

# The Federal Sentencing Guidelines: An Infectious Antidote

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**W**hy should a bank robber in California get a different sentence than a bank robber in Texas? This was the rallying cry behind the legislative implementation of the Federal Sentencing Guidelines. The Senate Judiciary Committee found that a major source of the astounding variations in federal sentencing for identical crimes was the “judge factor.”<sup>1</sup> Federal judges had the discretion to select a sentence from anywhere within a broad statutory range for each offense. The judge had the sole responsibility of assessing each individual offender and deciding where, within that broad range, the offender should receive a sentence. As a result, sentences issued for the same offense differed dramatically, depending on the judge who handed down the sentence.

The congressional response to the dilemma of disparate sentencing was the enactment of the Sentencing Guidelines Reform Act of 1984.<sup>2</sup> The legislation passed 85 to 3 in the Senate and 316 to 91 in the House of Representatives.<sup>3</sup> The broad bipartisan support for the Act suggests that the objective of eliminating unwarranted judicial sentencing disparity was an admirable and respectable goal that encompassed the concerns of the nation as a whole.

The Act provided for the creation of the United States Sentencing Commission, a novel federal rule-making agency. The Sentencing Commission was charged with the development of a sentencing range for each class of convicted persons based both on the offense and the offender. The Sentencing Commission accomplished this task with the establishment of the Federal Sentencing Guidelines, a set of guiding principles that were expected to promote a more deliberate, fair, and rational sentencing process than had previously existed in federal sentencing.<sup>4</sup> The “judge factor” was, thus, narrowly confined as the range of possible sentences was strictly defined and allowed for very little judicial discretion.

As stated earlier, the proclaimed goal of the Guidelines was to eliminate disparity and create truth in sentencing. It was not intended to serve as a cure-all to every judicial inequality that lies within the criminal justice system. Supporters of the Sentencing Commission and the Guidelines, however, may have naively assumed that such a miraculous judicial recon-

struction would be a natural consequence of the 1984 enactment. The system of rules and procedure even lends an appearance of having been constructed on the basis of service and technocratic expertise, giving it a threshold credibility to a general public not familiar with its actual contours and operation.<sup>5</sup> In reality, a new and equally devastating sentencing disparity has evolved with the implementation of the Federal Sentencing Guidelines, which can no longer be attributed to the “judge factor.”

Though originally created to produce a more equitable sentencing scheme, the Federal Sentencing Guidelines have had the opposite effect and become a major source of societal perpetration of racial inequality. The question that originally sparked legislative outrage and subsequent action in the realm of federal sentencing has been answered: *Why should a bank robber in California get a different sentence than a bank robber in Texas? He shouldn't!* A new question has arisen under the Guidelines, however, one that demands a response: *Why should a black drug offender in America receive a different sentence than a white drug offender?*

## I. HOW THE GUIDELINES WORK

Federal judges are statutorily required to sentence defendants according to the Sentencing Guidelines. A typical case is governed by the sentencing table, which prescribes sentencing ranges in months of imprisonment. A sentence is derived by intersecting the offender's criminal history and the level of the offense. Federal judges must now engage in complex numerical calculations before imposing a sentence under the Guidelines.<sup>6</sup> Chapter three of the Guidelines allows for judicial adjustments to the base level for certain aggravating or mitigating circumstances, such as victim impact, the offender's role in the offense, obstruction, multiple counts, and the offender's acceptance of responsibility.<sup>7</sup>

Following a guilty verdict or plea, a United States probation officer will conduct an independent pre-sentence investigation of a defendant and issue a Pre-Sentence Report (PSR) to aid the court in a sentence determination. The PSR is also provided to the Assistant U.S. Attorney prior to sentencing and any objec-

## Footnotes

1. Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1028.
2. *Id.* at 1027.
3. *Id.*
4. See KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING

GUIDELINES IN FEDERAL COURTS, at xi (1998).

5. *See id.*; 28 USC 1991(b)(B)(1).
6. See LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS & PRISONERS' RIGHTS IN A NUTSHELL, 8-9 (5th ed. 1998).
7. See Johnathan E. Scharff, *Federal Sentencing Guidelines: Due Process Denied*, 33 ST. LOUIS U. L.J. 1049, 1054 (1989).

tions concerning factual disputes and applicable Guidelines issues must be resolved between the two government agents before a final PSR is given to the court.<sup>8</sup> Also, a sentencing court is required to consider “all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.”<sup>9</sup> This designation includes conduct that was not formally charged, as well as offense conduct that was charged in the indictment, but for which the defendant was actually acquitted.

Another major consequence of the enactment of the Sentencing Reform Act is the evolution of mandatory minimum sentences. These sentences can greatly affect the sentence imposed on a defendant. Congress has set mandatory minimum sentences for more than 100 crimes.<sup>10</sup> In practice, only four statutes are used with any type of regularity, all covering drug and weapon offenses.<sup>11</sup> These four statutes appear to be responsible for 94% of all federal mandatory minimum cases.<sup>12</sup> Mandatory sentences require offenders to serve their

entire sentence without parole. “Mandatory minimum sentences trump the guideline ranges.”<sup>13</sup> Where the sentencing table places the low end of the sentencing range below the mandatory minimum, the court must follow the mandatory minimum sentence. Unless the government moves to depart below the statutory mandatory minimum, the court has no authority to do so.

## II. THE PROBLEM

There is great irony in the fact that the original, motivating purpose behind sentencing reform was the elimination of discriminatory “disparity” in sentencing, yet racial and class inequalities in sentencing under the Guidelines persist. The Guidelines have, in a sense, created a bifurcation of society between “We the people” and “We the *other* people.”<sup>16</sup> The sentencing reformers of the 1984 Congress attempted to rationally and reasonably solve an imperative governmental problem, but like the civil-rights hydra of the 1950s, many more

### ILLUSTRATION 1

Defendant, Jamaal, pled guilty under Federal Rule of Criminal Procedure 11(e)(1)(B) to two counts pursuant to a plea agreement: conspiracy to possess crack with intent to distribute, involving over 500 grams of crack cocaine; and distribution of crack.

In preparing the PSR, the probation officer first computes the base offense level predicated on the offense conduct described by the Assistant U.S. Attorney. The base offense level is 36 because Jamaal possessed over 500 grams of crack with the intent to distribute, and there are no specific aggravating offense characteristics, such as possession of a firearm, to factor in. Then the probation officer has to determine whether any other adjustments are mandated under the five sub-parts of chapter three of the Act: (A) victim-related adjustments; (B) role in the offense; (C) obstruction of justice; (D) multiple counts; and (E) acceptance of responsibility. In Jamaal’s case, there are no adjustments to be made. Because Jamaal pled guilty he receives a three-level downward adjustment for acceptance of responsibility, so his total offense level is 33.

Jamaal’s criminal history category is I, because he has no prior convictions. Looking at the sentencing grid, which has criminal history categories along one axis and the offense levels along the other, a judge must conclude that for an offense level of 33 and a criminal history of I, the sentencing range is 135-168 months (approximately 11 to 14 years).<sup>14</sup>

### ILLUSTRATION 2

Defendant, Johnnie, also pled guilty under Federal Rule of Criminal Procedure 11(e)(1)(B) to three counts pursuant to a plea agreement: conspiracy to import cocaine, involving more than 500 grams of cocaine; conspiracy to possess cocaine with an intent to distribute; and distribution of cocaine.

In Johnnie’s case, the base level at which the probation officer will arrive at for conspiracy to import more than 500 grams of cocaine is 26. Once again, no specific offense characteristics are present. In the “adjustments” stage of the process, however, the probation officer will adjust the base offense level with a three-level increase for the role Johnnie played in the offense, pursuant to Guidelines section 3B1.1(b), because he was a manager or supervisor of a criminal activity, which was otherwise extensive, and reaches a subtotal of 29. However, because Johnnie also pled guilty he receives a three-level downward adjustment for acceptance of responsibility, so his total offense level remains at 26.

Johnnie’s criminal history category is II, because he has three prior convictions. Looking at the sentencing grid criminal history axis and cross referencing that number with the offense level axis, a judge must conclude that for an offense level of 26 and a criminal history of II, the sentencing range is 70-87 months (approximately 5 to 7 years).<sup>15</sup>

8. *Id.* at 1033.

9. *Id.* (citing U.S. Sentencing Guidelines Manual, ch. 1, pt. A, cmt. 3 (1995)).

10. *Id.* at 1034.

11. Families Against Mandatory Minimums, *All About Mandatory Minimum Sentences*, available at [www.famm.org](http://www.famm.org).

12. *Id.*

13. Saris, *supra* note 1, at 1033.

14. *See id.* at 1036-37; 18 U.S.C. § 2D1.1(C). The illustrations used here are based in part on ones used by Judge Saris in her article. *See Saris, supra* note 1.

15. *See Saris, supra* note 1 at 1036-37.

16. A. LEON HIGGINBOTHAM, *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 6 (1996).

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sentencing problems have come forth to take the place of judicial disparity.

#### **A. Incarceration and Prosecutorial Sentencing**

The figures boasted by the United States on current per capita incarceration rate statistical charts are astoundingly high.<sup>17</sup> Billions of dollars have been and are being

diverted from educational programs to pay the costs of building and operating a burgeoning number of prisons and jails.<sup>18</sup> The United States has seen an explosion in numbers of federal offenders and an enormous financial burden has been placed on taxpayers. Judges find the fact that judicial power has been totally shifted and now lies in the hands of aggressive prosecutors to be a “scary notion” because prosecutors are hired without the careful scrutiny given to federal judges.<sup>19</sup> As a result, federal judges frequently find themselves imposing sentences that they wholly disagree with and feel are unjust.<sup>20</sup>

A fundamental United States principle, illustrated by the founding fathers’ implementation of a system of checks and balances, is that it is unwise to leave such power “unchecked in the hands of anyone, least of all in the hands of men and women whose decisions are made in the privacy of their offices, who are caught up in an adversarial role, and whose public function often serves as a stepping stone to higher political or judicial office.”<sup>21</sup> In an intense critique of the Guidelines, Judge J. Lawrence Irving of San Diego commented upon his retirement, “If I remain on the bench, I have no choice but to follow the law. I just can’t, in good conscience, continue to do this.”<sup>22</sup>

#### **B. Racial Disparity**

One major dilemma that has arisen and continues to tear at the social fabric of whole communities is the racial disparity perpetrated under the use of the Federal Sentencing Guidelines. The percentage of black men in both state and federal prison is

considerably higher than that of white men, even though blacks are only 12% of the male population.<sup>23</sup> Statistics show that, on any given day, one in three black men aged 20 to 29 is in prison or jail, on probation, or on parole.<sup>24</sup> Thus, there are more young black men in prison than there are in colleges across this nation.<sup>25</sup> Governmental statistics show that black people represent about 14% of the nation’s drug users, yet make up 35% of those arrested for drug possession, 55% of those convicted for drug possession, and 74% of those sentenced to serve time.<sup>26</sup> A recent report indicated that young Hispanic males have a one in six chance of spending time in prison.<sup>27</sup> In fact, the percentage of federal Hispanic prisoners grew 219% between 1985 and 1995, making Hispanics the fastest growing category of prisoners.<sup>28</sup> The percentage of federal Asian American prisoners also increased by a factor of four between 1980 to 1999.<sup>29</sup> Federal drug sentencing in the U.S. appears to purport a lofty goal of disparity elimination while, at the same time, creating yet another head on the hydra of racial injustice.

#### **C. Perpetration of Racial Discrimination**

The Guidelines have also served as an indirect source of the perpetration of racial discrimination in other areas. As young African-Americans continue to be disproportionately sentenced, the perception that most African-Americans are deviant and serve as the primary source of crime in this country becomes more prevalent in the mind of the white majority. In reality, whites commit drug crimes, too, but police enforcement strategies do not focus on white neighborhoods.<sup>30</sup> Drug arrests are simply easier to accomplish in impoverished inner-city neighborhoods than in stable middle-class neighborhoods.

It has been said that simply to make it through the day, blacks pay a psychic tax.<sup>31</sup> Members of all classes of African-Americans, middle-class, working-class, and the poverty-stricken, often and perhaps increasingly agree on this point. When you see a fellow black man get stopped by the police, you wonder how race figured into it. When you go into a store and the sales people give you an extra bit of scrutiny, you wonder. When you’re on an elevator and it stops at a floor and the white woman waiting moves to another elevator, your first thought is race.<sup>32</sup> Little things such as these remind the

17. *Sentencing Comm’n Review: Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary*, 106th Cong. (2000) (statement of Carmen D. Hernandez, National Ass’n of Criminal Defense Lawyers).

18. Branham, *supra* note 6, at 8-9.

19. U.S. District Judge Mark Bennett, Class Lecture (Oct. 23, 2001) (Drake University Law School); *Sentencing Commission Review: Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Committee on the Judiciary*, 106th Cong. (2000) (statement of Carmen D. Hernandez, National Ass’n of Criminal Defense Lawyers).

20. U.S. District Judge Mark Bennett, Class Lecture (Oct. 23, 2001) (Drake University Law School).

21. *Sentencing Comm’n Review: Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary*, 106th Cong. (2000) (statement of Carmen D. Hernandez, Nat’l Assoc. of Criminal Defense Lawyers).

22. Gerald F. Uelman, *Federal Sentencing Guidelines: A Cure Worse*

*Than the Disease*, 29 AM. CRIM. L. REV. 899, 899 (1992).

23. See CHRISTOPHER DARDEN ET AL., *THE DARDEN DELIMMA: 12 BLACK WRITERS ON JUSTICE, RACE, AND CONFLICTING LOYALTIES* 7 (1997).

24. The Sentencing Project, *Facts About Prisons and Prisoners* (April 2000), available at [www.famm.org](http://www.famm.org).

25. Darden, *supra* note 23.

26. John Conyers, *Points on Crack/Cocaine Disparity*, available at <http://www.house.gov/conyers/spst033101.htm> (last visited Dec. 17, 2001).

27. *Mandatory Minimum Sentences for Drug Crimes: Hearing Before the Criminal Justice, Drug Policy and Human Resources Committee on Government Reform* 106th Cong. (2000) (statement of Wade Henderson, Executive Director Leadership Conference).

28. *Id.*

29. *Id.*

30. *See id.*

31. Darden, *supra* note 23, at xi.

32. *Id.*

African-American community that, as a black person, you are paying your “black tax.”<sup>33</sup>

Yet another tragic consequence of the disparity created by the Guidelines is the devastation of inner-city communities, in which family serves as the core foundation. These communities are predominately minority-populated. The disproportionate sentencing scheme has been referred to as the “warehousing” of the sons and daughters of minority communities.<sup>34</sup> This warehousing merely postpones the confrontation of a much more serious problem:

When we put an 18-year-old minority youth in the federal penitentiary for 10 years for possessing 50 grams of crack, we assure our society of having to deal with a 28-year-old far less able to be productive in a society that has progressed in the 10 years, while he was warehoused in the penitentiary. Welcome to our next nightmare. What do we then do with the 28-year-old less equipped to lead a productive life in this society than he was at the age of 18? How many prison building campaigns can America afford to endure? And how many thousands of minorities can we afford to incarcerate before we admit that this disparity is directed at the heart and soul of our communities: our youth.<sup>35</sup>

It has been theorized that the ultimate effect of warehousing, yet to be realized, is a “raging epidemic of poor, dumb children.”<sup>36</sup> Irony lies in that fact that the United States boasts a label of the richest, most educated nation on earth. This epidemic and these children can be ignored for now, however, because they lack the power associated with constituency.

#### **D. The War on Drugs**

While facially neutral, the Guidelines contribute to continued racial discrimination in various insidious ways. This perpetuation is often carried out under the guise of America’s “War on Drugs.” It was under this guise that the base offense levels for various categories of drugs were set and the Anti-Drug Abuse Act of 1986 was passed.<sup>37</sup> Driven by the media-manufactured notion that crack cocaine would lead to the ruin of society, the legislature and its bureaucratic counterparts adopted the view that crack was far more dangerous than powdered cocaine.<sup>38</sup> During this time, Americans (constituents) cringed at the thought of becoming victims of random, irra-

tional assaults and the fear and frustration of the average citizen had grown to a level of anticipated “lynch mob mentality,” which became the common emotional reaction to crime.<sup>39</sup> The legislature accepted as fact the contention that crack does more harm to the body than powdered cocaine and does so faster.

Also, the legislature concluded that crack is more readily available than powdered cocaine and that its cheaper price makes it more rampant throughout society. This heightened view of crack as an epidemic that necessitated immediate action also came as a result of the crack overdose of 22-year-old, first round NBA draft pick, Len Bias, and the death of Cleveland Browns’ safety Don Rogers.<sup>40</sup>

Subsequently, all committee work on the Anti-Drug Abuse Act was completed in five weeks.<sup>41</sup> The legislative history of the 1986 Act is full of racially tinged references to ghettos and dealers of different ethnicities.<sup>42</sup> For example, the following statement was made on the Senate floor in support of the legislation’s passage: “For the growing numbers of the white middle class who have become hooked on cocaine rock, buying the drug can be like stepping into a foreign culture.”<sup>43</sup>

Certain members of Congress did express concern at the fast-paced passage of the Act. Representative Frenzel observed that the bill was “clumsy” and “put together in the style of a Great Society Program, as its hallmarks were lack of coordination, incomplete consideration, and misunderstood compromises.”<sup>44</sup> Senator Evans labeled the speedy legislative process a “sanctimonious election stampede,” which trampled the Constitution.<sup>45</sup> In his opinion, the actions of Congress with regard to the Anti-Drug Abuse Act resembled a lynch mob, as opposed to a legislature concerned with careful deliberation and implementation.<sup>46</sup> Senator Mathias also cautioned that sometimes “in our haste to do something about a serious problem, we create a whole new array of problems.”<sup>47</sup>

Despite these objections and the fact that crime proposals should be considered in a deliberate fashion, without giving in to ineffective, tough-sounding non-solutions, the bill easily passed through Congress without regard to usual legislative procedures. The legislation merely provided a band-aid

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33. *Id.*

34. See *Mandatory Minimum Sentences for Drug Crimes: Hearing Before the Subcomm. on Crime of the House Judiciary Committee* 106th Cong. (2000) (statement of William B. Moffit, National Association of Criminal Defense Lawyers).

35. *Id.*

36. *Id.*

37. See Uelman, *supra* note 22, at 904.; Kimberly Mache Maxwell, *A Disparity That Is Worlds Apart: The Federal Sentencing Guidelines Treatment of Crack Cocaine and Powder Cocaine*, 1 RACE & ETHNIC ANCESTRY L. DIG. 21, 21 (1995).

38. See *U.S. v. Clary*, 846 F. Supp. 768, 770 (E.D. Mo. 1994), *rev'd*, 34

E3d 709 (8th Cir. 1994).

39. See 846 F. Supp. at 771.

40. Uelman, *supra* note 22, at 904.

41. *Id.*

42. *Id.*

43. See *e.g.*, 132 Cong. Rec. S4672 (daily ed. April 22, 1986).

44. See *e.g.*, 132 Cong. Rec. H10776-04 (daily ed. October 17, 1986) (Statement of Rep. Frenzel).

45. See *e.g.*, 132 Cong. Rec. S13748 (Remarks of Sen. Evans)

46. See *id.*

47. See *e.g.*, 132 Cong. Rec. S13769 (daily ed. Sept. 26, 1986) (Remarks of Sen. Mathias).

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approach to crime, rather than treating its root causes. However, no political party wished to be labeled soft on crime in a nation preoccupied with crime and its proposed remedies. The provisions of the Act were then incorporated into the Federal Sentencing Guidelines.

The war on drugs has since proven to be an abysmal failure. The effort consumes more than an estimated \$75 billion per year of public money; exacts an estimated \$70 billion a year from consumers; is responsible for nearly 50% of the millions of Americans who are currently in jail; occupies an estimated 50% of the trial time of our judiciary; and devours the time of over 400,000 police officers.<sup>48</sup> Within the usage of a wartime metaphor, casualties are at hand—in this war, “we continue to inflict casualties upon ourselves.”<sup>49</sup> The war on drugs is targeted almost exclusively at inner-city communities and it basically serves as a war on young, highly visible, and wholly replaceable African-American street dealers. The provisions created by the Anti-Drug Abuse Act, however, are still in effect and continue to manufacture chaos.

These provisions created a 100-to-1 ratio between crack and powder cocaine.<sup>50</sup> A defendant convicted of selling 100 grams of powdered cocaine has committed a level 18 offense and may be sentenced to 27 to 33 months. In contrast, a defendant selling one gram of crack cocaine will also find himself at a level 18 offense and will be subject to the same sentence, assuming both have no prior convictions.<sup>51</sup> A person would have to possess 500 grams of powdered cocaine to receive the same sentence as someone found in possession of 5 grams of crack and 5,000 grams of powdered cocaine to receive a sentence equal to someone found in possession of 50 grams of crack.<sup>52</sup> Ironically, 5 grams of crack can create approximately 10 to 50 doses of the drug and may sell for an average retail price of \$225 to \$750 dollars.<sup>53</sup> Five hundred grams of powdered cocaine, however, represents anywhere from 2,500 to 5,000 doses and can sell for approximately \$32,500 to \$50,000.<sup>54</sup> The dosages and prices are dependent on the process used to manufacture and weigh the drug and the available market.<sup>55</sup>

Crack cocaine, however, has not sufficiently been proven more harmful than powder cocaine. Crack and powdered cocaine are essentially the same substance. Cocaine is a product that occurs freely in nature in the coca leaf and is the basic building block of other cocaine compounds. Cocaine’s molecular formula is  $C_{17}H_{21}N_4$ , it has a molecular weight of 303, and it has a melting point of 98 degrees Centigrade.<sup>56</sup> Powdered cocaine is a salt-containing hydrochloric acid, which is inhaled through the nose.<sup>57</sup> Crack is made up of powdered cocaine mixed with baking soda and water, which is then heated and hardened and broken into small pieces that are sold as rocks that are smoked in a glass pipe.<sup>58</sup> DEA chemists define crack simply as a “lumpy” substance containing cocaine and bicarbonate of soda.<sup>59</sup> There is no evidence that the “lumpiness” contributes anything to the potential for abuse, and, of course, other forms of cocaine and its salts and isomers can also appear in lumpy forms unless they are milled into fine particles.<sup>60</sup>

Though the Guidelines do not distinguish between white and black defendants, sociologists and criminologists will verify that use and distribution patterns for crack closely track inner-city ethnic and racial lines.<sup>61</sup> Crack is cheaper than powdered cocaine and is easier to break down and package into small quantities for distribution. It is, therefore, prevalent in the inner cities, where minorities are substantially represented within the population.

“No one is suggesting that the street dealer is innocent,” noted U.S. Representative John Conyers, Jr., “he is not. But neither is he the one flying planes to Colombia bringing back million-dollar cargoes.”<sup>62</sup> Since high-level dealers and drug wholesalers are more likely to handle powdered cocaine, it makes no sense to give them far lighter sentences than crack peddlers.<sup>63</sup> Peripheral agents of drug kingpins are receiving disproportionately harsh sentences. This agent is paid approximately \$200 dollars by a drug trafficker for manufacturing and transporting 50 grams of crack from one city to another and is subject to a mandatory 10-year sentence, which could quite possibly be a more substantial sentence than the trafficker who controls the drug organization and will receive the bulk of the profit, but deals only with powdered cocaine.<sup>64</sup> In a district court decision that has since been reversed, Judge Clyde Cahill stated that the disproportionate ratio has “created

48. Charles H. Whitebread, “Us” and “Them” and the Nature of Moral Regulation, 74 S. CAL. L. REV. 361, 368 (2000).

49. *Mandatory Minimum Sentences for Drug Crimes: Hearing Before the Subcomm. on Crime of the House Judiciary Comm.* 106th Cong. (2000) (statement of William B. Moffit, National Ass’n of Criminal Defense Lawyers).

50. See Uelman, *supra* note 22, at 904; 18 USC § 2D1.1 (c), Drug Quantity Table.

51. See 18 USC § 2D1.1 (c), Drug Quantity Table.

52. See 18 USC § 2D1.1 (c), Drug Quantity Table; Maxwell, *supra* note 53, at 21.

53. Nkechi Tafia, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 How. L.J. 641, 660 (1997).

54. *Id.*

55. *See id.*

56. *U.S. v. Davis*, 864 F. Supp 1303, 1305 (N.D. Ga. 1994).

57. Maxwell, *supra* note 37, at 21.

58. *Id.*

59. *Davis*, 864 F. Supp. at 1305.

60. *See id.*

61. *See Maxwell*, *supra* note 37, at 21.

62. Darden, *supra* note 23, at 25-26.

63. *See id.*

64. *See Sentencing Commission Review: Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary*, 106th Cong. (2000) (statement of Carmen D. Hernandez, National Association of Criminal Defense Lawyers).

a situation that reeks with inhumanity and injustice.”<sup>65</sup> Judge Cahill worried that the scales of justice had been turned and twisted so that the drug trafficking kingpins, the masterminds, escape detection, while those who play a trivial role are “hoisted on the spears of an enraged electorate and at the pinnacle of their youth are imprisoned for years while those most responsible for the evil of the day remain free.”<sup>66</sup> The war on drugs has been referred to as the reincarnation of Jim Crow laws.<sup>67</sup> It would seem to be not only logical, but economically sensible to devote scarce government resources to reducing the large ingress and wholesale distribution of powder cocaine by major traffickers, which would consequently reduce the existence of crack as a derivative product. Without cocaine, there would be no crack.

### III. CONSTITUTIONAL CHALLENGES

“Sadly, . . . one wonders whether the majority [of the court] still believes that . . . race discrimination against non-whites is a problem in our society, or even remembers that it ever was.”<sup>68</sup> Justice Harlan first introduced the idea of a color-blind Constitution in a 1896 dissent from the Supreme Court decision regarding *Plessy v. Ferguson*.<sup>69</sup> Unfortunately, in the year 2001, blacks were roughly eight times as likely to end up in jail as whites and the very notion of color-blind justice remains endangered.<sup>70</sup> Danger lies in the absence of the kinds of common cultural commitments and shared values that are crucial to holding any society together. The extraordinarily difficult task confronting the Supreme Court lies in crafting a concept of justice that recognizes a policy-level need for the acknowledgment of racial differences where necessary to overcome biased practices still in existence.<sup>71</sup>

#### A. Excessive Delegation and Separation of Powers

Certain challenges to the constitutionality of the Guidelines revolve around the Sentencing Commission itself. The Commission consists of seven voting members and one non-voting member.<sup>72</sup> The President appoints the voting members, at least three of whom must be federal judges.<sup>73</sup> The three judges are selected from a list of six judges recommended to the President by the Judicial Conference of the United States.<sup>74</sup> The commissioners are subject to removal by the President for “neglect of duty or malfeasance in office or for other good cause shown.”<sup>75</sup> Two claims generally raised by defendants challenging the Guidelines are that the Guidelines violate the

principle of separation of powers by requiring the appointment of three federal judges to the Commission and that they constitute an excessive delegation of legislative powers to the judicial branch.

Such defenses were raised by the defendants in *Gubiensio-Ortiz v. Kanahele*,<sup>76</sup> who were convicted of various unrelated offenses. The district and appeals courts both agreed. The Ninth Circuit held that executive or administrative duties of a non-judicial nature may not be imposed on judges holding office under Article III of the Constitution.<sup>77</sup> The court determined that the matters handled by the Commission, including the proper apportionment of punishment, were peculiarly questions of legislative policy and that, with the establishment of the Commission, Congress had effectively delegated legislative policymaking functions.<sup>78</sup> According to the court, these functions are tasks that only the legislative or executive branches, not the judicial branch, may constitutionally perform.<sup>79</sup> This decision was later vacated by the Supreme Court in *U.S. v. Chavez-Sanchez*<sup>80</sup> based on *Mistretta v. U.S.*<sup>81</sup>

The *Mistretta* decision halted all speculation and debate. In *Mistretta*, the Court concluded that, in the creation of the Sentencing Commission, Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate branches. The Court found that the functions delegated were non-adjudicatory and did not trammel the prerogatives of another branch of government.<sup>82</sup> In the only dissent, Justice Scalia conveyed his concern over the broad discretion given to the Commission to make value judgments and policy assessments in creating the Guidelines.<sup>83</sup> This case marks the first and the last time that the Supreme Court has considered an issue that revolves around the Sentencing Commission or the Guidelines.

#### B. Due Process

Historically, federal courts have also shown reluctance to interfere with the type of grant of prosecutorial discretion involved in the application of the Guidelines. Most federal

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65. *U.S. v. Clary*, 846 F. Supp. 768, 772 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

66. *Id.*

67. See ESSENCE NEWS, *Fight Mandatory Minimums*, available at [http://www.essence.com/highlights/take\\_stand/ts\\_090800.shtml](http://www.essence.com/highlights/take_stand/ts_090800.shtml) (last visited December 17, 2001).

68. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).

69. See *Plessy v. Ferguson*, 163 U.S. 537, 552-564 (1896) (Harlan, J., dissenting).

70. Darden, *supra* note 23, at xv-xvi.

71. *See id.*

72. See JOHN R. HOWARD, *THE SHIFTING WIND: THE SUPREME COURT AND*

*CIVIL RIGHTS FROM RECONSTRUCTION TO BROWN* 351 (1999).

73. *See id.*

74. *See id.*

75. *See id.*

76. 857 F.2d 1245, 1246 (9th Cir. 1988), *vacated*, *U.S. v. Gubiensio-Ortiz*, 488 U.S. 1036 (1989).

77. *See id.* at 1251.

78. *See id.* at 1254.

79. *See id.*

80. 488 U.S. 1036, 1036 (1989).

81. 488 U.S. 361, 362 (1989).

82. *See id.* at 388.

83. *See id.* at 414 (Scalia, J., dissenting).

**[C]ourts have repeatedly failed to find any discriminatory purpose in the legislative history of the Federal Sentencing Guidelines . . . .**

courts of appeals and district courts have consistently upheld the disparity in sentencing between crack and powder cocaine convictions. Defendants have argued that the Guidelines are violative of due process because Congress did not give any legitimate purpose for the distinctions in crack and powdered cocaine sentencing.<sup>84</sup> This argument has

generally been deemed invalid due to three justifiable distinctions. First, courts have determined that crack and powdered cocaine are two distinct substances and that crack is far more addictive than cocaine.<sup>85</sup> Also, because crack is small in physical size and inexpensive per dose, other societal problems are created.<sup>86</sup> Last, Congress's purpose in establishing more stringent punishments for crack convictions was to discourage its use and distribution.<sup>87</sup>

The defendants in *U.S. v. Davis*, however, obtained a rare victory based on the due process argument in the Northern District of Georgia. The defendants both pled guilty to possession of a cocaine base with the intent to distribute.<sup>88</sup> The only asserted challenge was to the constitutionally violative nature of the Guidelines.<sup>89</sup> The court in that case held that the statute was facially ambiguous because powdered cocaine and crack are derived from the same substance and have the same molecular structure, weight, and melting point. In other words, the terms "cocaine base" and "cocaine" are synonymous.<sup>90</sup> The court concluded that the physical form of the same drug has no rational relationship to any legislative intent to impose increased penalties that have nothing to do with potential for abuse.<sup>91</sup> *Davis* was not heard on appeal, but has subsequently been disagreed with or distinguished in other decisions of the Northern District of Georgia.<sup>92</sup>

### C. Equal Protection

In federal cases, the Fifth Amendment has been interpreted to imply an equal protection component forbidding discrimination that is "so unjustifiable as to be violative of due process."<sup>93</sup> Crack offense defendants have asserted that the Guidelines violate the Constitution because they have a disproportionate effect on African-Americans due to the fact that this racial group is more likely to use and distribute crack than

powdered cocaine.<sup>94</sup> The argument has been dismissed based on the *Feeney* test, where the Supreme Court held that in order for a law that is facially neutral to be found unconstitutionally discriminatory against a racial minority, there must be a finding of discriminatory purpose on the part of the lawmaker.<sup>95</sup> The test set forth in *Feeney* defines discriminatory purpose as an aspect that implies more than intent as volition or intent as awareness of consequences.<sup>96</sup> According to the Court, discriminatory purpose requires that the decision maker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.<sup>97</sup> *Feeney* adds to the conclusion first set forth in *Washington v. Davis*,<sup>98</sup> which stated that disproportionate impact on a certain group of people is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. Also, the Court has determined that a certain degree of specificity is required in disproportionate impact challenges.

In *McClesky v. Kemp*,<sup>99</sup> the Court held that statistical proof of discriminatory impact in the administration of the death penalty was insufficient to show an equal protection violation. The Court concluded that in order for the defendant to demonstrate an equal protection violation, he "must prove that the decisionmakers in *his* case acted with discriminatory purpose."<sup>100</sup> In general, the courts have repeatedly failed to find any discriminatory purpose in the legislative history of the Federal Sentencing Guidelines, as the disproportionate racial impact has been deemed a mere consequence of a facially neutral law. The Guidelines have been measured only by a rational basis standard, which means that the state must show merely a reasonable connection between the statute and its justification of public welfare.<sup>101</sup>

Once again, a lone case serves as the antithesis of the general rule. The district court in *U.S. v. Clary*,<sup>102</sup> held that the disproportionate penalties for crack cocaine violate equal protection generally and as applied in the case of the defendant. The court further held that purposeful discrimination was present in the enactment of the law.<sup>103</sup> Due to of the novel and controversial nature of the decision, the court made certain that every facet of its reasoning was explained in the opinion. The 18-year-old defendant in *Clary* was arrested for possession with intent to distribute 67.76 grams of crack cocaine.<sup>104</sup> *Clary* pled guilty to possession with intent to distribute crack, a crime punishable by a mandatory minimum sentence of ten years imprisonment.<sup>105</sup> Prior to sentencing, *Clary*, a black male, filed a motion challenging the constitutionality of the Guidelines that pertained to crack cocaine and contended that

84. See Maxwell, *supra* note 37, at 24.

85. See *id.*

86. See *id.*

87. See *id.*

88. *U.S. v. Davis*, 864 F. Supp. 1303, 1305 (N.D. Ga. 1994).

89. See *id.*

90. See *id.*

91. See *id.* at 1306.

92. See *U.S. v. Settle*, 1997 U.S. App. LEXIS 3103 at \*4 (4th Cir. 1997) (rejecting *Davis*).

93. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

94. See Maxwell, *supra* note 37, at 24.

95. See *Administrator v. Feeney*, 442 U.S. 256, 258 (1979).

96. *Id.*

97. *Id.*

98. See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

99. See *McClesky v. Kemp*, 481 U.S. 279, 286 (1987).

100. *Id.* at 292.

101. See Maxwell, *supra* note 37, at 24-25.

102. 846 F. Supp. 768, 797 (E.D. Mo. 1994), *rev'd*, 34 E3d 709 (8th Cir. 1994).

103. See 846 F. Supp. at 796-797.

104. *Id.* at 769-770.

105. *Id.*

they violated his equal protection rights. Early in the opinion the court agreed with Clary's assertion and recognized that the sentencing provision for cocaine base "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."<sup>106</sup> The opinion goes on to provide the reasons why the crack provision of the Guidelines "shocks the conscience of the Court."<sup>107</sup>

The *Clary* court based its decision on the constitutionally foundational requirement that persons similarly situated must be treated alike.<sup>108</sup> The opinion first explains that the disproportionate racial effect that results from the crack provision places the provision in the category of laws that are discriminatory as applied.<sup>109</sup> In order to justify this determination, the court relied on *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.<sup>110</sup> In *Arlington*, the Supreme Court set out a non-exhaustive list of factors to determine whether a law was enacted with discriminatory purpose. These factors include the historical context of the subject matter, the ultimate effect of the law at issue, any deviation from standard practice, and the legislative and administrative history of the particular law.<sup>111</sup>

With regard to the *Arlington* factors, the *Clary* court found that historically, Congress had been motivated along racial lines with respect to drug policy. The court based this finding on previous United States drug enactments, such as anti-opium legislation motivated by a notion of the "yellow peril" Far East military threat of the early 1900s.<sup>112</sup> The court also examined the Harrison Act of 1914, the first federal law to prohibit distribution of cocaine and heroin. The court relied on evidence that the Act was passed on the heels of overblown media accounts depicting heroin-addicted black prostitutes and criminals in the cities.<sup>113</sup> The court found that the author of the Act, Representative Francis Harrison, moved to include coca leaves in the bill "since the leaves make Coca-Cola and Pepsi-Cola and all those things are sold to Negroes all over the South."<sup>114</sup> In viewing the ultimate effect of the cocaine base provision, the *Clary* court found disproportionate impact obvious. The court relied on statistics that indicated that 98.2% of defendants convicted of crack cocaine charges in the Eastern District of Missouri between the years 1988 and 1992 were black.<sup>115</sup> In comparison, 45.2% of defendants sentenced for powder cocaine were white, while 20.7% were black defendants.<sup>116</sup> Concerning deviation from standard practice, the court placed great emphasis on the astoundingly expedient passage of the legislation that contained the crack provision. The opinion concluded that if such a law had been proposed in relation to pow-

der cocaine, it would have been much more carefully and deliberately considered due to its inevitable effect of sentencing droves of young white men to prison for extended terms.<sup>117</sup> In the same context, the court also considered the biased statements discussed earlier, which were set forth on the House floor to gain perspective as to the legislative history.<sup>118</sup> The court found that in reviewing the factors presented in *Arlington*, the crack cocaine provision of the Sentencing Guidelines was enacted with discriminatory purpose.

In *Clary*, the court also went on to explain that a new and equally dangerous breed of racism exists and serves as an additional motivation for the 100 to 1 crack/cocaine ratio enactment.<sup>119</sup> This new breed is "unconscious racism" and, according to the court, it has arisen as a result of the myths and fallacies of white superiority, which the nation has been inundated with for centuries.<sup>120</sup> The court reasoned that this notion of superiority has become so deeply embedded in the white majority that its acceptance and socialization from generation to generation has become mere routine.<sup>121</sup> In the view of the court,

A 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. In the "enlightened and politically correct 90s," whites have become indignant at the suggestion that they harbor any ill-will towards blacks or retain any vestiges of racism. After all, they have black friends. They work with black people every day. They enjoy black entertainers on their favorite television programs every night.<sup>122</sup>

As a result of its conclusions, the *Clary* court decided to impose a sentence in accordance within the range of the Sentencing Guidelines for powder cocaine, which would be for 21 to 27 months.<sup>123</sup> This initial decision, however, was reversed on appeal.<sup>124</sup> The appeals court illustrated tremendous concern at the district court's reliance on unconscious racism and found that the assertions offered by the defendant did not evidence that the crack cocaine provision was enacted

**[T]he Clary court found that historically, Congress had been motivated along racial lines with respect to drug policy.**

106. *Id.* at 770.

107. *Id.*

108. *See id.* at 773.

109. *See id.*

110. 429 U.S. 252, 253 (1977).

111. *See id.* at 253.

112. *Clary*, 846 F. Supp. at 775

113. *See id.*

114. *Id.*

115. *Clary*, 846 F. Supp. at 786.

116. *Id.*

117. *See id.*

118. *See id.* at 785.

119. *See U.S. v. Clary*, 846 F. Supp. at 779.

120. *See id.*

121. *See id.*

122. *Id.*

123. *Id.* at 797.

124. *U.S. v. Clary*, 34 F.3d 709, 710 (8th Cir. 1994).

**The fact that criminal sentencing is a highly charged political issue in our society implies that reform in this area will be an even harder task.**

“because of,” and not merely “in spite of” discriminatory purpose.<sup>125</sup>

#### **D. Cruel and Unusual Punishment**

The final constitutional argument offered against the sentencing disparity is that the Guidelines are cruel and unusual punishment and violative of the Eighth

Amendment because the sentencing is unduly severe compared with the crime committed.<sup>126</sup> The courts have once again deemed that substantial deference must be granted to the broad authority that the legislature necessarily possesses in determining the types and limits of punishments for crimes.<sup>127</sup> However, one district court did find merit in this claim. In *U.S. v. Walls*, defendants Blakney and Campbell were employed as crack cocaine cooks.<sup>128</sup> The two were asked to cook amounts of powdered cocaine for undercover DEA officers.<sup>129</sup> Blakney was paid \$100 compensation, while Campbell’s payment was in the form of a small rock of crack cocaine.<sup>130</sup> Blakney faced a mandatory sentence of 10 years and Campbell faced 20 years.<sup>131</sup> Both were drug addicts and it was this condition that led the court to a finding that such sentences would violate the Eighth Amendment.<sup>132</sup>

The court’s finding was based on the 1962 Supreme Court decision of *Robinson v. California*.<sup>133</sup> The *Walls* court interpreted the *Robinson* holding as stating that criminal punishment of a drug addict on account of his addiction is cruel and unusual.<sup>134</sup> *Robinson* invalidated a state law that imprisoned a drug addict as a criminal, even though he had never touched any narcotic drug within the state or been found guilty of any irregular behavior there.<sup>135</sup> *Robinson* recognized drug addiction as an “illness which may be contracted innocently or involuntarily.”<sup>136</sup> Thus, the *Walls* court sentenced Blakney and Campbell in accordance with the ranges prescribed for powder cocaine offenses: 24 to 30 months in the case of Blakney, and 27 to 33 months for Campbell. Both were also to be subjected to six years of probation upon release.<sup>137</sup>

The United States Court of Appeals for the District of Columbia determined that *Robinson* merely held that the Eighth Amendment forbids punishing a drug addict merely for the status of being an addict and that the Eighth Amendment does not command individualized sentencing and it does not

require consideration of mitigating factors in non-capital cases.<sup>138</sup> Thus, the decision was reversed and remanded for resentencing.

#### **IV. REFORMS**

Judicially, it appears that constitutional challenges to the Sentencing Guidelines present virtually insurmountable odds for the crack cocaine offender. Numerous reform proposals, however, have been offered in an attempt to halt the devastating impact inflicted upon minorities by the application of the Federal Sentencing Guidelines. However, reform has been tempered by a recognition that the Guidelines are likely to remain intact for some time to come because major legal reforms are always slow in coming. In our country, it seems that reshaping, redirecting, or eliminating any bureaucracy is a Herculean endeavor.<sup>139</sup> The fact that criminal sentencing is a highly charged political issue in our society implies that reform in this area will be an even harder task.

Principal critics of the Guidelines, federal judges, for all their vaunted independence and high status, are also poorly positioned and generally unable to influence national legislative policy.<sup>140</sup> The very complexity and intricacy of this large body of rules easily discourages any observer—policy maker, legislator, or lay citizen—tempted to take an interest in how federal crimes are punished.<sup>141</sup>

This historical reluctance to implement reforms in this area, which are so badly needed, along with the desire of our nation’s leaders to pretend that racism and discrimination are both phenomena of the past, could prove fatal for the Sentencing Guidelines reform movement. The public perception of African-Americans as inferior and venal beings has traditionally provided the basis of acceptability for the most outrageous of lies and, in some instances, continues to do so.<sup>142</sup> “Progress toward racial equality has been halting, at best.”<sup>143</sup> Instead, the nation often seems to be retreating from the values of a time in which there existed substantial consensus on the need for racial pluralism in positions of power and for the opportunity of upward mobility.<sup>144</sup> Time is of the essence:

It will be impossible for African Americans to achieve justice through traditional politics, including exercising their hard gained franchise. Perhaps “impossible” is too strong; it’s better to say that it will take too long, and African Americans can’t afford to wait, considering the emergency nature of the crisis. It will take too long because the only way African

125. *Id.* at 713.

126. See Maxwell, *supra* note 37, at 24-25.

127. See *Id.*

128. *U.S. v. Walls*, 841 F. Supp. 24, 26-27 (D. D.C. 1994), *rev’d in part*, 70 F.3d 1323, 1331 (D.C. Cir. 1995).

129. 841 F. Supp. at 26-27.

130. *Id.*

131. *Id.*

132. See *id.*

133. See *id.* at 31.

134. See *id.*

135. See *Robinson v. California*, 370 U.S. 660, 667 (1962).

136. See *id.*

137. See *Walls*, 841 F. Supp. at 33.

138. *U.S. v. Walls*, 70 F.3d 1323, 1331 (D.C. Cir. 1995).

139. See Stith, *supra* note 4, at xi.

140. Stith, *supra* note 4, at xi.

141. *Id.*

142. Higginbotham, *supra* note 16, at vii.

143. *Id.*

144. *Id.*

Americans win in our winner-take-all democracy is to persuade white people to vote with them. For matters of racial justice, that is really tough. If it took the white majority more than 200 years to understand that slavery was wrong, and approximately 100 years to realize that segregation was wrong (and still many don't understand), how long will it take them to perceive that American criminal justice is evil? And in the meantime, what should African Americans do? When one's house is on fire, should one wait for the people who set the fire to put it out?<sup>145</sup>

The criminal justice system places too much emphasis on punishment and not enough on justice. The Guidelines are based on the incorrect premise that incarceration is the only tough form of punishment. No one who has ever visited a jail or prison and seen fellow human beings locked in cages like animals can ever be unmindful of the enormity and severity of society's decision to deprive one of its members of his or her liberty.<sup>146</sup> The good news is that programs do exist that stop crime more effectively and that cost less than prison. The bad news is that most people, particularly lawmakers, seem not to care. An empirical study by the Rand Corporation found that the best way to prevent crime is to provide financial and health services to poor children and their families.<sup>147</sup> Per dollar spent, such intervention was shown to prevent more crime than sending offenders to prison.<sup>148</sup> It makes a great deal of sense. "If people commit certain kinds of crimes because they are poor and hopeless, give them money and hope."<sup>149</sup> Until we, as a society become as eager to provide those things for the young black population as we are to provide them with jail cells, reform seems to be nothing more than a distant, wholly unachievable idea.<sup>150</sup>

#### A. Legislative and Executive Reform

The legislature has been granted a tremendous amount of deference and is viewed as the proper forum for eliminating the disparity. In May of 1995, the annual congressional report of the Sentencing Commission revealed a unanimous agreement among the commissioners that the 100-to-1 ratio is far too great.<sup>151</sup> The Commission balanced statistics that evinced discrete and substantial harm to minority communities with the factors that had originally induced the vast ratio, such as availability of the drug and the harm caused by the substance.<sup>152</sup> In doing so, the Commission determined that the

100-to-1 ratio was unwarranted and, in its report, the Commission recommended an amendment to the drug sentencing guidelines that would entirely eliminate the cocaine sentencing disparity.<sup>153</sup> The proposed amendment set sentences for an offense involving equivalent amounts of crack cocaine and

powder cocaine at the level currently provided for powder cocaine.<sup>154</sup> Congress rejected the suggested amendment and directed the commission to recommend further amendments imposing higher sentences for trafficking in crack cocaine.<sup>155</sup> Out of 500 recommendations submitted by the Commission since its inception, this rejection marked the first time that Congress overrode the Commission's advice.<sup>156</sup>

Since the initial congressional rejection, at least one defendant has attempted to use Congress's refusal to adjust the ratio to prove the purposeful discrimination required under *Feeney*. However, the United States Court of Appeals for the Second Circuit found in *U.S. v. Teague*<sup>157</sup> that with Congress's reaffirmation of the 100-to-1 ratio, the legislative body simply decided that the 1-to-1 ratio proposed was inadequate. The court found no evidence that Congress reaffirmed the ratio "at least in part 'because of,' not merely 'in spite of'" its adverse effects upon African-Americans.<sup>158</sup>

#### B. Capacity-Based Guidelines

Other proposals for reform include the adoption of rational, capacity-based sentencing guidelines. In effect, such guidelines would actually impose a sentence proportionate to the crime committed. These proposed guidelines would guide judges in the exercise of their sentencing discretion, not impose strict, rigid regulations.<sup>159</sup> They would also ensure that the criminal penalties imposed do not exceed the resources made available to the corrections systems.<sup>160</sup> This suggested system of Guidelines would also include the adoption of a requirement of a corrections impact statement, which would detail the increased number of prisoners predicted and the prison administration's capacity to house them.<sup>161</sup> The impact statement would be submitted before any legislation that could raise the number of people subject to a particular sanction, such as imprisonment, is ever enacted.<sup>162</sup>

**The Guidelines are based on the incorrect premise that incarceration is the only tough form of punishment.**

145. Darden, *supra* note 23, at 16.

146. *Mandatory Minimum Sentences for Drug Crimes: Hearing Before the Criminal Justice, Drug Policy and Human Resources Committee on Government Reform* 106th Cong. (2000) (statement of Wade Henderson, Executive Director Leadership Conference).

147. *Id.*

148. *Id.*

149. *Id.*

150. Darden, *supra* note 23, at xxv.

151. See e.g., U.S. Sentencing Commission Special Report to Congress: Cocaine and Federal Sentencing Policy (1995) (issued after a review of cocaine penalties as directed by Pub. L.

No. 103-322, § 280006).

152. See *id.*

153. See *id.*

154. See *id.*

155. See *U.S. v. Teague*, 93 F.3d 81, 85 (2d Cir. 1996).

156. Tafia, *supra* n. 53, at 662.

157. See *Teague*, 93 F.3d at 85.

158. See *id.*

159. See Branham, *supra* note 6, at 83.

160. See *id.*

161. See *id.*

162. See *id.*

### C. Drug Court

Yet another proposal is the establishment of a federal drug court. By 2000, approximately 450 drug court programs had been implemented in states throughout the country.<sup>163</sup> Drug courts dispose of criminal cases while providing treatment to reduce the amount of drug abuse and its related social costs. They are premised on the assumption that it is infinitely better to keep a person out of prison, working, and paying taxes, as opposed to paying \$15,000 to \$25,000 per year to feed, clothe, secure, and provide medical care for that person.<sup>164</sup>

Within the general confines of the drug court program, a defendant charged with a nonviolent, drug related or drug-driven felony can elect to plead guilty and enter drug court. The prosecution must approve the application. After the guilty plea is entered, the court defers sentencing and admits the defendant to a drug treatment program, which is court based, has three phases, and is expected to last for one full year.<sup>165</sup> During the treatment program, the defendant is required to attend weekly group treatment sessions and meet with a case manager and treatment counselor for individual review sessions.<sup>166</sup> Also, the defendant must submit to frequent drug testing, attend a prescribed number of Narcotics Anonymous or Alcoholics Anonymous meetings weekly, and pay the treatment fee of \$1,500 a year.<sup>167</sup> Another requirement of the program is the periodic court appearance ordered by the judge to verify program compliance.<sup>168</sup> The defendant must test drug-free for a minimum of six months prior to graduation.<sup>169</sup> Failure to meet the imposed requirements result in a custodial prison sentence without the need for further court proceedings.<sup>170</sup> Defendants who successfully complete the program have their guilty plea set aside and their cases dismissed at a formal graduation ceremony where friends, family, fellow drug court participants, and the judge are present.<sup>171</sup>

## VI. CONCLUSION

The Federal Sentencing Guidelines were originally created to produce a more equitable sentencing scheme; however, the opposite effect has resulted and the Guidelines have become a major source of societal perpetration of racial inequality. The Guidelines have had a devastating effect on the minority population of the United States and the non-relenting, steadily rising incarceration of minorities serves a purpose of destroying minority communities by removing members of a certain race, mainly African-Americans, and isolating them during the most productive years of their lives.<sup>172</sup> The lingering question—*Why should a black drug offender in America receive a different sentence than a white drug offender?*—presents another seemingly obvious answer: *He shouldn't!* The fact that this matter

has not proven to be blatantly obvious to Congress and its legislative agencies should invoke outrage and reform movements across the nation. Sadly, both outrage and reform remain mere aspirations, rather than realizations.

Six months before his death, former Supreme Court Justice Thurgood Marshall gave a Fourth-of-July address at Independence Hall in Philadelphia:

I wish I could say that racism and prejudice were only distant memories . . . and that liberty and equality were just around the bend. I wish I could say that America has come to appreciate diversity . . . . But as I look around, I see not a nation of unity but of division—Afro and white, indigenous and immigrant, rich and poor, educated and illiterate . . . . But there is a price to be paid for division and isolation.

. . . . We cannot play ostrich. Democracy cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root among rage. We must go against the prevailing wind. . . . We must dissent from the fear, the hatred, and the mistrust.<sup>173</sup>

The Federal Sentencing Guidelines have created fences of division that must be knocked down and literal walls of imprisonment that must be torn apart. The national legislature continues to play ostrich and, thus, democracy's flourish is hindered amid fear, while liberty's bloom remains stagnant in the face of hate. Society must go against the prevailing wind and must dissent from the disastrous consequences of the raging storm created by the Sentencing Guidelines.



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163. *Drug Court Review: Hearing Before the Senate Judiciary Committee Subcomm. on Youth Violence*, 106th Cong. (2000) (statement of Michael E. McMaken, Mobile, Alabama, Drug Court Judge).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. See Darden, *supra* note 23, at 27.

173. See Higginbotham, *supra* note 16, at xxxi-xxxii (quoting Justice Thurgood Marshall).