

# RACE, CRIME, and the LAW

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Race, Law,  
and Punishment:  
*The War on Drugs*

THE "WAR ON DRUGS" refers to a policy that attempts to reduce the supply, distribution, and use of illicit narcotics by increasingly punitive criminal measures.<sup>1</sup> This policy figures prominently in discussions about race relations and the administration of criminal law because its enforcement has greatly enlarged the numbers of blacks subjected to arrest, prosecution, and imprisonment. The war on drugs has thus dramatically accentuated the suspicion with which police authorities regard blacks. Incidents generated by the war on drugs account for a large proportion of the cases discussed in chapter 4 concerning the propriety of using race as a signal of risk. The war on drugs, moreover, largely explains why, in recent years, the incarceration rate among blacks has exponentially superseded the rate among whites.<sup>2</sup> Some observers claim that these results are not merely unintended side-effects of a nonracial policy but are instead the consequences of something far more malevolent: a racially biased design. One theory is that authorities do not really desire to stop the drug trade (at least among blacks) but desire instead to use drugs as a means of corrupting and disabling black communities.<sup>3</sup> Another is

that the war on drugs is designed to imprison as many blacks as possible (particularly young black men), partly to incapacitate them and partly to make them into a particularly serviceable scapegoat—the Negro as Criminal.<sup>4</sup> A third is that the war on drugs, although truly aimed against illicit narcotics, is conducted in a fashion that is negligently indifferent to the war's collateral damage to blacks. According to this theory, if the war on drugs did to white communities what it is doing to black communities, white policymakers would long ago have called a truce in order to pursue some other, less destructive, course.<sup>5</sup>

I explore the racial critique of the war on drugs in two related contexts. In one, critics allege that officials single out black women for prosecution on charges of introducing their babies to cocaine. In the other, critics allege that Congress engaged in racial discrimination when it enacted, or retained, a law that punishes crack cocaine offenders much more harshly than powder cocaine offenders.

I make two main arguments. First, to a large extent, allegations of racial discrimination have been insufficiently substantiated to delineate a constitutional violation under governing law. Second, these allegations are not only unpersuasive in courts but also counterproductive in legislatures. They divert the discussion from the broad ground of whether a given policy is wise to the narrower, more treacherous ground of whether a given policy is racially discriminatory. The allegations are also counterproductive in that they trigger an especially stubborn defensiveness in support of existing policy from politicians who take umbrage at being accused of having engaged in racial misconduct. There is an important difference between saying that a policy is wrong, or misguided, or mistaken, or imprudent, or even silly and saying that a policy is "racist."

### ~~Race, Selective Prosecution, and "Crack Babies"~~

~~Is it true, as some scholars, activists, and journalists allege, that law enforcement authorities have engaged in racial discrimination in their prosecution of certain women for exposing fetuses or newborns to illicit drugs?<sup>6</sup>~~

~~The beginnings of this controversy can be traced to July 1989, when Jennifer Clarise Johnson, a twenty-three-year-old black crack addict,~~

are). It is also a political matter. Deficient allegations of racial discrimination further debase the already diminished currency of such claims, marginalize well-grounded criticisms of punitive sanctions, and elicit stubborn defensiveness from officials who can concede having been mistaken but cannot abide the charge that racial bias determined their conduct.

### Race and Differences in Sentencing for Crack Cocaine vs. Powder Cocaine

Professor Roberts attacked the administration of a criminal punishment. We turn now to an attack on a punishment itself: provisions which impose a much higher penalty for dealing or possessing crack cocaine than powder cocaine.\* Under the federal Anti-Drug Abuse Act of 1986,<sup>37</sup> a person convicted of possession with intent to distribute fifty grams or more of crack cocaine must be sentenced to no less than ten years in prison. By contrast, only if a person is convicted of possession with intent to distribute at least 5,000 grams of powder cocaine is he subject to a mandatory minimum of ten years—a 100:1 ratio in terms of intensity of punishment. Moreover, under the federal Anti-Drug Abuse Act of 1988,<sup>38</sup> a person caught merely possessing one to five grams of crack cocaine is subject to a mandatory minimum sentence of five years in prison. Crack cocaine is the only drug for which there exists a mandatory minimum penalty for a first offense of simple possession.

Many see this dramatic difference in punishment in racial terms because of the confluence of two considerations. The first is the apparent similarity of the underlying offenses; all involve cocaine. Because crack cocaine is derived from powder cocaine, some observers maintain that trafficking in one is essentially the same as trafficking in the other. Cocaine is cocaine, they assert. The second is the difference in the racial composition of the pools of people arrested, prosecuted, and imprisoned. In 1992, 92.6 percent of the defendants convicted for crack cocaine offenses nationally were black and only 4.7 percent white. In comparison,

\*Powder cocaine is a white substance that is a potent anesthetic and a powerful stimulant. It can be administered in a variety of ways, including injection and snorting. Crack cocaine is derived from powder cocaine and is taken into the body when it is vaporized and inhaled. See United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 7-30 (1995).

45.2 percent of defendants sentenced for powder cocaine offenses were white, and only 20.7 percent black.<sup>39</sup>

Some argue that by punishing crack cocaine offenses much more harshly than powder cocaine offenses federal and state governments violate the Equal Protection clause of the U.S. Constitution and other legal protections.<sup>40</sup> This claim has had some influence with journalists and other molders of public opinion.<sup>41</sup> It helped to move the Minnesota Supreme Court to invalidate Minnesota's drug sentencing law under the state constitution.<sup>42</sup> Moreover, concerns over racial fairness prompted the United States Sentencing Commission to recommend that Congress narrow the crack-powder sentencing differential.<sup>43</sup>

Several federal judges have also castigated the crack sentencing statute as racially unjust.<sup>44</sup> One judge invalidated the sentencing regime in a Missouri case that arose from Edward Clary's conviction, pursuant to a guilty plea, of possessing with intent to distribute 67.76 grams of crack cocaine.<sup>45</sup> Because Clary was caught with over 50 grams of crack, he was subject under federal law to a mandatory minimum sentence of ten years' imprisonment. To "qualify" under federal law for the same ten-year minimum sentence, he would have had to have been caught with 5,000 grams of powder cocaine.

Clary, an eighteen-year-old black man with no prior convictions, charged that this penalty differential had a disproportionate and unjustifiable impact on him and other blacks because blacks are much more likely than whites to traffic in crack. Everyone concedes that there exists a striking and racially identifiable pattern in the demographics of the drug trade. In the Eastern District of Missouri, between 1988 and 1992, blacks constituted 98.2 percent of the defendants convicted of crack cocaine charges.<sup>46</sup> The disagreement is over the inferences which should be drawn from such statistics in light of all that has surrounded the origins and ongoing ratification of the sentencing statute at issue.

Concluding that the sentencing provision in the Anti-Drug Abuse Act was a product of "unconscious racism" as well as "irrational and arbitrary" decisionmaking, Judge Clyde S. Cahill refused to sentence Clary in accordance with it.<sup>47\*</sup> His ruling, which was subsequently re-

\*According to Judge Cahill:

The totality of the facts in this case converge to support the conclusion that racial discriminatory influences, at least unconsciously, played an apprecia-

versed, emphasizes three points. First, racism has historically influenced the formulation of drug policy. Fear and hatred of Asians was part of what mobilized punitive legal measures against the distribution or use of opium, a drug associated in the public mind with the Chinese. Similarly, fear and hatred of blacks was part of what led to the criminalization of marijuana, cocaine, and heroin, drugs that were said to incite the dangerous instincts of African-Americans. Judge Cahill notes, for example, that "the Harrison Act of 1914, the first federal law to prohibit distribution of cocaine and heroin, was passed on the heels of overblown media accounts depicting heroin-addicted black prostitutes and criminals in the cities."<sup>48</sup> To Cahill, these historical episodes put the current demonization of crack into an alarming light:

Almost every major drug has been, at various times in America's history, treated as a threat to the survival of America by some minority segment of society. Panic based on media reports which incited racial fears has been used historically in this country as the catalyst for generating racially biased legislation. The association of illicit drug use with minorities and the threat of it "spreading to the higher ranks" is disturbingly similar to the events which culminated in the "100 to 1" ratio enhancement in the crack statute.<sup>49</sup>

Cahill's second point is that the crack trade largely stems from terrible social conditions which are permitted to fester because of a racially selective failure to adequately aid America's black ghettos:

Picture a city where it is easier to buy cocaine than it is to purchase a loaf of bread. . . . Think of a community where mothers, barely

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ble role in promulgating the enhanced statutory scheme for possession and distribution of crack. Legislators' unconscious racial aversion towards blacks, sparked by unsubstantiated reports of the effects of crack, reactionary media prodding, and an agitated constituency, motivated the legislators to enhance the punishment scheme to produce a dual system of punishment in the application of this statute.

846 F.Supp. 796-797 (E.D. Mo.), rev'd., 34 F.3d 709 (CA 8 1994), cert. denied, 115 S.Ct. 1172 (1995).

more than children themselves, serve as one-parent heads of households in a world without fathers. Consider a neighborhood without effective leaders because they all have fled to suburbia. . . . Remember the children who rarely see a doctor, lawyer, or teacher as a neighbor and whose only source of inspiration is a chain-bedecked drug peddler.

These portraits of misery and degradation are the daily world of the inner city resident and are all . . . products of unconscious racism. Is it any wonder that there is no motivation, no happiness, no hope?<sup>50</sup>

Cahill's third point is that there exists in American political culture widespread "unconscious racism." Relying heavily on an influential article by Professor Charles R. Lawrence, III,<sup>51</sup> Cahill declares:

Racism goes beyond prejudicial discrimination and bigotry. It arises from outlooks, stereotypes, and fears of which we are vastly unaware. Our historical experience has made racism an integral part of our culture even though society has more recently embraced an ideal that rejects racism as immoral. . . . The root of unconscious racism can be found in the latent psyches of white Americans that were inundated for centuries with myths and fallacies of their superiority over the black race. So deeply embedded are these ideas, that their acceptance . . . from generation to generation [has] become a mere routine. . . . 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. . . . Most Americans have grown beyond the evils of overt racial malice, but still have not completely shed the deeply rooted cultural bias that differentiates between "them" and "us."<sup>52</sup>

In Cahill's view, Congress's 100-to-1 sentencing disparity between crack and powder cocaine is an instance of unconscious racism at work, an example of "racial influences which unconsciously seeped into the legislative decisionmaking process." According to him, an important aspect of this process was racist media coverage, which misinformed legislators and inflamed their constituencies. The media, he wrote,

“created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society.” “Not all young black men are drug dealers,” he asserted, yet “the broad brush of uninformed public opinion paints them all the same.”<sup>53\*</sup>

Compounding the problem of exaggeration, Cahill argued, was the problem of influence. In his view, the media’s

stereotypical images undoubtedly served as the touchstone that influenced racial perceptions held by legislators and the public as related to the “crack epidemic.” . . . The prospect of black crack migrating to the white suburbs led the legislators to reflexively punish crack violators more harshly than their white, suburban, powder cocaine dealing counterparts.<sup>54†</sup>

To substantiate his conclusion that Congress acted at least partially on the basis of racial reflexes triggered by racist reporting, Judge Cahill notes that the legislation was developed speedily, that the Senate conducted only a single hearing dedicated to examining crack cocaine, and that, according to the then counsel to the House Subcommittee on Crime, important figures in the House of Representatives, without deliberation, “arbitrarily doubled [the punishment for crack cocaine] simply to symbolize Congressional seriousness.” The judge quotes the aide as remarking that “if the ratio selected had been 20 to 1, 3 to 1, or 5 or 10 to 1, it might have been a logical demarcation. But the exaggerated effect of a 100 to 1 ratio is illogical and not rational.”<sup>55</sup>

Judge Cahill found wholly unsatisfactory the justifications articulated by the U.S. Justice Department to support the crack–powder distinction. The Justice Department argued that Congress acted within its authority by punishing crack offenses more harshly than powder offenses because it reasonably viewed the former as more dangerous than the latter. It viewed crack as more dangerous because, in its opinion,

\*In the midst of his polemic against the news media Judge Cahill declares, jarringly, that “these stereotypical descriptions of drug dealers may be accurate.” 846 F.Supp. 783 (E.D. Mo. 1995).

†Judge Cahill also declared that “media reports associating blacks with the horrors of crack cocaine caused the Congress to react irrationally and arbitrarily.” 846 F.Supp. 784 (E.D. Mo. 1995).

crack is more potent, more addictive, and more accessible to more people because of pricing and the way it is typically marketed. Judge Cahill rejected the first two justifications on the basis of experts who testified at congressional hearings and in hearings before him. On the basis of their testimony, Cahill concluded, "There is no evidence that the use of crack makes the user physiologically or psychologically more prone to violence or other antisocial behavior than does the use of powder cocaine." With respect to the third prong of Congress's asserted justification, Cahill maintained that "crack is no cheaper than cocaine powder because cocaine is the essential product of crack."<sup>56</sup>

In sum, according to Judge Cahill, Congress had no reasonable basis to distinguish sharply the penalties for powder and crack cocaine. In the most impassioned section of his opinion, Judge Cahill declared:

It would be far more fair and just, in keeping with the "get tough" rhetoric . . . to require that both black and white violators serve the same 10 years imprisonment, be it "crack" or powder cocaine. Cocaine is, really, cocaine!! No crack could exist without cocaine powder. Eliminate cocaine and crack disappears!! This would be simple and fair and would eliminate racial injustice. Of paramount value would be the enhanced respect for the judiciary and the nation by bringing about equal justice for all—not merely punishment for "JUST US."<sup>57</sup>

According to the judge, "Although intent *per se* may not have entered Congress' enactment of the crack statute, its failure to account for a foreseeable disparate impact which would affect black Americans in grossly disproportionate numbers would nonetheless violate the spirit and letter of equal protection."<sup>58</sup> He asserted, moreover, that Congress would have acted differently if Congress knew that it was mainly whites rather than mainly blacks who stood to suffer such draconian punishment. "If young white males were being incarcerated at the same rate as young black males," he concluded, "the statute would have been amended long ago."<sup>59</sup>

Judge Cahill's opinion evidences an admirable abhorrence of racial inequities in American life and a laudable desire to better the situation. It also exemplifies, however, much of what this book debunks. Angered by racism and indifference to it, Judge Cahill seizes the moment to deliver a polemic against racial injustice despite features of the case that

believe his assertions. Careless about facts, the opinion evades facing realities that pose a challenge to its conclusions. Indifferent to the discipline of legal analysis, the opinion reads as if it were a caricature created to serve the purposes of those who denounce the supposed imperialism of the federal judiciary.

Part of Judge Cahill's historical point is valid. Prohibitionists of various sorts have excited racial sentiments to demonize drug usage they have sought to criminalize.<sup>60</sup> At the same time, it is also true that authorities have neglected vices that have menaced black communities, thereby depriving them of the equal *protection* of the law. Although Judge Cahill pays little attention to this side of the story, black legislators in Congress did when they initiated efforts to isolate crack as a peculiarly dangerous newcomer to the drug market.

One might have thought that for those who are suspicious of the aims and sentiments that guided the design of the Anti-Drug Abuse Act, the positions and statements of *black* members of Congress would be of some importance. But Judge Cahill and virtually all of the rest of the critics who have condemned as racist the crack-powder distinction have failed to take into account the opinions of the members of Congress who concerned themselves most intently and consistently with elevating the fortunes of African-Americans, namely the black members of Congress.<sup>61</sup> They have rendered the blacks in Congress invisible. This is not to say that the opinions of black members of Congress should be viewed as dispositive. Persons of any hue can be wrong, opportunistic, or racially prejudiced even with respect to people of their own racial background. Still, it would be useful to some extent to know where the black members of Congress have stood on the matter. The claim that illicit racial beliefs and perceptions animated the enactment of the crack-powder distinction would surely be strengthened if all or even most of the black members of Congress had objected to the statute on racial grounds.

The fact is, however, that eleven of the twenty-one blacks who were then members of the House of Representatives voted in favor of the law which created the 100-to-1 crack-powder differential. It is difficult to interpret precisely the meaning of a vote. A representative might be against certain portions of a bill but favor others sufficiently to support the legislation overall. Or one might even vote in favor of a bill while inwardly opposing it. Still, in light of charges that the crack-powder dis-

tion was enacted partly because of conscious or unconscious racism, it is noteworthy that *none* of the black members of Congress made that claim at the time the bill was initially discussed. Still more striking is that some of the black members of Congress who did vote for the bill expressed views regarding crack cocaine that strongly support the logic of the crack–powder differential.

Charles Rangel, an African-American liberal Democratic representative from Harlem, New York, chaired the House Select Committee on Narcotics Abuse and Control when the federal crack–powder differential was enacted. In March 1986, he became the first person in Congress to draw attention to crack as a new and special danger, noting that “what is most frightening about crack is that it has made cocaine widely available and affordable for abuse among our youth.”<sup>62</sup> Five months later, Major Owens, a liberal Democratic representative from the predominantly black Bedford-Stuyvesant section of Brooklyn, New York, introduced legislation to increase punishment for trafficking in cocaine. He did this to rectify what he viewed as “preferential treatment for cocaine.” At that time, trafficking in cocaine was punished much less harshly than trafficking in heroin. Owens’s proposed legislation lowered the amount of cocaine presumed to signal that a person is a distributor and raised the penalties substantially—twenty years and a \$250,000 fine for the first offense and forty years and a \$500,000 fine for a subsequent offense. “We must make it perfectly clear,” Owens declared, “that we view this drug as highly dangerous and that we will not tolerate its importation, possession, or sale.”<sup>63</sup>

Soon thereafter, Representative Owens returned to this subject, observing:

There is a groundswell in the neighborhoods . . . all across America . . . which demands that effective steps be taken to end the drug trafficking and the drug abuse epidemic. . . . None of the press accounts really have exaggerated what is actually going on. It is as bad as any articles have stated. It is as bad as anything you have read about. It is as bad as anything you have seen on television or heard on radio.”<sup>64</sup>

Complaining again about what he viewed as insufficient punishment for cocaine-related offenses, Owens maintained:

Current law does not take cocaine seriously. It is not surprising [therefore] that we have an epidemic now which is heightened by the appearance of a purified form of cocaine which is called crack. . . . Whereas the law requires stiff penalties for other narcotics, the law does not require very stiff penalties in the case of the possession of a considerable amount of cocaine."<sup>65</sup>

Representative Owens was followed on the floor of the House by Alton Waldon, another African-American liberal Democratic representative from a predominantly black district in New York. His message was much the same as Owens's but with a bit more punitive bite and a more focused attention on crack:

The madness which is crack has no respect for social, professional or economic status. Crack usage is the evidence that our society may in fact be losing control of itself. For those of us who are black this self-inflicted pain is the worst oppression we have known since slavery. . . . Let us . . . pledge to crack down on crack.<sup>66</sup>

The comments of Rangel, Owens, and Waldon were made before the 100-to-1 crack-powder differential was proposed as legislation. They are, however, consistent with that legislation and helped to prepare the ground for it. After all, if crack trafficking represents, in Waldon's words, "the worst oppression we have known since slavery," one reasonable response might well be to impose severe mandatory minimum sentences on those guilty of such antisocial conduct.

The absence of any charge by black members of Congress that the crack-powder differential was racially unfair speaks volumes; after all, several of these representatives had long histories of distinguished opposition to any public policy that smacked of racial injustice. That several of these representatives demanded a crackdown on crack is also significant. It suggests that the initiative for what became the crack-powder distinction originated to some extent *within* the ranks of African-American congressional officials. All of these facts are relevant in evaluating whether the crack-powder distinction should be prohibited on racial justice grounds. All of them militate against Judge Cahill's conclusion. None is mentioned in his opinion.

Judge Cahill concluded that Congress lacked any reasonable basis for punishing crack more harshly than powder and that subsequent study confirmed the lack of a reasonable basis for distinguishing between crack and powder. This assertion is preposterous. Congress acted on the basis of the same information that prompted Representatives Rangel, Owens, and Waldon to urge their colleagues to "crack down on crack," information which suggested that crack cocaine was more dangerous than powder cocaine along several dimensions: more addictive, more closely linked to criminal violence, more perilous to the health of users, and more widely accessible. Some of these claims have been challenged. However, even with respect to those that are most controversial, one cannot fairly say—as did Judge Cahill—that Congress had *no* reasonable basis for embracing them. One might disagree with the experts Congress chose to credit and the conclusions Congress chose to reach. To say, though, that those conclusions are bereft of rationality is clearly wrong.

Some opponents of the crack–powder distinction acknowledge this point. Thus, Professor David A. Sklansky, in a careful critique of the crack–powder distinction, writes, "The force of Judge Cahill's protest was unfortunately undercut by his own failure to recognize and respect . . . the genuine and important differences between crack and powder cocaine."<sup>67\*</sup> This, however, puts the matter all too nicely. Judge Cahill's opinion represents a willed refusal to acknowledge something that cannot be properly avoided: that whatever one's view about the wisdom of punishing crack cocaine offenses more harshly than powder cocaine offenses, it is simply irrefutable that crack and powder are distinct forms of narcotics, even though they share the same root. Putting to the side the controverted scientific testimony about the relative addictiveness and toxicity of powder and crack, one difference between the two appears to be accepted universally: crack is typically sold in smaller quantities at lesser prices in a more convenient form and is therefore more accessible to larger groups of people. Crack democratized the co-

\*At another point in his article, Sklansky describes as "demonstrably incorrect" Judge Cahill's claim that "there is no reliable medical evidence that crack cocaine is more addictive than powder cocaine." David A. Sklansky, "Cocaine, Race, and Equal Protection," 47 *Stanford Law Review* 1283 (1995).

caine high. It "reinvigorated the cocaine market and greatly increased the population of cocaine abusers."<sup>68\*</sup> That alone provided a sufficient basis for distinguishing between crack and powder, notwithstanding their common cocaine lineage. Even if crack and powder were otherwise identical, the greater marketability of crack means that it has more potential reach than powder and can thus be reasonably perceived as more of a social danger.<sup>†</sup>

Judge Cahill and other critics contend that even if crack is more dangerous than powder, it is not so much more dangerous as to justify the difference in punishment meted out by Congress. This complaint has two dimensions, one procedural, the other substantive. The procedural complaint is that Congress acted hurriedly and haphazardly. This is true. These flaws in the lawmaking process, however, are blemishes that constitutional law (fortunately) tolerates. Judge Cahill made much of the Congress bypassing routine procedures in its haste to legislate. But with the exception of certain constitutional requirements, there is nothing that compels Congress to follow any set course. Sometimes crises properly move legislators to streamline their typical procedures, as Congress did in 1964 when it enacted the Civil Rights Act.<sup>69</sup> The substantive complaint is that Congress's draconian punishment for crack offenses are simply too harsh to permit. The constitutional grounding for that challenge, however, is the Eighth Amendment's prohibition against cruel and unusual punishment not the Equal Protection clause's insistence upon equality of treatment. Several defendants have challenged the crack sentencing regime on Eighth Amendment grounds. But these claims, too, have been uniformly and rightly rejected by the federal courts.<sup>70</sup>

Two other features of *Clary* warrant comment. One has to do with

\*"In 1978, cocaine was something between a curiosity and a menace. . . . By 1988, cocaine had become the drug problem par excellence, with a retail market nearly equal to those for heroin and marijuana combined. . . . How did a minor drug become so major, a seemingly benign drug so horrible? In a word, crack happened." Mark A. R. Kleiman, *Against Excess: Drug Policy for Results*, 295-296 (1992).

†Addressing this point, Judge Cahill utters a non sequitur: "Crack is no cheaper than cocaine powder because cocaine is the essential product of crack." 846 F.Supp at 792 (E.D. Mo. 1995). Assuming that "cocaine is the essential product of crack," drug pushers can and do market powder and crack differently, a difference that lawmakers can reasonably take into account in establishing punishments.

Judge Cahill's portrayal of enhanced punishment for crack offenses as an increased burden on blacks as a class. The other has to do with his comments regarding the influence of the media in shaping public opinion regarding crack.

Although Cahill assumes that punishing black crack offenders is a burden upon blacks as a class, the basis for this assumption is questionable. After all, it could be that increasing the punishment of crack offenders correspondingly benefits those who obtain relief when those offenders are incarcerated. As Professor Kate Stith keenly observes:

While it appears true that the enhanced penalties for crack cocaine more often fall upon black defendants, the legislature's action might also have been a laudatory attempt to provide enhanced protection to those communities—largely black . . .—who are ravaged by abuse of this potent drug. . . . [I]f dealers in crack cocaine have their liberty significantly restricted, this will afford greater liberties to the majority of citizens who are the potential victims of drug dealing and associated violent behaviors. *This is the logic of the criminal law*, and it is distressing that [judicial opponents of the crack–powder distinction] recognize[] only half of this logic—the denial of liberty to lawbreakers.<sup>71</sup>

In his zeal to protect that mainly black pool of persons convicted of crack offenses, Cahill almost completely ignores those, also mainly black, who must share space on streets and in buildings with crack traffickers.

His neglectfulness is facilitated by two important holes in his analysis. First, he appears to be unmindful that imprisonment is both a burden and a benefit—a burden for those imprisoned and a good for those whose lives are bettered by the confinement of criminals who might otherwise prey upon them. Second, he appears to be unmindful of what properly constitutes a racially discriminatory burden. Among the reasons he struck down the federal crack–powder sentencing distinction is that, in his view, it imposed a racially discriminatory burden upon blacks as a class. But what is racially discriminatory about the crack–powder distinction? Enhanced penalties for trafficking in crack fall upon *anyone* convicted of such conduct, regardless of race. Without explaining why, Cahill writes as if black crack convicts represent blacks

as a whole. They do not. To the extent that the enhanced punishment for crack offenses falls upon blacks, it falls not upon blacks as a class but only upon a distinct subset of the black population—those in violation of the crack law.

There have been laws, silent as to race, that directly burdened only a subset of the black population but were intentionally aimed at disadvantaging blacks as a class. For example, one of the methods used by Alabama to minimize the electoral power of blacks as a class was a state constitutional provision, silent with respect to race, that permanently disenfranchised those convicted of committing certain crimes. The authors of the provision designed it to be a weapon useful for removing from voting lists as many blacks as possible by designating as disenfranchising crimes only those offenses that blacks were thought most likely to commit. Because unjustified racial considerations animated the Alabama officials, the Supreme Court rightly voided that law.<sup>72</sup> If there existed persuasive evidence that in 1986 or subsequently Congress had as one of its purposes the aim to imprison blacks longer than whites, then that too would be an instance of unconstitutional racial discrimination. Evidence supporting such a conclusion is scarce, however, which is precisely why Judge Cahill had to go beyond, indeed *against*, the evidence and perform various doctrinal contortions in order to conjure a violation of the Equal Protection Clause.

Like many who condemn the crack–powder distinction, Judge Cahill attributes much of the blame to the media. “Congress’ decision was based, in large part,” he writes, “on the racial imagery generated by the media which connected the ‘crack problem’ with blacks in the inner city.” He maintains that “legions of newspaper articles regarding the crack cocaine epidemic depicted racial imagery of heavy involvement by blacks in crack cocaine. Practically every newspaper account featured a black male either using crack, selling crack, involved in police contact due to crack, or behind bars because of crack.”<sup>73</sup>

Cahill is right to consider as relevant evidence of motive materials that members of Congress entered into the *Congressional Record*. One might, in some instances, be able to draw inferences from sources to which a legislator appreciatively refers. As with much else in his opinion, however, Judge Cahill takes this point too far by automatically attributing to the legislators the motives he discerns in the journal-

ists. News reporting or scholarship that is admittedly racist can be put to all manner of uses depending on the user's aims. Newspaper stories generated by journalists who reflexively link blackness with crime can be read and acted upon by a legislator who rejects the journalists' racial premise but nonetheless believes that, for nonracial reasons, punishments need to be enhanced to discourage crack trafficking more firmly.

Judge Cahill is also right to question the monochromatic portraiture of crack usage that often emerges in newspaper and television accounts. Such accounts typically link crack and blacks. As Dorothy Lockwood, Anne E. Pottieger, and James A. Inciardi observe, "Journalists have portrayed crack use and crack-related crime as essentially problems of blacks in inner city neighborhoods." These researchers conclude, however, that "the crack/crime/black connection repeatedly portrayed in the popular media . . . is an overstatement." There does appear to be disproportionate crack use among blacks. Statistics from the National Institute of Drug Abuse (NIDA) Household Survey in 1991 show, for instance, that while 4.3 percent of blacks surveyed had used crack, only 1.5 percent of whites and 2.1 percent of Hispanics reported having used the drug. But as Lockwood, Pottieger, and Inciardi point out, "because whites represent the majority of the U.S. population, these percentage estimates still imply that most crack users are *not* black." Extrapolating from the NIDA estimates, they estimate that of 479,000 crack users in 1991, 49.9 percent (238,000) were white, 14.2 percent (68,000) were Hispanic, and 35.9 percent (172,000) were black.<sup>74</sup>

Judge Cahill asks why it is that so few white crack users and dealers appear in media coverage when whites appear to constitute the plurality of crack abusers. His answer is "racism." The deep-seated association between blackness and criminality may indeed have fixed the expectations of those responsible for creating "the news" such that they are more willing and able to see and report drug abuse by blacks as opposed to drug abuse by whites. Perhaps managers of news media also pander to certain expectations in order to create news that will fit comfortably into the assumptions held by large numbers of consumers.

These are plausible hypotheses that resonate with what we know about recurrent patterns in the production of news. Much more detailed, systemic analysis will be required, however, for an authoritative

conclusion. First of all, there are plausible alternative explanations that warrant investigation. One is that journalists, like police, gravitate toward drug scenes that are simultaneously dramatic and accessible. It might be that crack abuse is peculiarly concentrated and open in black neighborhoods and that therefore they have been the locales most attractive to journalists interested in reporting the crack story.\* Invidious racial discrimination is not absent as a consideration in this hypothesis. Racial discrimination helps to explain why so many black communities suffer from peculiarly intense levels of social isolation, communal deterioration, and hyper-concentrations of poverty.<sup>75</sup> Under this hypothesis, however, the main locus of objectionable discrimination resides not in the media that report the problem of crack abuse but rather in the com-

\*Commenting on police practices, Michael Tonry observes that urban police departments often focus on disadvantaged minority neighborhoods in combating the trade in illegal narcotics:

For a variety of reasons it is easier to make arrests in socially disorganized neighborhoods, as contrasted with urban blue-collar and urban or suburban white-collar neighborhoods. First, more of the routine activities of life, including retail drug dealing, occur on the streets and alleys in poor neighborhoods. In working-class and middle-class neighborhoods, many activities, including drug deals, are likelier to occur indoors. This makes it much easier to find dealers from whom to make an undercover buy in a disadvantaged urban neighborhood than elsewhere.

Second, it is easier for undercover narcotics officers to penetrate networks of friends and acquaintances in poor urban minority neighborhoods than in more stable and closely knit working-class and middle-class neighborhoods. The stranger buying drugs on the urban street corner or in an alley or overcoming local suspicions by hanging around for a few days and then buying drugs is commonplace. The substantial increases in the numbers of black and Hispanic police officers in recent decades make undercover narcotics work in such neighborhoods easier. . . .

Both these differences between socially disorganized urban neighborhoods and other neighborhoods make extensive drug-law enforcement operations in the inner city more likely and, by police standards, more successful. Because urban drug dealing is often visible, individual citizens, the media, and elected officials more often pressure police to take action against drugs in poor urban neighborhoods than in other kinds of neighborhoods

Tonry, *Malign Neglect: Race, Crime, and Punishment in America*, 105-106 (1995).

plex and diffuse array of actors—national politicians, urban mayors, voters, bankers, developers, and so forth—whose actions over decades have contributed significantly to creating and perpetuating criminogenic ghettos.

Another hypothesis is that much of the news media linkage between crack and black communities stems not from bigotry but, to the contrary, from an impulse to *help* those communities precisely because of their racial identity. This hypothesis is consistent with Cahill's complaint that news media racially discriminate in making judgments about the portrayal of the crack story. It is inconsistent with Cahill's complaint insofar as it attributes a benign motivation to the media's racial discrimination. In evaluating this possibility, recall the claim of Congressman Rangel that news media were paying insufficient attention to the havoc crack was wreaking in black neighborhoods.

Determining whether cultural imagery is good or bad politically for blacks or any other group is difficult and unavoidably open to disputation. In December 1993, the *New York Times Magazine* ran a series of photographs by Eugene Richards that focused on hard-core cocaine addicts and the ugliness and desperation that surrounded the lives of his subjects.<sup>76</sup> The most controversial of the photos showed a black female crack addict reaching for a man's zipper with the purpose of exchanging oral sex for money. A toddler clings to her back and in the background on the wall of her apartment are portraits of Malcolm X, Martin Luther King, Jr., and W.E.B. DuBois. Richards and the *Times* were harshly criticized in some quarters for publishing the photo. A spokesman for the Committee to Eliminate Media Offensive to African People (CEMO-TAP), echoing Judge Cahill's theme of unconscious racism, labeled Richards "a racist who doesn't seem to know he's a racist."<sup>77</sup> In a review of Richards's photographs, Brent Staples asked plaintively: "Couldn't [he] have found a setting where most or at least half of the drug addicts were white?"\*

There is an important and legitimate criticism articulated by these comments. As was noted above, there does exist a striking disjuncture

\*Staples goes on to say that he was "not asking for equal opportunity representation of drug abuse." That seems implicitly, however, to be precisely what he demanded. See Brent Staples, "Coke Wars," *New York Times Book Review*, February 6, 1994.

between the racial demographics of *actual* illicit drug use (which is mainly white in absolute numbers) and the racial demographics of *portrayed* illicit drug use (which is mainly black). Also reflected in these comments, however, is a tendency to blame the messenger for bad news. Eugene Richards did not fabricate the conditions he photographed; he publicized them. The Congress of the United States did not fabricate a distinction between crack cocaine and powder cocaine; it recognized the difference and chose to respond to it by imposing disparate punishments.

### The Future of the Crack-Powder Distinction

Judge Cahill's ruling in *Clary* was promptly overturned by a U.S. Court of Appeals, which joined all of the other federal courts of appeal that had previously rejected equal protection attacks on the crack-powder sentencing differential.<sup>78</sup> The essential message of all of these rulings is that, in order to prevail, a defendant must show that Congress punished crack more harshly than powder for racial reasons. It is not enough to show that Congress initially passed the law or has kept it in place with the knowledge that the law would give rise to a racial disparity among those prosecuted for drug offense. Rather, the courts demand that a defendant show that Congress acted with the intention of bringing about the racial results anticipated. To paraphrase the Supreme Court, a defendant must show that the government acted because of and not simply despite foreseen racial consequences. Since there is no substantial evidence indicative of such intent on the part of Congress courts have rightly rejected claims of the sort articulated by Mr. Clary's lawyers.

Given that most courts have already reached this conclusion, why do I invest space, time, and energy defending their rulings? \* I do so because their rulings, although currently ascendant, are nonetheless controversial. In influential circles—the newspaper editorial page, the law review, the constitutional law class, and the statements of distinguished jurists—the rulings I defend are condemned as illegitimate. Unre-

\*I am responding here to a question posed by Professor David Cole. See "The Paradox of Race and Crime: A Comment on Randall Kennedy's 'Politics of Distinction,'" 73 *Georgetown Law Journal* 2547, 2548–2549 (1995).

butted, these attacks will gather momentum and influence and spread the errors so vividly displayed in Judge Cahill's opinion. An example of this danger is offered by the U.S. Sentencing Commission.

In 1995, the Commission took steps to "equalize[] sentences for offenses involving similar amounts of crack cocaine and powder cocaine."<sup>79</sup> The Commission sought to amend the sentencing guidelines it promulgates and recommended that Congress eliminate the statutory differential distinguishing crack and powder. The Commission suggested a level-down equalization pursuant to which traffickers in crack cocaine would be sentenced identically with traffickers in powder cocaine. The Commission's amendments to the sentencing guidelines would have gone into effect automatically absent specific disapproval from both houses of Congress. However, with the support of President Clinton, Congress did disapprove, the first time it had done so in the Commission's history.<sup>80</sup>

Congress and the president probably took the action they did not so much on the basis of a careful review of the Commission's recommendation but instead on the basis of a political dynamic that has captured both the Republican and Democratic parties, a political dynamic that rewards perceived "toughness" and punishes perceived "softness" in the war on crime. Given that crack has become the well-recognized epitome of the drug menace, the likely political fallout from lowering penalties against crack offenses would alone have discouraged most electoral politicians from pursuing that course.\*

In *Cocaine and Federal Sentencing Policy*, a report published by the

\*Commenting on President Clinton's support for the congressional override of the Sentencing Commission's recommendations, Professor Christopher Edley, Jr., observes that

from the president's perspective the question of crack sentencing seemed quite simple because the politics were so compelling. Whatever the substantive merits of reducing the disparities in sentencing, it would have been impossible from a *communications* standpoint to explain to the American people that it was anything but a soft-on-crime retreat in the war on drugs. One of President Clinton's singular political achievements was to eliminate the national GOP's almost thirty-year edge in opinion polls as the party that is tough on crime. I suppose it was thought [by the Clinton administration] that nothing should be done to destroy that achievement.

*Not All Black and White: Affirmative Action and American Values*, 236-237 (1996).

Commission several months before its ill-fated attempt to amend the crack-powder disparity, the Commission set forth several reasons in favor of reducing the magnitude of the crack-powder distinction. One was that sentencing guidelines enacted subsequent to Congress's establishment of the crack-powder distinction could provide judges with a more finely calibrated means of either imposing or declining to impose enhanced punishments as certain prescribed circumstances warranted. Another was that the existing crack-powder distinction created undesirable anomalies. "One premise of the mandatory minimum sentencing structure," the Commission noted, "is that, all other things being equal, a drug dealer's danger to society is in direct proportion to the quantity of the drug in which he/she deals. Yet, as a result of the [crack-powder] differential, a large-scale powder cocaine dealer who traffics in 500 grams (2,500-5,000 dosage units) of powder cocaine will receive the same sentence as a crack dealer who has sold only 5 grams (10-25 doses) of crack cocaine; that is a five-year sentence of imprisonment."<sup>81</sup> The Commission conceded that this massive difference in the quantity of drug necessary to trigger the same sentence would be acceptable if crack cocaine was that much more dangerous than powder cocaine. The Commission stated, however, that it did not view crack as being multiply more dangerous. The commission suggested that crack cocaine may be somewhat more socially harmful than powder cocaine but indicated quite firmly that it did not believe that this marginal difference justified Congress's dramatically enhanced punishment of crack offenses.

For reasons already mentioned, it is doubtful that any conceivable set of arguments offered by the Commission would have persuaded the Congress or the president to lessen punishments imposed on crack offenders. The Commission did not help its case, however, with its statement setting forth the reasons behind its recommendations for reform. The Commission's statement differs in significant ways from its previous report to Congress. Most important, in the previous report, concern over racial disparities did not drive the analysis. The Commission recognized that much of the opposition to the crack-powder distinction stemmed from a perception that it was racially discriminatory.<sup>82</sup> But the Commission report suggests neither that a desire to mollify those holding that impression determined the Commission's recommendation nor that the Commission itself believed the crack-powder distinction to be

racially biased. By contrast, the Commission's subsequent statement to Congress clearly suggests that the Commission had been won over by those advancing a racial critique of the crack-powder distinction. Race took center stage, with the Commission averring that it "was deeply concerned that almost ninety percent of offenders convicted of crack cocaine offenses in the federal courts are blacks" and that in its view an insufficient policy basis existed to justify a penalty differential that was having a severe impact on a particular minority group.<sup>83</sup>

The appearance of justice is a proper and important consideration in policymaking. That the crack-powder distinction appears to many to be racially unfair (and will be viewed as such by many even after explanations have been offered) is an important negative factor to consider in determining whether to reform or eliminate the crack-powder distinction. The Commission's statement, however, went beyond this point to imply that, in substance as well as appearance, the existing crack-powder distinction is racially unjust.

In making this claim, the Commission adopted some of the most self-discrediting stances taken by opponents of the crack-powder distinction. Without explanation, the Commission asserted, for example, that "the fact that crack cocaine is typically sold in smaller amounts, which may make it more readily available among lower-income groups, [does not] justify increased punishment compared to a form of the drug that is more commonly sold in amounts available only to more affluent persons."<sup>84</sup> This assertion is much in need of defense. One of the strongest reasons *favoring* the crack-powder distinction is precisely that crack is more accessible and, for that reason alone, more dangerous. As Representative Rangel observed, "what is most frightening about crack is that it has made cocaine widely available and affordable for abuse among our youth."<sup>85</sup> Surely it would be just and sensible for a government to punish more severely a person knowingly distributing a poison in a low-priced (say \$5) container as opposed to a high-priced (say \$50) container even if the poison in the two containers was otherwise identical. It would be just and sensible on the grounds that because the \$5 container is less expensive it is more affordable to more people and thus more potentially accessible. The same logic supports distinguishing crack cocaine from powder cocaine. Because it is relatively inexpensive, crack helped tremendously to democratize cocaine use, a dubious

“achievement” that the government should surely be able to “reward” with a punitive response without eliciting the charge that doing so is racially discriminatory.

The congressional debate over the Commission’s recommendation produced no new insights. Proponents of maintaining the crack–powder distinction repeated familiar refrains: Drugs are evil; crack is especially evil; lessening the penalties on crack would signal failure of nerve in the war on drugs, and so on. Opponents did much the same. A few resorted to open accusations that the crack–powder distinction represented purposeful racial discrimination. “Is there a conspiracy,” Representative Bobby Rush asked rhetorically, “to incarcerate as many African American males as possible?” Others were a bit more subtle. “I have never suggested that the motivation ten years ago . . . was a racist motivation,” Representative Mel Watt remarked. But “the impact of this law has been very, very, very substantially racist.”<sup>86</sup>

In all likelihood, nothing could have been said which would have changed the mind of the Congress. I suspect, though, that a turnabout was made even more improbable by allegations branding existing policy (and by implication its backers) as racist. That is because allegations of racism put into question more than a person’s judgment; they put into question a person’s basic moral fitness. Once the racism charge is voiced, considerations of personal honor and public reputation elevate the stakes and polarize the antagonists. Moreover, once a charge of racism is lodged, it tends to dominate all other concerns. Instead of determining on a broad basis the relative merits of a policy, discussion is channeled toward the narrow question of whether the policy at issue is “racist.” During the congressional debate, for example, the Commission’s nonracial reason for sentencing reform was eclipsed. Focused on loud allegations of racism, many members of Congress, including the proponents of reform, overlooked the fact that, under current law, low-level crack dealers sometimes receive longer sentences than their high-level, powder-selling suppliers.

Those propounding a racial critique of the crack–powder distinction often assert that the situation would be different if the racial shoe were on the other foot, if over 90 percent of crack offenders were white instead of black. If that were so, the argument runs, white policymakers would be prompted to change course because of the clamorings of con-

stituents terrified by the prospect of a son, daughter, or friend facing five- and ten-year mandatory minimum prison sentences. The plausibility of this scenario is itself disturbing. For the more plausible this counterfactual proposition, the more it suggests the possibility that racially selective empathy is presently at work, silently prompting legislators to pursue a strategy in attacking drug use that they would not pursue if whites were in the same position that blacks occupy.\*

On the other hand, there are indications that cut the other way. Trafficking and use of methamphetamine is dominated by whites. Yet recently a bill was enacted that enhanced the punishment for dealing this drug to levels comparable to that imposed on crack dealers.<sup>87</sup> After the state supreme court invalidated Minnesota's crack-powder distinction under the Minnesota Constitution, the state legislature was put to the test of either leveling up—raising the criminal penalty on powder offenses (to that reserved for crack offenses)—or leveling down—lowering the penalty on crack offenses (to that reserved for powder offenses). The legislature chose to level up. Pushed to move one way or another, President Clinton and many in the U.S. Congress would also choose to level up.<sup>88</sup> Arguably this would be a good result. It would erase, for many, the appearance of a racial double standard.† On the

\*Arguing that racially selective sympathy plays a role in deciding criminal punishments for drug offenses, Alfred Blumstein avers:

A major factor contributing to [the de facto decriminalization of marijuana] was undoubtedly a realization that the arrestees were much too often the children of individuals, usually white, in positions of power and influence. Those parents certainly did not want the consequences of a drug arrest to be visited on their children, and so they used their leverage to achieve a significant degree of decriminalization.

See Alfred Blumstein, "Making Rationality Relevant: The American Society of Criminology 1992, Presidential Address," 31 *Criminology* 1 (1993).

†Equalization of punishments, however, would not completely negate the suspicions of some skeptics that racially selective sympathies are still present in the decision to continue the war on drugs. That is because the numbers of whites adversely affected by a leveling up of punishments would remain very small in comparison with the total white population. Skeptics contend that this relatively small number of marginalized whites would serve as a sacrifice to legitimate a policy that would continue to disproportionately burden blacks.

other hand, the cost of purchasing this assurance of evenhandedness would be a rise in the numbers of people being sent to prison for long stays—a steep price, indeed, but one that ascendant political forces are likely willing to pay.

Again I want to stress what I have and have not said. I have not endorsed the current crack-powder sentencing differential. Perhaps it should be rejected. After all, it perversely permits some large-scale traffickers in powder to be punished less severely than some small-scale traffickers in crack. More important, the crack-powder sentencing differential is part of a war against drugs that should be reconsidered. There is force to the argument that policing prohibition with draconian laws is inefficient, the cause of avoidable misery, and inferior to alternative models of regulation.<sup>89</sup> Maybe the crack-powder distinction and, indeed, the entire war on drugs is mistaken. But even if these policies are misguided, being mistaken is different from being racist, and the difference is one that greatly matters.