reasonable doubt.[178] Justice Antonin Scalia, writing for the majority, interpreted "statutory maximum" for *Apprendi* purposes, holding that it is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[179] When the court again failed to address the effect of its decision on the Sentencing Guidelines, Justice O'Connor expressed similar concerns to those conveyed in her dissent in *Apprendi*, fearing that the Sentencing Guidelines were in jeopardy.[180] Following this decision, the circuits split as to how to apply *Blakely* to the Sentencing Guidelines.[181]

D. United States v. Booker

The Supreme Court consolidated two appeals—those of *Booker* and *Fanfan*—to decide the question of whether *Apprendi* and *Blakely* applied to the Sentencing Guidelines.[182] In both cases, the trial judge made additional findings by a preponderance of the evidence. In *Booker*, the judge applied the enhancements (though the Seventh Circuit reversed the decision);[183] in *Fanfan*, the district court did not.[184] In a two-majority decision, the first majority concluded that the enhancement factors violated the Sixth Amendment.[185] In a separate opinion, authored by Justice Breyer, the majority found the appropriate remedy was to make the Sentencing Guidelines advisory rather than mandatory.[186]

---

177. *Id.* at 300.

178. *See id.* at 300–01.

179. *Id.* at 303.

180. *See id.* at 325 (O'Connor, J., dissenting) ("This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate.").

181. *See* Klein, *supra* note 168, at 712.

182. *See* United States v. Booker, 543 U.S. 220, 229 (2005).

183. *Id.* at 227–28.

184. *Id.* at 228–29.

185. *Id.* at 245. Justice Stevens wrote the first 5-4 majority decision reaffirming the holding in *Apprendi*.

186. *Id.* at 245 ("So modified, the Federal Sentencing Act . . . makes the Guidelines effectively advisory.").

In the first majority, Justice John Paul Stevens found the Sentencing Guidelines to be indistinguishable from the scheme in *Blakely*, and because the Sentencing Guidelines were mandatory, they required judges to increase sentences based upon their own fact-finding.[187] As explained in *Apprendi* and *Blakely*, this type of fact-finding must be done by the jury and must be found beyond a reasonable doubt. Justice Breyer determined that, by severing the provision making the Sentencing Guidelines mandatory, the Court could preserve them without violating the Sixth Amendment right to a jury trial.[188] The Court also had to sever the provision relating to the appellate process, because the previous standard of review was that sentences should be in conformity with the Sentencing Guidelines; now, sentences will be reviewed for "reasonableness."[189]

IV. THE EFFECT OF *BOOKER* ON THE CRACK/POWDER DEBATE

Judges and scholars now are left to wonder what effect *Booker* will have on the crack/powder debate. Will the decision leave room for judges to sentence crack defendants to a term lower than what the 100:1 ratio would require? If so, will the results add enough fuel to the fire that has been burning to finally lead Congress to change the ratio, and adopt the Sentencing Commission's recent recommendation of 20:1? The answer to the latter question remains to be seen.[190] While the answer to the former question is still developing, based on what has transpired in federal courts in the past year, the preliminary answer is in the affirmative.

Booker "significantly affected" the "dynamics of crack cocaine sentencing."[191] After ten years, the repeated efforts to eliminate the disparity have a new path.[192] Now, judges who previously

187. *Id.* at 234–35.

188. *See* Klein, *supra* note 168, at 714 (noting that in the process, judicial discretion in sentencing matters was also greatly expanded).

189. *See Booker*, 543 U.S. at 260–62.

190. Many critics have made clear that this is exactly what they think should happen. *See, e.g.*, KING & MAUER, *supra* note 9, at 3 ("Congress should review the recommendations of the Sentencing Commission . . . and reconsider proposals to amend the law.").

191. KING & MAUER, *supra* note 9, at 1.

192. *See* Pamela A. MacLean, *Sentencing*, BROWARD DAILY BUS. REV., Oct. 6, 2005, at 10 (explaining that past efforts have "foundered on the rocky shoals of politics," but that now, "emboldened by a newfound independence," some judges "have begun to quietly roll back potential crack sentences").

could do no more than voice their complaints about imposing the ratio can take action.[193] Even beyond that, some commentators hope that "Congress will rectify the problem of the disparate mandatory minimums . . . and also will approve ameliorative changes to the Sentencing Guidelines."[194] Courts are now trying to sentence below the advisory guideline range for crack defendants. As one judge commented, "[t]he growing sentiment in the district courts is clear."[195]

The pressure to change the Sentencing Guidelines is coming not only from the court system. The Justice Roundtable has requested that the Inter-American Commission hold a hearing to examine the discriminatory impact of mandatory minimum sentencing, citing the distinction between crack and powder as the "most flagrant example."[196] The American Bar Association ("ABA") has also urged the Commission to hold a hearing to examine the discriminatory impact of mandatory minimums, stating that it agrees with the Justice Roundtable about the effect of the crack/powder distinction.[197] Following these requests, the Inter-American Commission on Human Rights decided to hold a hearing on March 3, 2006.[198]

---

193. *See, e.g.*, Editorial, *supra* note 3, ("United States district courts are no longer bound to impose the extraordinarily harsh Guideline sentences on sellers of crack cocaine."). *But see*, Lee Hammel, *Crack vs. Cocaine: Caught between a rock and a powder*, WORCHESTER TELEGRAM & GAZETTE, Feb. 19, 2006, at A1 (stating that "not even the U.S. Supreme Court's . . . decision [in *Booker*] . . . has been able to protect crack cocaine defendants from lengthy incarceration").

194. *Id.*; KING & MAUER, *supra* note 9, at 10 ("The past two decades have witnessed a growing chorus of interested parties demanding reform . . . . *Booker* changed the terrain of federal sentencing . . . open[ing] up room for reform within the federal system.").

195. United States v. Perry, 389 F. Supp. 2d 278, 307 (D.R.I. 2005) ("[T]he advisory guideline range for crack cocaine based on the 100:1 ratio cannot withstand the scrutiny imposed by sentencing courts when [sentencing goals] are applied."); *see also* Klein, *supra* note 168, at 727–28 ("[J]udges, who had their hands tied until *Booker*, are now imposing crack cocaine sentences below that formerly required by the Guidelines.").

196. See Letter from Justice Roundtable to Dr. Santiago Canton, Executive Secretary, Inter-American Commission on Human Rights 2 (Dec. 20, 2005), *available at* http://www.drugpolicy.org/docUploads/LetterSantiagoCanton122005.pdf. One of the primary missions of the Justice Roundtable is "to promote fairness and equality in the criminal justice system" and its "ultimate goal is to build safe and healthy communities that respect the civil and human rights of all." *Id.* at 1 n.1.

197. *See* Letter from Michael S. Pasano, Chair, American Bar Association, Criminal Justice Section, to Dr. Santiago Canton, Executive Secretary, Inter-American Commission on Human Rights 1 (Jan. 4, 2006), *available at* http://www.osipc.org/pub/doc_98/ABA%20Criminal%20Justice%20Section%20Letter.pdf.

198. Press Release, Inter-American Commission on Human Rights, The Inter-

Judges can now fashion a sentence to more appropriately meet the goals and true purposes of sentencing.[199] Still, the courts are not free to sentence as they like—they must follow certain rules in sentencing defendants even after *Booker*. Courts must now consider the Sentencing Guideline range along with sentencing goals and factors in 18 U.S.C. § 3553(a).[200] This section provides a mandate that a court "impose a sentence '*sufficient, but not greater than necessary*,' to comply with the four purposes of sentencing. . . ."[201] In addition to complying with this mandate, sentencing courts must now consider, along with the Sentencing-Guideline range, several other factors also set forth in § 3553(a):

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for—
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ;
> . . . .
> (5) any pertinent policy statement issued by the Sentencing Commission . . . ;
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victims of the offense.[202]

American Commission on Human Rights to Review Mandatory Minimum Sentencing in the U.S. Justice System (Feb. 9, 2006), *available at* http://www.osipc.org/printer_friendly.php?docId=98&url=/news/article.php?docID=98.

199. *See* KING & MAUER, *supra* note 9, at 2; *see also id.* at 8 ("[J]udges are increasingly using its remedial prescription in their consideration of enhancements that go above the mandatory minimum.").

200. *See* David L. McColgin & Brett G. Sweitzer, *Grid & Bear It*, 29 THE CHAMPION 50, 50 (2005).

201. *Id.* (quoting 18 U.S.C. § 3553(a) (2000)). The four factors are retribution, deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553(a)(2)(A)–(D) (2000).

202. 18 U.S.C. § 3553(a)(1)–(7).

An additional constraint is that even if, after consideration of these factors, the court determines that it should impose a sentence below the range, it cannot go below any statutorily imposed mandatory minimum.[203] Along with these statutory factors, the recommendations of the Sentencing Commission have "provided valuable guidance in the crafting of a non-Guideline sentence."[204]

In crafting a sentence, judges must always determine the applicable Guideline range. Exactly how much weight should be given to the Guideline range, however, has been debated. Most evaluate the additional criteria "equally relative" to the Guidelines.[205] A three-step process in sentencing a defendant after *Booker* includes calculating the applicable guideline range, determining whether any departures apply, and then determining the appropriate sentence.[206] Following this process, staying above the mandatory minimum, and following the factors set out in § 3553(a), a number of district courts have still found ways to depart from the advisory Guideline range.[207] Many of courts have used the § 3553 factors and determined that the Guideline sentences are disproportionate to meet the sentencing goals.[208]

Using these factors, many courts found leeway to depart from the Sentencing Guideline range. For example, Judge Adelman in the Eastern District of Wisconsin imposed sentences below the range for crack defendants, citing the 100:1 disparity as one ra-

---

203. *See, e.g.*, United States v. Alexander, 381 F. Supp. 2d 884, 889 (E.D. Wis. 2005) ("[A]lthough I must still impose any penalty mandated by statute, I have discretion to modify the guideline portion of a sentence in order to produce a reasonable total sentence."); United States v. Beamon, 373 F. Supp. 2d 878, 884 (E.D. Wisc. 2005) (explaining that *Booker* allows consideration of the 3553(a) factors in deciding whether to follow guidelines when they exceed mandatory minimum); United States v. Smith, 359 F. Supp. 2d 771, 781 (E.D. Wisc. 2005) ("Only Congress can correct the statutory problem, but after *Booker* district courts need no longer blindly adhere to the 100:1 guideline ratio.").

204. KING & MAUER, *supra* note 9, at 17; *see also,* United States v. Eura, No. 05-4437, 05-4533, 2006 WL 440099 at *7 (4th Cir. Feb. 24, 2006) (Michael, J., concurring) ("I write separately to discuss the practical utility of the Sentencing Commission's reports . . . . [T]hese reports can be useful to courts . . . .").

205. *See, e.g., id.* at 11.

206. *See Smith*, 359 F. Supp. 2d at 772–73 ("Following *Booker*, a court will typically follow a three-step sentencing process."). *But see Eura*, 2006 WL 440099 at *5 (using a two step process to sentence after *Booker*—calculating the Guideline range and then consider the range along with the § 3553(a) factors).

207. *See* KING & MAUER, *supra* note 9, at 4–5 (providing a table of case outcomes detailing the guideline range, the actual sentence, and the rationale provided by the court).

208. *Id.* at 13; *see id.* at 15 (explaining that courts are reluctant to use the Guideline range when the sentences are disproportionate to offense).

tionale in a few cases.[209] In analyzing the § 3553(a) factors listed above, Judge Adelman grouped them into three categories: "the nature of the offense, the history of the defendant, and the needs of the public."[210] Then, in considering the Sentencing Guidelines, he determined that there is room to depart under subsections (a)(2) and (a)(6).[211]

Section 3553(a)(2) affords the court discretion to determine whether the Sentencing Guideline range is greater than necessary to satisfy the purposes of sentencing. In light of the Sentencing Commission's finding that the 100:1 disparity is not warranted, it is also within the court's discretion to sentence below the guideline range.[212] Section 3553(a)(6) permits the court to tailor the sentence to avoid unwarranted disparity. [213] A court also acts within its discretion in concluding that the Guidelines create a racial disparity and a disparity between crack and powder defendants.[214] Thus, Judge Adelman used these factors to fashion a sentence believed to be more in accordance with the goals of sentencing but that was below the Sentencing Guideline range normally used for the crack defendants.[215]

This logic has been followed in courts other than those in Wisconsin. In New York, for example, judges of the Eastern District and the Southern District sentenced outside the Sentencing Guideline range in crack cases. Judge Sweet, in two sentencing opinions from the Southern District—*United States v. Castillo*[216] and *United States v. Stukes*[217]—determined that "[u]se of [a 20:1 ratio] . . . will mitigate the disparity. . . . It will also further the policy considerations . . . while still achieving the level of deterrence necessary to protect the public."[218]

---

209. *See, e.g.*, United States v. Leroy, 373 F. Supp. 2d 887, 893 (E.D. Wis. 2005) (using the Sentencing Commission's suggestion of a 20:1 ratio as a guideline); *Beamon*, 373 F. Supp. 2d at 886 (E.D. Wisc. 2005); *Smith*, 359 F. Supp. 2d at 781–82.

210. *Leroy*, 373 F. Supp. 2d at 890.

211. *See id.* at 891 (noting that subsection (a)(5) does not allow departure because the Commission has not set forth its crack-cocaine findings in a guideline policy statement).

212. *Id.*

213. *Id. But see Eura*, 2006 WL 440099 at *6 (stating that sentencing outside of the 100:1 ratio would increase disparities).

214. *Id.* at 892.

215. *See Leroy*, 373 F. Supp. 2d at 896; *Beamon*, 373 F. Supp. 2d at 887; *Smith*, 359 F. Supp. 2d at 782.

216. No. 03 CR. 835, 2005 WL 1214280 (S.D.N.Y. May 20, 2005).

217. No. 03 CR. 601, 2005 WL 2560244 (S.D.N.Y. Oct. 12, 2005).

218. *Id.* at *2.

Similar findings were made in another case out of the Southern District of New York, *United States v. Fisher*.[219] In that case, Judge Scheindlin found the applicable Guideline range, discussed past criticisms of the 100:1 ratio, noted that courts had to defer to Congress with respect to the mandatory minimum, and recognized that after *Booker*, courts could depart from the Guideline range,[220] eventually finding that the range "substantially overstat[ed] the seriousness of the offense."[221] The Eastern District of New York decided *Simon v. United States*[222] along the same lines. The court, after discussing the history of the ratio[223] and noting that many of the assumptions underlying the ratio have not held up,[224] imposed a sentence lower than the one provided in the Guideline range.[225]

Tennessee has also recognized the need to avoid unwarranted sentencing disparities and the new flexibility afforded courts since *Booker*.[226] There, district court Judge Greer recognized the unjustified disparity that results from the 100:1 ratio and found that, even if the Guidelines were given substantial weight, a reasonable sentence would be one beneath the applicable range.[227] In Indiana, though not required to rely on the 100:1 disparity, district court Judge Simon discussed the ratio and sentenced a crack defendant to a term outside of the low end of the Guideline range.[228]

In a detailed decision out of Rhode Island, another district court judge discussed the disparity and found that it could not stand up to an analysis under § 3553(a).[229] Judge Smith's decision

---

219. No. S3 03 CR 1501, 2005 WL 2542916 (S.D.N.Y. Oct. 11, 2005).

220. *Id.* at *9.

221. *See id.* at *4–7.

222. 361 F. Supp. 2d 35 (E.D.N.Y. 2005).

223. *See id.* at 44.

224. *Id.* at 47.

225. *See id.* at 49 ("[T]he recommended Guidelines sentencing range . . . substantially overstates the seriousness of the offense.").

226. *See* United States v. Clay, No. 2:03CR73, 2005 WL 1076243, at *4 (E.D. Tenn. May 6, 2005).

227. *See id.* at *6.

228. *See* United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005). "There can be no doubt that [the 100:1 ratio] issue is extremely controversial and one which this Court will no doubt face in future sentencings. However, the Court found that it need not address the 100-to-1 powder to crack cocaine ratio in crafting this sentence." *Id.* at *4.

229. United States v. Perry, 389 F. Supp. 2d 278, 282 (D.R.I. 2005).

points out that while the ratio has been criticized for years, the decision in *Booker* "gives new vitality to the crack/powder cocaine sentencing controversy."[230] Judge Smith also cited a number of cases from other district courts that support below-Guideline sentences for crack cases, though "falling short" of imposing one directly.[231] As in the cases from other districts, Judge Smith followed the Commission's recommendations and imposed a 20:1 ratio.[232]

Though not all courts have used these factors to sentence outside of the range, at least one court, choosing to sentence within the range, has stated that it is not "comfortable with a sentencing scheme that prescribes significantly lengthier sentences for crimes involving one type of cocaine than it does for crimes involving the same amount of the drug in another form."[233] It should be recognized, however, that stiff penalties are still imposed for the serious offenses.[234] The decision even noted that the advisory nature of the Sentencing Guidelines has "reinvigorated the debate over the appropriate penalties for crack offenses."[235]

The Court of Appeals for the Fourth Circuit has also held that a court may not substitute its own ratio for the policy judgment of Congress.[236] Though the court did not permit a rejection of the Guideline range, it is important to note that the facts in this case demonstrated that the defendant was what could be considered a serious offender—he was a "known source of crack"[237] and also had weapons.[238] These circumstances do not make this the optimal case for sentencing a crack defendant outside the Guideline range. Another important aspect of this case that makes it less than optimal is that while the lower court did mention that it was

230. *Id.* at 301.

231. *Id.* at 306–07.

232. *See id.* at 307 ("[T]his Court believes a 20:1 ratio (as suggested by the Commission in its 2002 report) makes the most sense.").

233. United States v. Doe, No. CRIM. 02-0406, 2006 WL 177396, at *1 (D.D.C. Jan. 26, 2006).

234. *See* KING & MAUER, *supra* note 9, at 3. A court is only permitted to sentence outside the range when they determine, after consideration of the guideline range and the § 3553(a) factors, that the guideline sentence would be unreasonable—for the most serious offenses, the defendant will still be subject to the harsh penalties.

235. *See Doe*, 2006 WL 177396, at *3.

236. *Eura*, 2006 WL 440099 at *1; *cf.*, Hammel, *supra* note 193 (concluding that "an end to the arguments about the injustice of the law is not likely").

237. *Eura*, 2006 WL 440099 at *1 n.2.

238. *See id.* at *2.

not just rejecting the guidelines[239] it could have pointed to more specific circumstances of the case[240] or explained more fully why the sentence still serves the purposes of § 3553(a).[241] Significantly, however, the court did state that "it does not follow that *all* defendants convicted of crack cocaine offenses must receive a sentence within the advisory sentencing range.[242]

The court in *United States v. Doe* found that it could not substitute the court's policy judgment for that of Congress. It would therefore not depart from the range, stating that Congress has repeatedly endorsed harsher sanctions for crack offenders.[243] Largely based on the notion that the court could not ignore the express conclusions of Congress, the *Doe* court sentenced the defendant within the Guideline range.[244] Significantly, the court made clear that the decision should not be taken to mean that the Guidelines for crack offenses must be applied in all circumstances—only that a departure should be based on case-specific considerations rather than a categorical disagreement.[245] Perhaps decisions like these speak more strongly to Congress of the need to take action than those finding room to deviate.[246]

Like the court in *Doe*, the Court of Appeals for the First Circuit in *United States v. Pho*[247] held that a court may not "impose a sentence outside the advisory . . . range based *solely* on its categorical rejection of the guidelines' disparate treatment of offenses involving crack cocaine . . . and powdered cocaine."[248] The court acknowledged that courts now have increased discretion, but

239. *See id.* at *4 ("I think it is appropriate to note that it is appropriate to consider this matter as an individual matter, not as a wholesale objection or acceptance of the guideliens.") (quoting the Joint Appendix at 335–36).

240. *See id.* at *9 (explaining that "sentencing courts must make individual sentencing decisions grounded in the factors of 18 U.S.C. § 3553(a)).

241. *See id.* at *5.

242. *See id.* at *6.

243. *See id.* at *1. It is important to recognize, though, that harsher penalties are also given to crack offenders, based, in part, on the mandatory minimum structure.

244. *See id.* at *1.

245. *See id.* at *9.

246. *Cf. Doe.* at *9 ("Perhaps now, prodded by judicial and other observations regarding the inequity of the current crack and powder-cocaine sentencing structure, Congress will again consider and (one hopes) address this important issue.").

247. 433 F.3d 53 (1st Cir. 2006).

248. *Id.* at 54 (emphasis added); *see also id.* at 59 (citing the district court decision which stated that the only reason to deviate was the disparity between crack and powder).

noted that the discretion is still not limitless.[249] Pure policy judgments should be left to Congress, and therefore, a categorical rejection of the ratio would usurp Congressional power.[250] The court concluded by making clear that it did not want to diminish the discretion now available to district courts; its goal was just to channel the discretion to ensure that it comports with the separation of powers.[251]

A majority of courts have still been able to depart from the 100:1 ratio to alleviate the disparity while adequately accounting for the goals of sentencing. To be clear, these departures did not simply occur because the range was disliked. One judge stated, "I did not simply reject the guideline because I did not like it, personally thought it too harsh, or disagreed that crack posed special problems. . . . [A]fter carefully reviewing the data . . . , I concluded that the 100:1 ratio did not produce a sentence consistent with the § 3553(a) factors. . . ."[252] This is an important statement, especially if the decision is appealed, as seen in the First Circuit in *Doe*. A court does have discretion to sentence outside the range, but it would need to make clear that the sentence was not based only on a categorical rejection of or disagreement with the range, but instead on case-specific circumstances.

What is left is the recognition that many—if not all—courts want to sentence crack defendants outside of the Guideline range. The courts, though, must make sure to do so using case-specific circumstances rather than a policy-based, categorical rejection of the ratio. The "right" path of analysis would conduct a guideline analysis and then compare cases.[253] One troubling development is that the Sentencing Commission did not address *Booker* or the crack guidelines in its most recently proposed amendments.[254] This silence and the failure to codify a new ratio will "ensure additional post-*Booker* disparities" and "breed[ ] distrust and disrespect."[255] Some now hope for a circuit split to encourage the Su-

249. *See id.* at 61.

250. *See id.* at 62–63.

251. *Id.* at 65.

252. United States v. Leroy, 373 F. Supp. 2d 887, 893 (E.D. Wis. 2005).

253. *Cocaine cases: Finding Justice*, PROV. J. BULL., Dec. 18, 2005, at B1 (detailing the analysis of Judge Smith in a decision sentencing a crack defendant).

254. *See* Sentencing Law and Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/2006/week4/index.html (Jan. 29, 2006, 20:22 EST).

255. *Id.*

preme Court to resolve the issue.[256] Perhaps, the more important question is whether Congress will follow suit of the majority of courts and clear up the ambiguities left after *Booker* in favor of a less disparate ratio.

V. CONCLUSION

The 100:1 ratio, created in 1986, penalizes crack offenses one hundred times more severely than powder cocaine offenses, setting the same punishment for five grams of crack as for five hundred grams of powder cocaine. This structure can be seen in both the mandatory minimums found in statutes and in the once mandatory Federal Sentencing Guidelines. The initial formation was largely brought about due to the War on Drugs launched in the 1980s and public awareness of the growing drug problem. Crack was seen as a far more dangerous drug. The drug brings with it violence and crack houses, opens the cocaine market to the young and to the poor, and causes more addiction.

While crack is still seen as deserving harsher punishment by many, the size of the disparity has led to much criticism and many efforts to change the way in which cocaine offenses are sentenced. Many of the initial fears surrounding the creation of the ratio have not actually been realized. Even though some of them may be true, they do not justify such a large differential in the two penalties. Crack comes from powder and would not exist without it. Crack and powder also provide the same physiological result, albeit at different speeds. Sentencing crack at such low quantities has the ironic effect of targeting the low-level dealers instead of the drug kingpins that Congress intended to target. Last, but certainly not least, the racial disparity that the sentencing leads to cannot be justified. The Sentencing Commission has done much research and issued three reports concluding that the ratio cannot be justified. Judges and commentators have agreed.

The Sentencing Guidelines, spawned from a movement attempting to curtail judicial discretion, have recently come under attack. Ever since the Supreme Court's decision in *Booker*, courts have been given more flexibility and more discretion in sentenc-

256. *See* Charles Delafuente, *Cracked Sentencing*, 5 No. 4 A.B.A. J. E-REPORT, 2 Jan. 27, 2006.

ing. With the Sentencing Guideline ranges now merely advisory, courts, after consideration of a list of sentencing factors, are free to depart from the range. While the federal courts do still need to comply with the mandatory minimums (also reflecting the 100:1 ratio), the Sentencing Guideline range is often much higher. Judges can now follow the Sentencing Commission's recommendations—in light of all the research reflecting the negative, unjustified effects of the ratio—and sentence crack defendants below the advisory Guideline range. *Booker* adds to the ongoing, decade-long debate over crack versus powder, and will, perhaps, add just enough fuel to the fire to prompt the long-awaited change.

Briton K. Nelson