

FORGET SENTENCING EQUALITY: MOVING FROM THE
“CRACKED” COCAINE DEBATE TOWARD PARTICULAR
PURPOSE SENTENCING

by
*Jelani Jefferson Exum**

While a racial equality-themed discourse has traditionally fueled the crack-versus-powder cocaine sentencing debate, this Article asserts that seeking equality in sentencing outcomes is the wrong goal. This Article argues that reformers seeking racial equality in sentencing are misguided in using the cocaine sentencing standards as a benchmark of fairness, because the current cocaine sentencing standards do not effectively serve the purposes of punishment. Rather than focusing on equality, this Article advocates implementing Particular Purpose Sentencing, which involves developing a framework for drug offenses to be analyzed individually and matched with punishments that purposefully address the concerns associated with the particular offense. Particular Purpose Sentencing also requires that, once sentences are matched to a specific purpose, the outcomes of those sentences be studied to ensure that they are fulfilling their particular sentencing purpose. This Article analyzes the legislative and judicial limits of basing sentencing reform on racial equality goals, and explores how implementing Particular Purpose Sentencing has the potential to result in more effective and racially equal consequences. Though this Article introduces Particular Purpose Sentencing using the drug sentencing context, this new sentencing theory can be applied to achieve fairer, more successful sentencing for all offenses.

* Associate Professor, University of Toledo College of Law. Professor Jefferson Exum wishes to thank the participants of the 2011 and 2012 Central States Law Schools Association Annual Scholarship Conference, the 2012 Southeast/Southwest People of Color Conference, the 2012 Lutie Lytle Scholarship Conference, and the Fall 2012 Case Western faculty exchange (especially Michael Benza and Kevin McMunigal for their insightful comments). Further, she would like to extend a special thanks to her colleagues at the University of Toledo for their helpful comments on her draft. Professor Jefferson Exum would also like to thank Lowen Exum, Jamila Jefferson-Jones, Jalila Jefferson-Bullock, and Eric Miller for their invaluable assistance on this project. This paper was supported by a University of Toledo College of Law Summer Research Grant.

INTRODUCTION 96

I. THE RISE OF THE EQUALITY-THEMED DISCOURSE: RACIAL INEQUALITY AND THE CRACK/POWDER COCAINE SENTENCING DISPARITY 101

 A. *The Infamous 100:1 Ratio*..... 102

 B. *Calls for Equality and the Road to the Fair Sentencing Act*..... 105

II. LEGISLATIVE AND JUDICIAL LIMITATIONS TO SENTENCING EQUALITY 110

 A. *The Limits of Fighting for Legislatively Created Equality*..... 110

 B. *Equal Protection and the Limits of Using Judicial Action to Achieve Sentencing Equality*..... 114

 C. *The Limits of Judges as Reformers to Achieve Equality*..... 116

III. PURPOSELESS COCAINE SENTENCING AND THE NEED FOR PARTICULAR PURPOSE SENTENCING 122

 A. *Retribution*..... 123

 B. *Deterrence*..... 124

 1. *General Deterrence* 125

 2. *Specific Deterrence* 127

 C. *Rehabilitation* 127

 D. *Incapacitation*..... 128

IV. SENTENCING IS DIFFERENT: THE FUNDAMENTAL PROBLEM WITH SENTENCING EQUALITY..... 130

 A. *Individualization and the Unique Nature of Sentencing Decisions*..... 132

 B. *Equal Sentences May Still Yield Racially Disparate Results* 136

 C. *Equalized Sentencing Will Not Equal Proper Sentencing—Questioning Powder Cocaine as the Benchmark for Crack Sentencing*..... 137

 1. *The Problematic Weight-Based Sentencing Approach* 138

 2. *Turning the Focus to the Crime* 139

V. IMPLEMENTING PARTICULAR PURPOSE SENTENCING 143

 A. *Sentencing Decisions Without Particular Purpose Sentencing*..... 145

 B. *Dealing with Legislative Compromise and the Use of the Sentencing Commission*..... 147

 C. *Selecting Sentences*..... 151

CONCLUSION 153

INTRODUCTION

In his 2008 *Blueprint for Change*, then Presidential Candidate Barack Obama took the position that “the disparity between sentencing crack and powder-based cocaine is wrong and should be completely eliminated.”¹ Thus far, the federal government’s failure to fully correct the dis-

¹ BARACK OBAMA & JOE BIDEN, BLUEPRINT FOR CHANGE 49 (2008), *available at* <https://archive.org/details/346512-obamablueprintforchange>. Sources have also

parity² has led to criticism and doubt about the government's commitment to racial equality in sentencing.³ This Article questions the basis of this disappointment by making the claim that focusing on racial equality in sentencing—especially through an emphasis on equivalent sentencing⁴—has become an ineffective method of sentencing advocacy and reform. The cocaine sentencing debate, and thus the reform, has been “cracked,” or in other words, overshadowed by the crack-equality issue.⁵

recorded that the Obama Administration repeated this stance in 2009. *E.g., Restoring Fairness to Federal Sentencing: Addressing the Crack–Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 203 (2009) (statement of Thomas S. Susman, Dir. of Gov't Affairs, American Bar Ass'n), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg57626/pdf/CHRG-111shrg57626.pdf>; Jasmine Tyler & Anthony Papa, *Obama Administration Calls for End to Crack–Powder Sentencing Disparity*, HUFFINGTON POST (Apr. 29, 2009), http://www.huffingtonpost.com/jasmine-tyler/obama-administration-call_b_193028.html; THE SENTENCING PROJECT, *Federal Crack Cocaine Sentencing* 9, http://sentencingproject.org/doc/publications/dp_CrackBriefingSheet.pdf.

² As explained later in this Introduction, as well as in Part I, there is currently approximately an 18:1 ratio in the federal sentencing of powder cocaine and crack cocaine, meaning that it takes nearly 18 times the amount of powder cocaine to receive a sentence equivalent to a crack cocaine sentence.

³ For criticism of the Fair Sentencing Act, see KARA GOTSCH, “AFTER” THE WAR ON DRUGS: THE FAIR SENTENCING ACT AND THE UNFINISHED DRUG POLICY REFORM AGENDA 7–8, AM. CONST. SOC'Y (2011), available at http://www.acslaw.org/sites/default/files/Gotsch_-_After_the_War_on_Drugs_0.pdf; Ethan Nadelmann, *Obama Takes a Crack at Drug Reform*, THE NATION, Sept. 13, 2010, at 23 (describing the Fair Sentencing Act as “at once a historic victory and a major disappointment. It's both too little, too late and a big step forward.”); Press Release, American Civil Liberties Union, President Obama Signs Bill Reducing Cocaine Sentencing Disparity (Aug. 3, 2010), <http://www.aclu.org/drug-law-reform/president-obama-signs-bill-reducing-cocaine-sentencing-disparity> (quoting Jennifer Bellamy, ACLU Legislative Counsel, as saying, “The remaining disparity is at odds with an American criminal justice system that requires that all people be treated equally.”).

⁴ The focus on equivalent sentencing is meant to recognize that racial equality in sentencing can be measured in a variety of manners. For instance, one could look only to whether race makes a difference in the sentences being imposed on individuals convicted of the same offense (i.e., Are Blacks receiving longer sentences than Whites when they are convicted of the same offense?). The “equality-themed” arguments against disparate cocaine sentencing have looked to the failure to impose equivalent sentences for crack and powder cocaine offenses as a basis for arguing that there is racial inequality in sentencing. Therefore, their measurement of sentencing equality is being done through an assessment of equivalent sentences. It is this focus on equivalent sentencing outcomes that this Article says should be forgotten.

⁵ Merriam-Webster Dictionary defines “cracked” as “broken (as by a sharp blow) so that the surface is fissured” and “mentally disturbed: crazy.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 528 (2002). As this Article will demonstrate, both of these understandings of the word “cracked”—broken and crazy—apply to the cocaine sentencing reform debate. Attorney General Eric Holder has admitted as much when he said the following in a speech before the American Bar Association: “While I have the utmost faith in—and dedication to—America's legal system, we must face the reality that, as it stands, our system is in too many respects broken.” Eric Holder, Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of

In what may be considered a controversial position, this Article argues that the main lesson of this “cracked” cocaine debate is that reformers and advocates (including legislators and judges) should forget this type of sentencing equality, and instead demand what can be called “Particular Purpose Sentencing” in order to encourage the development of a federal sentencing system that is accountable to its outcomes.⁶ In other words, reformers should move past taking for granted the reasonableness of powder cocaine sentencing and begin to question whether the sentencing of cocaine of any type is effective at all. Particular Purpose Sentencing requires Congress (through the help of the United States Sentencing Commission) to select a specific purpose of punishment that is sought to be achieved for every federal offense so that sentence types and lengths can be conformed to that goal.⁷ Accountability is a built-in aspect of Particular Purpose Sentencing as well, requiring that penalties regularly be tested for their success in satisfying their particular purpose and revised as needed. This approach allows for continued, reasoned reform of sentencing law and policy in an effort to become ever fairer.

Delegates (Aug. 12, 2013), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> [hereinafter Holder Remarks].

⁶ Many other scholars have discussed sentencing equality and also posited ways to incorporate purposes into sentencing law and policy. *See, e.g.*, Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. (SPECIAL ED.) 271, 273 (2005) (discussing the move from indeterminate to determinate sentencing guided by a Sentencing Commission and claiming, “The administrative reform model offered the hope of developing a more complete and nuanced conception of equality; the unfortunate reality that has emerged is a conception of formal equality that should be as disquieting as the formal inequality that came before.”). This Article is unique, however, because it is not arguing that sentencing equality is better achieved in a determinate sentencing scheme versus an indeterminate one. (Determinate sentencing refers to a sentencing scheme in which a court imposes an exact sentence (i.e., 5 years of imprisonment) on a defendant. In an indeterminate sentencing system, a court imposes a sentencing range on a defendant (i.e., 5–10 years) and the defendant’s release will be determined by a parole board.) Instead, this Article argues that sentencing equality is a misguided endeavor altogether and that a focus on purpose is the only way to achieve meaningful sentencing reform. While recognition of the need for purpose to be incorporated into federal sentencing is not new, this Article introduces Particular Purpose Sentencing as an original concept that requires the selection of a specific purpose of punishment behind each specific offense and incorporates accountability of outcomes in its framework.

⁷ By sentencing purposes, this Article is referring to rehabilitation, incapacitation, deterrence (specific and general), and retribution. *See* Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (“The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”); *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A at 1 (2012) [hereinafter 2012 U.S. SENTENCING GUIDELINES] (explaining the U.S. Sentencing Guidelines’ mission, “The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.”). The meanings of these purposes are discussed in Part III of this Article.

Thus far, an “equality-themed discourse” has been the centerpiece of calls for cocaine sentencing reform. For more than 25 years, the crack/powder cocaine sentencing debate has been neatly packaged in arguments of whether defendants convicted of crack offenses should be sentenced to the same degree as those convicted of powder cocaine offenses. In this traditional equality-themed discussion, critics assert that crack and powder cocaine offenses should be sentenced similarly, if not exactly equally, because those offenses involve substances that are essentially the same drug. “‘Crack’ is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride [powder cocaine] and sodium bicarbonate, and usually appearing in a lumpy, rock-like form.”⁸ Crack, then, only exists through the processing and cutting of powder cocaine to package it in small, low-value retail amounts. Therefore, the equality-themed argument continues that any failure to equalize sentences for these crimes means treating cocaine offenders inequitably—based on the form, rather than the type of drug—resulting in sentencing patterns that disproportionately harm racial minorities, especially Blacks. Thus, calls for parity in crack and powder cocaine sentencing have become fueled by the goal of racial equality in sentencing outcomes. This equality-themed approach, however, misses the big picture and understates the true problem because it only focuses on and purports to remedy one part of the issue—the inequities that arise when low-level crack dealers (retailers) are punished as though they are high-level cocaine wholesalers. Equality advocates fail to push for clarification of what the true harms are of crack cocaine offenses and how those harms should be dealt with to achieve a certain punishment outcome.

The Fair Sentencing Act of 2010 (the “FSA”) was born of this equality-themed argument and resulted in a federal cocaine sentencing scheme that has been deemed “fairer” because it changed the previous 100:1 powder/crack cocaine sentencing ratio to a “more equal” 18:1 ratio.⁹ The Fair Sentencing Act’s solution, though perhaps closer to sentencing equality, is no closer to reasoned, effective sentencing outcomes. Three years after the FSA was enacted, Attorney General Eric Holder announced to the American Bar Association that he had “mandated a modification of the Justice Department’s charging policies so that certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences.”¹⁰ In supporting this move he used equality-themed language, stating a need to “address the fact that young black and Latino men are disproportionately likely to become involved in our criminal justice system.”¹¹ Holder’s approach, though admirable, still does not address the purposelessness of cocaine

⁸ 2012 U.S. SENTENCING GUIDELINES app. C, Amend. 487 (effective Nov. 1, 1993).

⁹ See *infra* Part I for an explanation of these sentencing ratios.

¹⁰ Holder Remarks, *supra* note 5.

¹¹ *Id.*

sentencing laws that impose those “draconian mandatory minimum sentences.” While the racial inequalities that have resulted from the grossly disparate sentencing of crack and powder cocaine offenses are indisputable,¹² this Article takes the new approach of using the narrow story of cocaine sentencing progression to argue more broadly that, in the world of sentencing, focusing on gaining racial equality through equivalent sentencing is a limited endeavor that ought not be the preoccupation of sentencing reform.¹³ Once Congress embraces Particular Purpose Sentencing and begins to articulate why specific sentences are appropriate for certain offenses, then it will be more apparent that the types and lengths of sentences currently imposed for cocaine (and arguably all drug) offenses do not effectively serve any sentencing purpose. When drug sentencing is brought into line with a selected sentencing purpose—be it retribution, deterrence, incapacitation, or rehabilitation—the unwarranted racial disparity between crack and powder cocaine sentencing will necessarily be questioned, and possibly eventually eradicated, as well.¹⁴ Thus, a Particular Purpose Sentencing approach will be more effective in achieving overall sentencing fairness¹⁵ than equivalent sentences between crack and powder cocaine offenses will ever be, and also may result in sustainable racial equality in sentencing outcomes. This is largely because, when sentencing purpose is considered, powder cocaine sentencing itself is unreasoned. Therefore, it provides a faulty benchmark against which to measure appropriate crack cocaine sentencing. In other words, the foundation for powder cocaine sentencing is itself wrong, and thus, making crack cocaine sentencing equal to that of pow-

¹² For a discussion of the racial disparities, see *infra* Part I.B.

¹³ This Article focuses on cocaine sentencing because that is one of the most problematic aspects of federal sentencing. However, the lessons from the crack cocaine debate can be applied to drug sentencing overall, and even extended to the sentencing laws of all offenses. Other scholars have also recognized the need to begin reform by focusing on drug sentencing. See, e.g., Ronald F. Wright, *Drug Sentences As a Reform Priority*, 5 FED. SENT'G REP. 199, 199 (1993) (“If it becomes important for those who wish to improve federal sentencing to choose their priorities, I have a suggestion: begin with the drug cases. If Congress and the Commission can address the injustice and irrationality of the current system for sentencing drug offenders, they can take the edge off many other problems in federal sentencing.”).

¹⁴ This Article is not claiming that racial injustice in the criminal justice system will be eliminated by Particular Purpose Sentencing, but instead that once a particular purpose is indicated as the goal of cocaine sentencing, the disparity between crack and powder cocaine sentencing will have to be addressed. This may in turn rectify the racial injustices born of the crack/powder cocaine sentencing disparity.

¹⁵ One definition of “fairness” given by Merriam-Webster Dictionary is “marked by impartiality and honesty: free from self-interest, prejudice, or favoritism.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 445 (1984). It is this understanding of fairness that Particular Purpose Sentencing hopes to achieve. By Congress being “honest” about purpose, sentencing laws can be applied with that goal in mind and the effect of sentencing laws can be tested in order to combat “prejudice” in the actual sentencing laws.

der cocaine in the name of racial justice merely makes crack cocaine sentencing equally wrong.

Ultimately, this Article asserts that, when it comes to sentencing, equality in sentencing outcomes is simply the incorrect goal. Instead, the goal should be clarity in our reasons for punishing each offense so that we can recognize when there are and are not true differences among offenses. While some equality theorists may argue that there is value in equally wrong treatment, this Article counters with the view that the significance of equality does not hold the same weight in the sentencing context as it does in others legal frameworks. This is because equally wrong sentencing still leaves us with unreasoned, misguided, and therefore, unfair sentencing. Only after Particular Purpose Sentencing is imposed without the equality debate's cloak will powder cocaine no longer be seen as the necessary benchmark for crack sentencing, and drug offenses will have to stand up to a punishment goal on their own accord. Part I of this Article will explore the development of the powder/crack cocaine ratios in order to demonstrate that criticism and reforms have been fueled by an equality-themed discourse. Part II begins to dismantle the wisdom of that debate by discussing the legislative and judicial limits of basing sentencing reform on racial equality goals. In Part III, the Article introduces the need for Particular Purpose Sentencing by showing that current cocaine sentencing laws are not effectively serving any purpose of punishment. In Part IV, the Article will explain that racial equality in sentencing is the wrong goal in and of itself because it does not provide the same substantive benefits that equality provides in other contexts. Part IV also questions the acceptance of powder cocaine as the benchmark for crack cocaine sentencing. Part V returns to the better approach—Particular Purpose Sentencing—and discusses the possible implementation of that approach. When drug offenses are analyzed on their own accord (rather than compared to one another to gauge racially disparate outcomes), we may find that, due to the history of the War on Drugs and the differences in law enforcement strategies concerning crack and powder cocaine, these two offenses have evolved into very different crimes with different concerns about why and how to punish each. The reasons for punishing each type of offense should have to stand up to a particular purpose of punishment on its own. Thus, this Article concludes that cocaine sentencing provides a teaching moment on the limits of the sentencing equality discourse and presents Particular Purpose Sentencing as a means of better developing a coherent punishment system that may also result in more racially equal consequences for offenders.

I. THE RISE OF THE EQUALITY-THEMED DISCOURSE: RACIAL INEQUALITY AND THE CRACK/POWDER COCAINE SENTENCING DISPARITY

Today's federal drug sentencing scheme was born of legislation from 1986. However, despite having over 25 years to contemplate the ineffectiveness of drug sentencing, we have not seen a developed discussion of

the purposes and goals of the punishment of drug offenders. Instead, the Anti-Drug Abuse Act of 1986,¹⁶ which consisted of a weight-based, and highly punitive, approach to sentencing drug offenses—especially crack cocaine offenses—has been mainly criticized for the racially disparate outcomes it fosters.¹⁷ As the crack/powder cocaine debate demonstrates, this equality-themed discourse has become the norm in arguing for cocaine sentencing reform.

A. *The Infamous 100:1 Ratio*

Before the recent legislative changes,¹⁸ an offense had to involve 100 times more powder cocaine for a defendant to receive the same sentence as defendants convicted of a crack cocaine offense. This infamous 100:1 sentencing ratio first appeared in the Anti-Drug Abuse Act of 1986 (the “1986 Drug Act”) in which offenses involving five grams of cocaine base (commonly referred to as “crack”) were treated as equivalent to those involving 500 grams of cocaine hydrochloride (commonly referred to as “powder cocaine”) for triggering a 5-year mandatory minimum sentence.¹⁹ Likewise, 5,000 grams of powder cocaine were necessary to trigger the same 10-year mandatory minimum sentence that was triggered by 50 grams of crack.²⁰ This ratio was based, at least in part, on the testimony of police investigator, Johnny “Jehru” St. Valentine Brown, Jr., who indicated in hearings before Congress that trafficking 20 grams of crack cocaine was “at the same ‘serious’ level in the marketplace” as the trafficking of 1,000 grams of powder cocaine.²¹ It is worth noting that, in 2000,

¹⁶ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1, 100 Stat. 3207 (1986).

¹⁷ See, e.g., Marcia G. Shein, *Race and Crack Cocaine Offenses: Correcting a Troubling Injustice Post-Booker*, 31 THE CHAMPION APR. 2007, at 18, 22; see also Richard Dvorak, *Cracking the Code: “De-Coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 613 (2000) (arguing that “members of Congress and the media used ‘coded’ messages to gain support for the passage of the Anti-Drug Abuse Act of 1986”); Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 123 (1994); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks”*, 6 J. GENDER RACE & JUST. 381, 391–92 (2002).

¹⁸ Recent legislative changes refer to The Fair Sentencing Act of 2010, which is discussed *infra* Part I.B.

¹⁹ Anti-Drug Abuse Act of 1986, § 1002. Pursuant to the resulting 21 U.S.C. § 841, a 5-year mandatory minimum applies to any trafficking offense of 5 grams of crack or 500 grams of powder, 21 U.S.C. § 841(b)(1)(B)(ii), (iii); its 10-year mandatory minimum applies to any trafficking offense of 50 grams of crack or 5,000 grams of powder, § 841(b)(1)(A)(ii), (iii). The 1986 Drug Act imposed the heavier penalty on “cocaine base,” without specifying that to mean crack. However, in 1993, the Sentencing Commission clarified that “‘Cocaine base,’ for the purposes of this guideline, means ‘crack.’” 2012 U.S. SENTENCING GUIDELINES app. C, Amend. 487.

²⁰ See 21 U.S.C. § 841(b)(1)(A)(ii), (iii).

²¹ *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Security, of the H. Comm. on the Judiciary*, 110th Cong. 171 (2007) (statement of Eric E. Sterling, President, Criminal Justice Policy Found.), available at http://judiciary.house.gov/hearings/printers/111th/111-48_51013.PDF.

Officer Brown was indicted on several counts of perjury for lying under oath at trials about his credentials as an expert on illicit drugs.²² Still, for over two decades, the legacy of Officer Brown's congressional testimony regarding the practices of crack and powder cocaine trafficking took on a lasting existence in the form of mandatory minimum sentencing laws and the Federal Sentencing Guidelines ranges imposed for these offenses.²³

One reason that Officer Brown's testimony carried such force, apart from the strength of his falsified credentials, was the media-fueled concern at the time regarding the dangers of crack cocaine. The most well-known news account encouraging this fear was the cocaine-induced death of college basketball star Len Bias in June 1986.²⁴ It was widely reported that Bias died from a crack overdose, and the public alarm spilled over into Congress and led to the 1986 Drug Act being rushed through the legislative process.²⁵ Once again, though, the narrative that spurred a legislative response was later proved false or incomplete. Just as Officer Brown was ultimately discredited as an expert, it was eventually discovered that Len Bias died from snorting powder cocaine and using alcohol for over four hours, and not from crack cocaine use at all.²⁶ However, the fear created by stories like that of Len Bias was pervasive and the effects were long lasting.²⁷

²² See Bill Miller, *Ex-D.C. Detective Gets One Year for Contempt*, WASH. POST, Mar. 2, 2001, at B4.

²³ See Statement of Eric E. Sterling, *supra* note 21, at 171, 173.

²⁴ See U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 117 (1995), [hereinafter 1995 U.S. SENTENCING COMM'N REPORT], available at www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/index.cfm.

²⁵ See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 5 (2002), [hereinafter 2002 U.S. SENTENCING COMM'N REPORT], available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf; see also 1995 U.S. SENTENCING COMM'N REPORT, *supra* note 24, at 117, 122 (explaining that "following Bias's death, newspapers across the country ran headlines and stories containing a quote from Dr. Dennis Smyth, Maryland's Assistant Medical Examiner, that Bias probably died of 'free-basing' cocaine. Newspapers that ran such headlines included the Los Angeles Times, USA Today, the Chicago Tribune, The Atlanta Constitution, and the Washington Post.").

²⁶ See 2002 U.S. SENTENCING COMM'N REPORT, *supra* note 25, at 5; see also Carol A. Brook, *Mukasey Puts Latest Crack in Truth on Drugs*, CHI. TRIB., Mar. 7, 2008, available at http://articles.chicagotribune.com/2008-03-07/news/0803060576_1_crack-cases-bias-death-sentences.

²⁷ One of the most pervasive images of the crack hysteria is the crack baby. The Sentencing Project described this imagery and its erroneous nature aptly: "The notion of the 'crack baby' became common in the 1980s and was associated mostly with African American infants who experienced the effects of withdrawal from crack. Over time, the medical field determined the effects of crack on a fetus had been overstated." THE SENTENCING PROJECT, *supra* note 1, at 6 (citing U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 68 (2007), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_

In the 1994 Eastern District of Missouri case, *United States v. Clary*, Judge Clyde Cahill explained the media effect this way:

Crack cocaine eased into the mainstream of the drug culture about 1985 and immediately absorbed the media's attention. Between 1985 and 1986, over 400 reports had been broadcast by the networks. Media accounts of crack-user horror stories appeared daily on every major channel and in every major newspaper. Many of the stories were racist. Despite the statistical data that whites were prevalent among crack users, rare was the interview with a young black person who had avoided drugs and the drug culture, and even rarer was any media association with whites and crack. Images of young black men daily saturated the screens of our televisions. These distorted images branded onto the public mind and the minds of legislators that young black men were *solely* responsible for the drug crisis in America. The media created a stereotype of a crack dealer as a young black male,²⁸ unemployed, gang affiliated, gun toting, and a menace to society.

While Congress kept those types of media reports, as well as Brown's testimony, in mind when considering a variety of possible ratios for crack and powder cocaine trafficking punishment,²⁹ it was clear that crack offenses would be punished the most severely.³⁰ It is understood that Congress considered crack to be much more dangerous than powder cocaine and believed that:

(1) crack cocaine was extremely addictive; (2) crack cocaine distribution and use were highly associated with violence and other systemic crime; (3) crack cocaine use was especially perilous, with particularly devastating harms to children prenatally exposed to the

and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf [hereinafter 2007 U.S. SENTENCING COMM'N REPORT]). Deborah Frank, a professor of Pediatrics at Boston University, describes the "crack baby" as "a grotesque media stereotype, not a scientific diagnosis." *U.S. Sentencing Comm'n Hearing of Feb. 25, 2002* (testimony of Deborah A. Frank), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20020225-26/Public_Hearing_Agenda.htm. "Indeed, [Frank] found the negative effects of crack use on the fetus are similar to the negative effects of tobacco or alcohol use, poor prenatal care or poor nutrition on the fetus." THE SENTENCING PROJECT, *supra* note 1, at 6.

²⁸ 846 F. Supp. 768, 783 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994) (emphasis added) (footnotes omitted).

²⁹ Judge Cayhill also noted this fact when he wrote, "Legislators used these media accounts as informational support for the enactment of the crack statute. The Congressional Record, prior to enactment of the statute, is replete with news articles submitted by members for their colleagues' consideration which labeled crack dealers as black youths and gangs. Members of Congress also introduced into the record media reports containing language that was either overtly or subtly racist, and which exacerbated white fears that the 'crack problem' would spill out of the ghettos." *Id.* at 783-84 (footnotes omitted).

³⁰ See 1995 U.S. SENTENCING COMM'N REPORT, *supra* note 24, at 117 (explaining the various ratios that Congress considered and stating that "[t]o the extent that Congress saw the drug problem as a national 'epidemic' in 1986, it viewed crack cocaine as at the very forefront").

drug; (4) young people were particularly prone to crack cocaine use; and (5) crack cocaine's purity, potency, low cost per dose, and ease of distribution and administration were leading to its widespread use.³¹

Therefore, in response to the perceived national drug emergency, the 1986 Drug Act passed with no committee hearings and no accompanying House or Senate reports, and the disparate 100:1 crack/powder cocaine sentencing ratio was born.³²

As all of this occurred, there was an organization charged with ensuring that sentencing ranges for federal offenses were appropriate: the U.S. Sentencing Commission. Though for many offenses the Commission used an empirical approach that considered the lengths of sentences already being imposed,³³ for drug offenses the Commission simply adopted the 1986 Drug Act's weight-based approach.³⁴ Thus, the 100:1 crack/powder cocaine sentencing ratio was incorporated into the Federal Sentencing Guidelines.³⁵ This incredible disparity, and its accompanying racial injustice, would persist for over two decades.

B. *Calls for Equality and the Road to the Fair Sentencing Act*

It is clear that Congress's intent in the 1986 Drug Act was to embrace the notion that crack trafficking reached a serious level when smaller amounts were involved than would be required to make powder cocaine trafficking a serious matter. Criticisms of the 1986 Drug Act have focused mainly on the disparate racial and socioeconomic impact that the 100:1 ratio created. In 2007, Eric Sterling, President of The Criminal Justice Policy Foundation and a former member of the subcommittee responsible for developing the legislation that created the cocaine quantity-based sentencing approach, made a statement to the Congressional Subcommittee on Crime, Terrorism, and Homeland Security.³⁶ In that statement, Sterling claimed that, in passing the 1986 Drug Act, Congress never intended to treat black drug offenders more harshly than white drug offenders.³⁷ However, regardless of congressional intent, the disproportionate consequences of the 1986 Drug Act on minority communities are undeniable. This racial disparity is a main reason that the U.S. Sentencing Commission has repeatedly urged Congress to reduce the 100:1 sentencing ratio—mostly to no avail.

³¹ 2002 U.S. SENTENCING COMM'N REPORT, *supra* note 25, at 90 (explaining what originally led Congress to adopt the 100:1 ratio).

³² *See id.* at 5.

³³ 2012 U.S. SENTENCING GUIDELINES ch. 1, pt. A, 4.

³⁴ *See id.* § 2D1.1(c) (2012); *see also* *Kimbrough v. United States*, 552 U.S. 85, 96 (2007).

³⁵ *See Kimbrough*, 522 U.S. at 96.

³⁶ Statement of Eric E. Sterling, *supra* note 21, at 166.

³⁷ *Id.* at 170.

The first of the Sentencing Commission's recommendations to change crack cocaine sentencing came in February 1995 when the Commission suggested a reduction of the 100:1 ratio.³⁸ The U.S. Sentencing Commission reported that 88.3% of crack cocaine offenders were black.³⁹ The Commission cited to a study conducted by the Bureau of Justice Statistics finding that, due to the 100:1 ratio, "the average sentence imposed for crack trafficking was twice as long as for trafficking in powdered cocaine."⁴⁰ Ultimately, the Sentencing Commission concluded that the "100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants."⁴¹ In May of the same year, the Commission urged Congress to equalize crack and powder cocaine penalties.⁴² Congress rejected both of these proposed amendments to the Sentencing Guidelines—the first time in Guidelines' history that Congress rejected an amendment proposed by the Commission.⁴³ In doing so, Congress explicitly stated that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine."⁴⁴ The Sentencing Commission stood firm and in 1997 again issued a report unanimously recommending the elimination of the 100:1 ratio.⁴⁵ Congress, however, did not act on this recommendation.

Racial inequality was a theme in the 2002 Sentencing Commission hearings in which experts found that there was no scientific or medical difference between crack and powder cocaine or the effects of the drugs.⁴⁶ In its resulting 2002 Report to Congress, the Sentencing Commission explained its findings that an "overwhelming majority" of crack offenders were black—91.4% in 1992 and 84.7% in 2000.⁴⁷ The Commission also reported that "[i]n addition, the average sentence for crack cocaine offenses (118 months) is 44 months—or almost 60%—longer than the average sentence for powder cocaine offenses (74 months), in large

³⁸ 1995 U.S. SENTENCING COMM'N REPORT, *supra* note 24.

³⁹ *Id.* at 152.

⁴⁰ *Id.* at 153 (quoting DOUGLAS C. McDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 1 (1993), available at <https://www.ncjrs.gov/pdffiles1/145328NCJRS.pdf>).

⁴¹ *Id.* at 154.

⁴² See Amendments to the Sentencing Guidelines for the United States Courts, 60 Fed. Reg. 25074, 25075–76 (proposed May 10, 1995).

⁴³ See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334, 334; S. Res. 1254, 104th Cong. (1995).

⁴⁴ *Id.* § 2.

⁴⁵ U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997), http://www.uscc.gov/Publications/Reports_to_Congress/index.cfm.

⁴⁶ 2002 U.S. SENTENCING COMM'N REPORT, *supra* note 25, at E-3 to E-5.

⁴⁷ *Id.* at 62.

part due to the effects of the 100-to-1 drug quantity ratio.”⁴⁸ As a result of the hearings and findings, the Commission again advocated for a reduction in the 100:1 ratio, stating in its report that: (1) the current penalties exaggerate the relative harmfulness of crack cocaine; (2) the current penalties sweep too broadly and apply most often to lower level offenders; (3) the current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality; and (4) the current penalties’ severity mostly impacts minorities.⁴⁹ Given that Congress’s initial reason for punishing crack offenses more harshly than powder cocaine offenses was tied to its belief about the relative dangerousness of the two drugs, one would think that the Commission’s report rejecting this reasoning would be persuasive. However, again, Congress did not respond.

By 2004, the Sentencing Commission was bluntly expressing its views on the racial injustice of the cocaine sentencing guidelines. The Commission explained:

This one sentencing rule contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination. *Revising the crack cocaine thresholds would better reduce the gap than any other single policy change*, and it would dramatically improve the fairness of the federal sentencing system.⁵⁰

After three more years of inaction by Congress, the Sentencing Commission finally took matters into its own hands. In 2007, the Commission enacted a series of Guidelines amendments that it called “only a partial step in mitigating the unwarranted sentencing disparity that exists between Federal powder and crack cocaine defendants.”⁵¹ Amendment 706, effective November 1, 2007, reduced by two levels the base offense level for most crack offenses.⁵² This equality-themed reform may have fi-

⁴⁸ *Id.* at 90.

⁴⁹ *Id.* at v–viii.

⁵⁰ U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 132 (2004), http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf (emphasis added).

⁵¹ Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20071211_Press_Release.htm.

⁵² 2012 U.S. SENTENCING GUIDELINES app. C, Amend. 706 (effective Nov. 1, 2007); *see also* Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28558, 28571–72 (May 21, 2007). The Sentencing Guidelines assign a base offense level to every federal criminal offense. Because the Sentencing Commission adopted a system of “real offense sentencing,” Chapter Three of the Sentencing Guidelines also includes several sections of adjustments that add points to the base offense level based on particular offense factors and offender conduct (i.e., role in the offense, type of victim, etc.). *E.g.*, 2012 U.S. SENTENCING GUIDELINES 335, 341 (§ 3B1.1 (aggravating role); § 3A1.1 (hate crime motivation or vulnerable victim)). The sum is

nally—although not promptly—motivated Congress to take seriously the need to reduce the cocaine sentencing disparity. As the Commission noted when it enacted Amendment 706:

The Commission, however, views the amendment only as a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to those problems. Any comprehensive solution requires appropriate legislative action by Congress. It is the Commission's firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio.⁵³

Despite recognition of the hugely racialized consequences for two decades, it took until 2010 for Congress to pass federal legislation reducing the 100:1 ratio—and even then Congress did not completely eliminate the disparity.

When Congress finally began seriously considering changes to the cocaine sentencing scheme, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing which took place on May 21, 2009.⁵⁴ The resulting House Report adopted the equality-themed discourse in explaining the need for cocaine sentencing reform. The Report stated, "African Americans serve almost as much time in Federal prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months), largely due to sentencing laws such as the 100-to-1 crack-powder cocaine disparity."⁵⁵ On October 15, 2009, Senator Richard Durbin, a Democrat from Illinois, introduced his version of the Fair Sentencing Act to "eliminate the sentencing disparity that exists in the United States between crack cocaine and powder cocaine."⁵⁶ As Senator Durbin explained, the purpose was to "accomplish[] two very important goals: One goal is to restore fairness to drug sentencing and, second, to focus our limited Federal resources on the most effective way to end violent drug trafficking."⁵⁷ On the issue of fairness, Senator Durbin clearly had racial equality in mind. He stated, "It is important to note that the crack/powder disparity disproportionately affects African Americans. While African Americans constitute less than 30 percent of crack users, they make up 82 percent of those convicted of Federal crack offenses."⁵⁸ Senator Durbin envisioned a 1:1 ratio for crack and powder cocaine sentencing. What followed instead was, as Senator

the total offense level, which corresponds to the Sentencing Grid and is matched up with a criminal history category to result in a sentencing range.

⁵³ 2007 U.S. SENTENCING COMM'N REPORT, *supra* note 27, at 10.

⁵⁴ See *Unfairness in Federal Cocaine Sentencing: Hearing on H.R. 1459, H.R. 1466, H.R. 265, H.R. 2178 & H.R. 18 Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009).

⁵⁵ H.R. REP. NO. 111-670, pt. 1, at 4 (2010) (Conf. Rep.).

⁵⁶ 155 CONG. REC. 24954 (2009) (statement of Sen. Richard Durbin).

⁵⁷ *Id.*

⁵⁸ *Id.*

Durbin described it, “a good bipartisan compromise” that reduced the 100:1 ratio but did not completely eliminate the sentencing disparity.⁵⁹

The resulting Fair Sentencing Act of 2010 (the “FSA”) decreased the powder to crack cocaine sentencing ratio to nearly 18:1.⁶⁰ Now, under the FSA, it takes 28 grams (instead of the former 5 grams) of crack cocaine to trigger a 5-year mandatory minimum imprisonment, and 280 grams (rather than 50 grams) of crack cocaine to trigger a 10-year mandatory minimum imprisonment term.⁶¹ The 500 grams and 5 kilograms (or 5,000 grams) of powder cocaine that it takes to activate the 5-year and 10-year mandatory minimums, respectively, remained unchanged.⁶² The mandatory minimum for a first-time offense of simple possession was eliminated, and first-time simple possession of any quantity of crack cocaine, like powder cocaine, will result in a sentence no longer than one year.⁶³

The FSA also directed the Sentencing Commission to adopt a similar Guidelines punishment scheme for crack and powder cocaine offenses, resulting in roughly the same 18:1 ratio.⁶⁴ Though this legislative action had been a long time coming, the story behind the sentencing change is not one that suggests great strides in studied drug sentencing. The legislative record gives no indication of a reasoned or reflective exercise that led legislators to settle upon an 18:1 ratio. Judge Mark Bennett in the Northern District of Iowa explained this well when he wrote of the new FSA ratio:

I assumed that Congress, the Sentencing Commission, or the prosecution in this case would have had some medical, chemical, physiological, or other scientific or social science evidence to support that new ratio. Unfortunately, I now find that my assumptions or expectations have not been fulfilled.⁶⁵

Instead of being supported by “evidence,” the new FSA ratio suffers from the same arbitrariness as the former 100:1 ratio. It has, in turn, perpetuated the form in which the crack/powder cocaine debate has been waged for the past few decades—one that focuses on sentencing equality. Due to the focus on sentencing equality, Congress struck a compromise between the current 100:1 ratio and calls for completely equivalent sentencing outcomes and landed on the current 18:1 ratio. This Article argues that, because the cocaine debate has been “cracked,” the FSA reform missed an opportunity to move beyond the legislative and judicial

⁵⁹ 156 CONG. REC. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Richard Durbin).

⁶⁰ See Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372 (codified at 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii) (Supp. V 2012)).

⁶¹ 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii) (Supp. V 2012) (amending 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii) (2006)).

⁶² 21 U.S.C. § 841(b)(1)(A)(ii), (B)(ii) (2006).

⁶³ Fair Sentencing Act of 2010 § 3 (codified at 21 U.S.C. § 844(a) (Supp. V 2012)).

⁶⁴ See 2012 U.S. SENTENCING GUIDELINES app. C, Amend. 748 (effective Nov. 1, 2010).

⁶⁵ *United States v. Williams*, 788 F. Supp. 2d 847, 885 (N.D. Iowa 2011).

limitations of the equality-themed discourse by embracing Particular Purpose Sentencing.

II. LEGISLATIVE AND JUDICIAL LIMITATIONS TO SENTENCING EQUALITY

The story of crack and powder cocaine sentencing shows that the usual approaches to legal reform—through legislative and/or judicial action—lead to slow and disappointing results. Furthermore, the closer one gets to equal sentencing outcomes, the more apparent it becomes that achieving sentencing equality would be an incomplete success. This is because equality as a sentencing goal is faulty. Thus, abandoning racial equality as a sentencing objective and instead calling for Particular Purpose Sentencing is a more effective strategy for reaching reasoned and, therefore truly fair, sentencing. The following examination of legislative and judicial limitations demonstrates why reformers should forget sentencing equality. An explanation of the stronger reform objective—Particular Purpose Sentencing—follows this discussion.

A. *The Limits of Fighting for Legislatively Created Equality*

Legislation is by nature and design an endeavor requiring compromise.⁶⁶ As already explained, it took more than 20 years for the 100:1 ratio of the Anti-Drug Abuse Act of 1986 to change to the 18:1 ratio of the FSA, despite continual criticism from the time of the 1986 Act's enactment.⁶⁷ Meanwhile, tens of thousands of crack offenders have been shoveled into prison as a result of crack sentencing. Part I has already explained the devastating racial injustices of this practice, which have gotten much attention in the reform discussion. Therefore, it goes without saying, then, that the legislative process is not just slow, but is painfully and destructively so. A two-decade delay might be justified if the eventual resolution somehow placed those suffering under the weight of sentencing disparity in a substantially better position. Sadly, it is hard to

⁶⁶ As explained by Professor John F. Manning, "In fact, the whole flavor of the legislative process suggests the centrality of compromise. By dividing power among three competing institutions that answer to distinctively configured constituencies, the bicameralism and presentment requirements of Article I, § 7 effectively create a supermajority requirement for legislation. This feature, in turn, gives political minorities extraordinary power to block legislation or to insist upon compromise as the price of assent. The legislatively adopted rules of procedure for each House reinforce this reality. Among other things, bills must clear all of the relevant gatekeeping committees, find time on the floor of each House, and survive the threat of a filibuster in the Senate; in other words, there are many ways for a bill to die—and thus many opportunities for legislative stakeholders to insist upon compromise as a condition of its survival. It is hardly surprising, therefore, that a bill might not be coherent with its apparent purpose, even in the absence of some policy miscalculation or imprecision in expression by the legislature." John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33, 38–39 (2006) (citations omitted).

⁶⁷ For the discussion of the transition from the 100:1 to the 18:1 ratio, see *supra* Part I.

view the FSA as having produced that result. The current 18:1 ratio still results in black defendants being disproportionately imprisoned. In its 2011 Annual Report, the U.S. Sentencing Commission gave the following statistics:

The average prison term for drug offenders varied widely by drug type, from an average of 104 months for crack cocaine offenders (median of 84 months) to 36 months for marijuana offenders (median of 24 months). Most crack cocaine defendants were Black (83.0%) while 10.0 percent were Hispanic, and 6.1 percent were White. In contrast, the race/ethnicity distribution of powder cocaine defendants was 58.4 percent Hispanic, 24.5 percent Black, and 15.8 percent White.⁶⁸

Part of the problem is that the reform debate became “cracked,” meaning that it has been a broken and misguided conversation focused on whether crack is worse than powder cocaine, rather than about the overall purpose of drug sentencing. Stating the reasons against treating crack and powder cocaine differently by using racial equality arguments allowed the opponents of equivalent sentencing to simply deny racism and respond that there are still reasons to treat crack offenses more harshly. Therefore, as is common with the legislative process, a compromise had to be reached.

When Senator Durbin introduced the FSA, he explained that the bill had support “across the political spectrum” of groups, including police forces, the American Bar Association, The Leadership Conference on Civil Rights, and the United Methodist Church.⁶⁹ While his bill calling for a 1:1 ratio for crack and powder cocaine sentencing passed in the Senate, it did not make it to the House of Representatives unchanged.⁷⁰ Instead, Democratic and Republican members of the Senate Judiciary Committee haggled over its details, resulting in the change to the 18:1 ratio.⁷¹ The bill met resistance in the House as well. Some, like Representative Lamar Smith of Texas, opposed any reduction to drug offense penalties.⁷² As Representative Smith put it, “Now Congress is considering legislation to wind down the fight against drug addiction and drug-related violence. Reducing the penalties for crack cocaine could expose our neighborhoods to the same violence and addiction that caused Congress to act in the first place.”⁷³ Representative Smith characterized the bill as “coddling

⁶⁸ U.S. SENTENCING COMM’N, 2011 ANNUAL REPORT 37 (2011), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2011/ar11toc.htm (footnote omitted).

⁶⁹ 155 CONG. REC. 24955 (2009) (statement of Sen. Richard Durbin).

⁷⁰ See 156 CONG. REC. H6197 (daily ed. July 28, 2010) (statement of Rep. Robert “Bobby” Scott).

⁷¹ See *id.*

⁷² See *id.* at H6197–98 (statement of Rep. Lamar Smith).

⁷³ *Id.* at H6197.

some of the most dangerous drug traffickers in America.”⁷⁴ Thus, a move from Senator Durbin’s 1:1 ratio to a more severe 18:1 ratio was seen as necessary to get the FSA passed at all. This way, legislators on both sides of the aisle could take comfort in the resulting compromise. Representative James Clyburn, a Democrat, praised the bill as a “significant step” toward creating laws that are “smart, fair, and rational.”⁷⁵ At the same time, Representative Jim Sensenbrenner, a Republican, applauded those who came to the compromise that “does not let those who possess crack cocaine off easily.”⁷⁶ The result, though arguably progress toward social justice, was not the complete parity that many had demanded for the past couple of decades. Instead, legislative reform led to what Representative Ron Paul said should more aptly be called “the Slightly Fairer Resentencing Act.”⁷⁷

It can be argued that compromise leads to better political decisions that all of society can accept.⁷⁸ While this may be true in some contexts, it has not appeared to be the case for federal cocaine sentencing. Senator Jeff Sessions was one of the main opponents of the adoption of a 1:1 ratio in the Senate Judiciary Commission. He gave a statement asserting that he would “oppose anything that represents a 50, 60, 70, or 80% reduction in penalties.”⁷⁹ Senator Sessions said that he thought the current system was “not fair,” but he explained that he is “a strong believer in law enforcement and prosecution of those who violate our laws, particularly criminals who really do a lot of damage beyond just dealing drugs.”⁸⁰ While these sentiments indicate why Senator Sessions favored strongly punitive drug sentencing laws, they do not clarify why he made the decision that a “50, 60, 70, or 80 percent reduction in penalties” would be objectionable. Likewise, the legislative record is devoid of any reason why 18:1 eventually was chosen as the appropriate ratio, other than the implication that it was chosen because it was less than 100:1 and more than 1:1. There is no statement in the record explaining that 18:1 better reaches punishment goals of retribution, deterrence, rehabilitation, or incapacitation than some other ratio. There is no report accompanying the 18:1 ratio in Senate Bill 1789. The most elucidating piece of legislative history on the 18:1 ratio is a July 10, 2010 letter from the Senate Judiciary Committee that states:

⁷⁴ *Id.* at H6198.

⁷⁵ *Id.* (statement of Rep. James Clyburn).

⁷⁶ *Id.* (statement of Rep. Jim Sensenbrenner).

⁷⁷ *Id.* at H6203 (statement of Rep. Ron Paul).

⁷⁸ See JAMES MCCLELLAN, LIBERTY, ORDER, AND JUSTICE: AN INTRODUCTION TO THE CONSTITUTIONAL PRINCIPLES OF AMERICAN GOVERNMENT 263 (Liberty Fund, Inc. 3d ed. 2000) (1989) (“In national politics, as in private life, it is sometimes wise to compromise one’s goals on certain occasions. Not everybody can have everything he wants; and half a loaf is better than none. In every country there are competing interests, differing bodies of opinion, distinct classes, and other rival groups or factions.”).

⁷⁹ 155 CONG. REC. 24955–56 (2009) (statement of Sen. Jeff Sessions).

⁸⁰ *Id.*

The Fair Sentencing Act would establish an 18:1 crack-powder ratio, which reflects a bipartisan compromise that was reached in the Senate Judiciary Committee. *This 18:1 ratio responds to concerns raised by many in law enforcement, who agree that the 100:1 disparity is unjustified, but argue that crack is associated with greater levels of violence and therefore should be subject to tougher penalties.*⁸¹

Even with this letter, however, why 18:1 was selected as the appropriate middle ground remains a mystery. While it was clearly a political compromise, in this context such a compromise did not lead to the best result when “best” is measured in terms of sentencing effectiveness. It is safe to conclude that 18:1 was selected because it was palatable to those who objected to a 1:1 ratio and could be touted as progress for those who were against the 100:1 ratio.⁸² Apparently, arguing for legislative reform to reach sentencing equality has led to a slow and compromised response that only yielded “fairer,” rather than equal, sentencing.

The limits of depending on the legislature to achieve sentencing equality are highlighted by Attorney General Holder’s 2013 directive that federal prosecutors cease charging low-level, nonviolent drug offenders with crimes that will trigger mandatory minimums.⁸³ Holder discussed the racial disparity in the prison population.⁸⁴ Further, he recognized that current sentencing laws send “too many Americans . . . to too many prisons for far too long, and *for no truly good law enforcement reason.*”⁸⁵ Therefore, Holder decided to work around purposeless sentencing laws and depend upon prosecutorial power to address sentencing equality issues. Though Holder’s approach is better than the status quo, purposeless cocaine sentencing laws still remain. Prosecutors are just being told to avoid charging under them. Holder’s unwillingness to continue to wait on a legislative fix underscores the dissatisfying results that legislative compromise has yielded on this issue. Likewise, using the courts to reach sentencing equality has been similarly unfruitful.

⁸¹ United States v. Williams, 788 F. Supp. 2d 847, 874 (N.D. Iowa 2011) (quoting Letter from Patrick J. Leahy et al., U.S. Senators, U.S. Congress, to Colleagues, U.S. Congress (July 10, 2010)).

⁸² See *id.* at 875–79 (discussing evidence in the legislative record that the 18:1 ratio was selected as a compromise and seen as progress rather than as a reasoned fix to the cocaine sentencing scheme).

⁸³ Holder Remarks, *supra* note 5.

⁸⁴ *Id.* (“One deeply troubling report, released in February, indicates that—in recent years—black male offenders have received sentences nearly 20 percent longer than those imposed on white males convicted of similar crimes. This isn’t just unacceptable—it is shameful.”).

⁸⁵ *Id.* (emphasis added).

B. Equal Protection and the Limits of Using Judicial Action to Achieve Sentencing Equality

When racial equality is in question, the usual litigation strategy is to turn to the Equal Protection Clause.⁸⁶ However, as is the case with many racial equality efforts, the Equal Protection Clause has proven to be a dead end for sentencing equality.⁸⁷ In his 1995 article, *Cocaine, Race, and Equal Protection*, Professor David A. Sklansky used the racialized impact of crack cocaine sentencing to criticize Equal Protection doctrine.⁸⁸ Sklansky argued that “there are certain important dimensions of racial injustice our law does not see”⁸⁹ and urged that Equal Protection doctrine be reformed to “identify[] inequality and help[] to deny it the protection of invisibility.”⁹⁰ He then went on to describe the plight of black crack defendants, stating that “the crack sentences raise troubling issues of fairness that we should want equal protection doctrine to address.”⁹¹ Though Sklansky framed his argument as one of doctrinal repair, his writing suggests that his main concern was finding a vehicle to achieve equality for crack cocaine defendants. He saw the Equal Protection doctrine as a viable option because he was discussing the problem through the lens of racial inequality. In his article, Sklansky questioned whether crack sentences would be so severe if they affected a larger proportion of white defendants.⁹² In explaining his equality-based criticism of the crack sentences, Sklansky stated:

Those [crack] penalties do not simply impose a disproportionate share of their burdens on members of a minority—they impose virtually all of their burdens on them. And blacks are not just any minority—they are the paradigmatic “discrete and insular minority,” the minority whose oppression gave rise to equal protection law in

⁸⁶ The Equal Protection Clause is found in the Fourteenth Amendment of the United States Constitution, which reads in relevant part: “nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*” U.S. CONST. amend. XIV, § 1 (emphasis added).

⁸⁷ The Supreme Court’s interpretation of the Equal Protection Clause has failed plaintiffs in many cases. In the education context, the Supreme Court has held that there is no Equal Protection violation for unequal school funding. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973). In the criminal law context, the Supreme Court held that the death penalty poses no Equal Protection problem despite the increased risk of receiving the death penalty for Black defendants convicted of killing White victims. *McCleskey v. Kemp*, 481 U.S. 279, 291–92, 297–98 (1987).

⁸⁸ See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1284 (1995).

⁸⁹ *Id.*

⁹⁰ *Id.* at 1285.

⁹¹ *Id.* at 1284.

⁹² *Id.* at 1301–02.

the first place. Nor, of course, are long mandatory prison sentences just any burden.⁹³

In Sklansky's view, crack cocaine sentencing should be seen as a violation of Equal Protection because of the real-life ramifications of such long sentences that fell squarely on the shoulders of black offenders. Sklansky was not then, and is not now, alone in his articulation of the racial inequalities plaguing crack cocaine sentencing and his desire to use Equal Protection doctrine to rectify the injustices. However, to date, these claims have been rejected.

In the 1994 case *United States v. Stevens*, the Second Circuit rejected the defendant's claim that the crack/cocaine sentencing disparity resulted in "an unconstitutionally disparate impact on African-Americans."⁹⁴ Though the court recognized statistics indicating the racial disparity in sentencing, the court explained that because the defendant "d[id] not contend that either Congress or the Federal Sentencing Commission acted with discriminatory intent" it would not subject the Guidelines provisions at issue "to heightened scrutiny."⁹⁵ The court then applied a rational basis analysis and rejected the Equal Protection claim for the following reasons:

Congress had a valid reason for mandating harsher penalties for crack as opposed to powder cocaine: the greater accessibility and addictiveness of crack. Because we believe that treatment of one gram of crack cocaine as the equivalent of 100 grams of powder cocaine is rationally related to the legitimate governmental purpose of protecting the public against the greater dangers of crack cocaine, we reject [the defendant's] equal protection challenge to this sentencing scheme.⁹⁶

The Second Circuit went on to note that it was joining six other circuits in directly deciding that the 100:1 ratio did not violate the Equal Protection Clause.⁹⁷ The court also mentioned that it was in the company of four circuits that "have also rejected equal protection challenges to the enhanced penalty structure for crack offenses."⁹⁸ The next year, the Ninth Circuit also declined to find an Equal Protection violation in the

⁹³ *Id.* at 1301.

⁹⁴ 19 F.3d 93, 96–97 (2d Cir. 1994).

⁹⁵ *Id.* at 96.

⁹⁶ *Id.* at 97 (citation omitted).

⁹⁷ *Id.* (citing *United States v. Williams*, 982 F.2d 1209, 1213 (8th Cir. 1992); *United States v. Frazier*, 981 F.2d 92, 95 (3d Cir. 1992) (per curiam); *United States v. Galloway*, 951 F.2d 64, 65–66 (5th Cir. 1992) (per curiam); *United States v. Lawrence*, 951 F.2d 751, 754–55 (7th Cir. 1991); *United States v. Turner*, 928 F.2d 956, 959–60 (10th Cir. 1991)). The First Circuit also came to such a holding in *United States v. Singletary*, 29 F.3d 733, 739–40 (1st Cir. 1994).

⁹⁸ *Stevens*, 19 F.3d at 97 (citing *United States v. King*, 972 F.2d 1259, 1260 (11th Cir. 1992) (per curiam); *United States v. Harding*, 971 F.2d 410, 412–14 (9th Cir. 1992); *United States v. Thomas*, 900 F.2d 37, 39–40 (4th Cir. 1990); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989)).

100:1 ratio, stating that “Congress reasonably could have considered that crack’s differing physiological and psychological effects, and its greater marketability, made crack a greater societal problem meriting more severe punishment.”⁹⁹ Like the Second Circuit and many others, the Ninth Circuit based its reasoning on the finding that Congress did not act with discriminatory intent in enacting the law, nor did prosecutors have a discriminatory purpose in acting under it.¹⁰⁰

These cases, among others, show that any claim that the racially disparate outcomes of the crack/cocaine sentencing gap is an Equal Protection violation will fail. Because non-black defendants have been convicted of crack offenses, and black defendants have been convicted of powder cocaine offenses, courts have approached the crack/cocaine sentencing disparity as something other than a failure to apply the protection of the law equally.¹⁰¹ Further, to receive the near-fatal strict scrutiny of the court, a defendant would have to show to the court a discriminatory purpose behind the sentencing disparity, which to date, has not been accomplished. Therefore, the only judicial recourse for sentencing reform advocates is to convince individual judges to become sentencing reformers in crack cocaine cases. While this has been done to a certain extent, the use of judicial reformers to achieve racial equality in sentencing has its limitations as well.

C. *The Limits of Judges as Reformers to Achieve Equality*

Once the Federal Sentencing Guidelines were made advisory in the 2005 Supreme Court case *United States v. Booker*, calls were made for judges to use their renewed discretion to circumvent the crack/cocaine disparity whenever possible.¹⁰² Again, the reason for correcting this disparity largely has been discussed in terms of racial equality. In 2007, defense attorney Marcia Shein wrote, *Race and Crack Cocaine Offenses: Correcting a Troubling Injustice Post-Booker*, in which she stated in her opening lines that “[s]ince 1987, and the promulgation of the federal Sentencing Guidelines, there has been an egregious sentencing disparity between crack and powder cocaine offenses. Courts and defense attorneys throughout the country have asserted that the disparity has disproportionately affected minorities.”¹⁰³ Shein recognized the disconnect between crack sentencing and sentencing purposes.¹⁰⁴ However, she, like many, mainly fo-

⁹⁹ *United States v. Dumas*, 64 F.3d 1427, 1429 (9th Cir. 1995).

¹⁰⁰ *Id.* at 1429–32.

¹⁰¹ Of course, the dissenting argument here is that while the law may be facially neutral, it is applied in a racially disparate manner through discriminatory law enforcement practices, biased prosecution, and prejudiced sentencing practices. However, the court cases previously cited have looked to the neutrality of the law, and that it applies to people of all races, to conclude that there is no Equal Protection violation.

¹⁰² 543 U.S. 220, 226–27 (2005).

¹⁰³ Shein, *supra* note 17, at 18.

¹⁰⁴ *See id.* at 23.

cused on the racial inequality resulting from the disparity in crack and powder cocaine sentencing in her instructions to counsel on how to argue to sentencing courts for shorter sentences for crack offenders.¹⁰⁵ The bulk of her suggestions are based on pointing out to courts the racial disparities that result from the harsh crack sentences available.¹⁰⁶ In other words, she encourages counsel to ask sentencing judges to do what the Equal Protection Clause has been held not to do—find that disparate crack/cocaine sentencing is unfair. Though the inequality claims made by Sklansky, Shein, and others who have argued against the crack/cocaine sentencing disparity are factually valid, the framework for these arguments miss an opportunity to criticize the use of cocaine sentencing as a sentencing foundation for crack sentencing at all. While the equality-themed approach raises important concerns, by not arguing that cocaine sentencing is altogether purposeless, reformers are limiting reform possibilities. Instead, their equality-themed approach set the stage for judges to also use such limited reasoning in deciding to correct the sentencing disparity on their own.

In 2007, the Supreme Court explicitly sanctioned this sort of judicial action in *Kimbrough v. United States* when it held that district courts “may consider the disparity between the Guidelines’ treatment of crack and powder cocaine offenses” in deciding how to sentence a defendant.¹⁰⁷ In that case, Petitioner Kimbrough pled guilty to several crack cocaine offenses as well as powder cocaine offenses and a firearm offense.¹⁰⁸ The district judge calculated the advisory Guidelines range, which was 228 to 270 months of imprisonment, but decided that a sentence in that range “would have been ‘greater than necessary’ to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553(a).”¹⁰⁹ Pursuant to the relevant parts of § 3553(a), sentencing courts shall consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment;
- (3) the kinds of sentences available;

¹⁰⁵ *See id.* at 18, 22–24.

¹⁰⁶ *See id.* at 22–23.

¹⁰⁷ 552 U.S. 85, 91 (2007).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 92–93. In the remedial opinion of *United States v. Booker*, the Supreme Court held that, though the Federal Sentencing Guidelines would be advisory, sentencing courts were still required to calculate and consider the applicable Guideline range. *See* 543 U.S. 220, 259–60 (2005). However, rather than taking that range as mandatory, sentencing judges were to impose a reasonable sentence that comports with the factors set out in 18 U.S.C. § 3553(a). *Id.*

- (4) the kinds of sentence and the sentencing range established for [the] offense;
- (5) any pertinent policy statement issued by the Sentencing Commission;
- (6) the need to avoid unwarranted sentence disparities; and
- (7) the need to provide restitution to victims.¹¹⁰

Ultimately, the district judge sentenced Kimbrough to the statutory minimum sentence of 15 years.¹¹¹ In deciding to do so, the judge explained that the case demonstrated “the ‘disproportionate and unjust effect that crack cocaine guidelines have in sentencing.’”¹¹² The court discussed the sentencing range that would have applied if the crack offenses had involved an equivalent amount of powder cocaine—97 to 106 months—and decided upon the defendant’s sentence with that in mind.¹¹³ Upon review, the Fourth Circuit vacated the sentence, holding that “a sentence ‘outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.’”¹¹⁴ The Supreme Court, however, disagreed with the Fourth Circuit. After a discussion of the history and development of the cocaine sentencing Guidelines, the Supreme Court stated:

The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of “empirical data and national experience.” Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, i.e., sentences for crack cocaine offenses “greater than necessary” in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence “greater than necessary” to achieve § 3553(a)’s purposes, even in a mine-run case.¹¹⁵

Whether wittingly or not, the Supreme Court opened the door for advocates to argue that sentencing judges should regularly depart from

¹¹⁰ See 18 U.S.C. § 3553 (2006).

¹¹¹ *Kimbrough*, 552 U.S. at 93.

¹¹² *Id.* (quoting Joint Appendix at 72, *Kimbrough*, 552 U.S. 85 (No. 06-6330), 2007 WL 2219925).

¹¹³ *Id.*

¹¹⁴ *Id.* (quoting *United States v. Kimbrough*, 174 F. App’x 798, 799 (2006)).

¹¹⁵ *Id.* at 109–10 (citations omitted) (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

the now-advisory Guidelines in crack cocaine cases. Sentencing judges followed suit, usually basing their decision in racial inequality arguments.

The years following *Booker* have seen an increase in the number of district judges who are willing to flex their discretionary muscle and impose reduced sentences for crack offenders.¹¹⁶ However, as mentioned, these courts still use cocaine sentences as the benchmark, often falling back on equality-themed reasoning for doing so. For instance, in the 2005 case *United States v. Smith*, Judge Lynn Adelman in the Eastern District of Wisconsin explained that “courts, commentators and the Sentencing Commission have long criticized this disparity [between crack and powder cocaine sentencing], which lacks persuasive penological or scientific justification, and creates a racially disparate impact in federal sentencing.”¹¹⁷ After discussing the racial disparity and a host of other problems with the crack cocaine sentencing scheme,¹¹⁸ Judge Adelman wrote, “In the present case, I concluded that adherence to the guidelines would result in a sentence greater than necessary and would also create unwarranted disparity between defendants convicted of possessing powder cocaine and defendants convicted of possessing crack cocaine.”¹¹⁹ The court

¹¹⁶ In its 2012 *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, the U.S. Sentencing Commission reported that “[i]n fiscal year 2010, the average sentence for crack cocaine trafficking offenders was 23.8 percent below the average guideline minimum.” U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING pt. A, at 66 (2012), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/index.cfm. “This was the largest percent difference between the average guideline minimum and the average sentence dating back to fiscal year 1996.” *Id.* However, in reference to the effect of the Fair Sentencing Act’s reduction of crack penalties overall, the Commission also noted that “[i]n contrast, the average sentence during 2011 was 22.3 percent below the average guideline minimum. The change is small, and it may be too soon to determine whether reduced penalties for crack cocaine trafficking offenses might bring average sentences closer to the guideline minimum.” *Id.*

¹¹⁷ 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005) (citing *United States v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995) (Boochever, J., concurring); *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring); *United States v. Clary*, 846 F.Supp. 768, 770 (E.D. Mo. 1994), *rev’d*, 34 F.3d 709 (8th Cir. 1994); *United States v. Patillo*, 817 F. Supp. 839, 840 (C.D. Cal. 1993); Sentencing Guidelines for United States Courts, 67 Fed. Reg. 2456, 2465 (Jan. 17, 2002); Douglas A. Berman, *Windows into Sentencing Policy and Practice*, 10 FED. SENT’G REP. 179, 179 (1998); Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines’ Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215, 215–19 (1994); Sklansky, *supra* note 88, at 1284).

¹¹⁸ In addition to racial disparity, Judge Adelman also discussed the lack of a deliberative process in passing the Anti-Drug Abuse Act of 1986; the resulting targeting of low-level street dealers, rather than the intended high-level dealers; the absence of violence or other aggravating conduct in the majority of crack cases; the fact that crack is neither more dangerous nor more addictive than powder cocaine; and the possibility for unethical police tactics that the distinction between powder and crack cocaine provides. *Smith*, 359 F. Supp. 2d at 778–80.

¹¹⁹ *Id.* at 781.

then turned to the question of what ratio to apply.¹²⁰ In making that decision, Judge Adelman relied on the Sentencing Commission's recommendation that, though the 100:1 ratio was inappropriate, crack offenses should still be sentenced more harshly than cocaine offenses.¹²¹ Following the powder-to-crack cocaine sentencing ratio that the Commission had proposed at that time, Judge Adelman adopted a 20:1 sentencing ratio.¹²² As a result, Defendant Smith, who pleaded guilty to possession with intent to distribute more than 50 grams of crack cocaine, received 18 months of incarceration instead of the 121 to 151 months called for by the Sentencing Guidelines.¹²³ In the 2009 case *Spears v. United States*, the Supreme Court reiterated its *Kimbrough* holding by clarifying that it is permissible for a sentencing judge to come up with his or her own sentencing ratio for cocaine offenses.¹²⁴ Thus, actions like Judge Adelman's were held to be completely legal.

Judge Adelman's decision was not an irrational one. He, like many others, recognized the racial injustice that crack sentencing provisions were creating. In his decision to impose a 20:1 ratio, the judge was understandably reliant upon the experts who had apparently done the research—the U.S. Sentencing Commission. Several other judges have chosen the same course.¹²⁵ However, because the focus has been on correcting racial inequalities rather than on the purposes of sentencing, few have questioned the wisdom of the Sentencing Commission's decision to set cocaine sentences as it has.

Some judges have insisted upon complete parity between crack and powder cocaine sentencing. Judge Mark W. Bennett in the Northern District of Iowa (the sentencing judge in *Spears*) has been one of the most eloquent examples of a judge adopting a 1:1 sentencing ratio based upon the need for racial equality. Judge Bennett first decided to implement a 1:1 sentencing ratio for crack and powder cocaine offenders in 2009, prior to the FSA.¹²⁶ He has maintained the commitment to that parity since

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 781–82.

¹²³ *Id.* at 772, 782.

¹²⁴ 555 U.S. 261, 265–67 (2009) (per curiam). As the Court explained in *Spears*, however, while a sentencing judge may impose her own sentencing ratio, she is still bound by the mandatory minimum sentencing laws for crack and powder cocaine offenses. *Id.*

¹²⁵ See *United States v. Perry*, 389 F. Supp. 2d 278, 307–08 (D.R.I. 2005) (adopting a 20:1 ratio); see also *United States v. Castillo*, No. 03 CR 835(RWS), 2007 WL 582749, at *6–8 (S.D.N.Y. Feb. 26, 2007) (adopting a 20:1 ratio); *United States v. Clay*, No. 2:03CR73, 2005 WL 1076243, at *5–6 (E.D. Tenn. May 6, 2005) (rejecting the 100:1 ratio).

¹²⁶ See *United States v. Gully*, 619 F. Supp. 2d 633, 646 (N.D. Iowa 2009). The Defendant pleaded guilty to one count of distributing less than five grams of crack cocaine and three counts of distributing less than five grams of crack within 1,000 feet of a public playground or school after having previously been convicted of a felony. *Id.* at 634. Judge Bennett sentenced the defendant to 84 months of

the FSA imposed the 18:1 ratio. In the 2011 case, *United States v. Williams*, Judge Bennett explained his reasoning for adopting the 1:1 ratio in the first place.¹²⁷ He clarified that he did it:

on policy grounds, for several reasons, not least of which were the failure of the Sentencing Commission to exercise its characteristic institutional role in developing the Guidelines, the lack of support for the assumptions that apparently motivated adoption of the ratio, and the disparate impact of the ratio on black offenders.¹²⁸

Though Judge Bennett acknowledged the racial inequality and cited it as one reason for concluding that parity was needed in crack and powder cocaine sentencing, he also expressed a disappointment with the lack of expert reasoning for settling upon the 18:1 ratio in the FSA. Judge Bennett explained:

When I first learned that the 2010 FSA was about to be passed, I just assumed that I would change my opinion from a 1:1 ratio to the new 18:1 ratio, because I assumed that Congress would have had persuasive evidence—or at least some empirical or other evidence—before it as the basis to adopt that new ratio. I likewise assumed that the Sentencing Commission would have brought its institutional expertise and empirical evidence to bear, both in advising Congress and in adopting crack cocaine Sentencing Guidelines based on the 18:1 ratio.¹²⁹

What is clear from Judge Bennett's opinion is that he decided upon a 1:1 ratio in part because he recognized the racialized consequences of the 100:1 ratio; and likewise, he understood that the new ratio imposed by the FSA was just as arbitrarily decided as the problematic 100:1 ratio. Judge Bennett's own words best describe his reasons for maintaining a 1:1 ratio:

I also concluded that the 100:1 ratio was a “remarkably blunt instrument” to address the perceived greater harms and dangers of crack cocaine, preferring to address those effects when they were present in a particular case. Therefore, I developed what I believed was a reasoned alternative methodology, under which the sentencing court would calculate the guideline range under existing law (i.e., using the 100:1 ratio and any appropriate guideline adjustments or departures), but then calculate an alternative guideline range using a 1:1 ratio, and ultimately use or vary from that alternative guideline range, depending upon the court's consideration of the 18 U.S.C. § 3553(a) factors, to account, for example, for the de-

incarceration instead of selecting a sentence within the 100:1 Guidelines range of 108–135 months. *Id.* at 645–46.

¹²⁷ 788 F. Supp. 2d 847, 891–92 (N.D. Iowa 2011).

¹²⁸ *Id.* at 853.

¹²⁹ *Id.* at 849–50.

fendant's history of violence, the presence of firearms, or the defendant's recidivism.¹³⁰

Though Judge Bennett's reasoning for holding to his previously decided 1:1 ratio was well thought out, it still relies on an equality-themed sentiment that powder cocaine ought to be the yardstick for sentencing crack cocaine, based upon the assumption that current powder cocaine sentencing is itself sound. Judges like Judge Bennett are attempting to undo the racial consequences of the cocaine sentencing disparity by equalizing the punishment. This is a noble cause; however, these judges still have to work within the existing sentencing laws. They are bound by mandatory minimum sentencing laws in most cocaine cases, and these mandatory laws use powder cocaine as the point of reference against which to measure the seriousness of crack cocaine offenses.¹³¹ Therefore, even if a judge wanted to totally reject cocaine as the benchmark against which to punish crack offenses, that judge would still be bound by the approach that Congress has taken in the Fair Sentencing Act, which measures crack against powder cocaine to set mandatory sentencing floors.

Because of the many obstacles erected, when it comes to sentencing, racial equality ought not be the motivation for reform, whether judicial or legislative. The legislative response will be slow and compromised. The judicial response has been mired in Equal Protection jurisprudence that often disregards statistics on racial disparities. Further, even individual judges who believe that crack penalties are too harsh are still compelled by mandatory minimum sentencing laws to use powder cocaine punishments as a measuring stick for crack sentencing. Rather than continuing to argue for sentencing parity and reaching undesirable results, reformers should stop implicitly accepting the reasonableness of cocaine sentencing law and policy and begin to question whether powder cocaine sentencing is effective at all in achieving any particular purpose. This can be done by pushing for Particular Purpose Sentencing.

III. PURPOSELESS COCAINE SENTENCING AND THE NEED FOR PARTICULAR PURPOSE SENTENCING

That sentencing ought to serve the desired purposes of punishment is the main lesson of the crack/powder cocaine debate, which should be refocused from a discussion about racial equality to one about Particular

¹³⁰ *Id.* at 853 (citation omitted) (quoting *Gully*, 619 F. Supp. 2d at 641).

¹³¹ *See* *United States v. Freemont*, 513 F.3d 884, 890 (8th Cir. 2008) ("Nothing in the reasoning of *Booker* expands the authority of a district court to sentence below a statutory minimum.") (quoting *United States v. Williams*, 474 F.3d 1130, 1132 (8th Cir. 2007)); *see also* *Kimbrough v. United States*, 552 U.S. 85, 104–05 (2007) ("If the 1986 Act does not require the Commission to adhere to the Act's method for determining LSD weights, it does not require the Commission—or, after *Booker*, sentencing courts—to adhere to the 100-to-1 ratio for crack cocaine quantities other than those that trigger the statutory mandatory minimum sentences.").

Purpose Sentencing. Attorney General Holder has argued that, “with an outsized, unnecessarily large prison population, we need to ensure that incarceration is used to punish, deter, and rehabilitate—not merely to warehouse and forget.”¹³² Evidence suggests that current federal cocaine sentencing laws are not adequately deterring cocaine crimes, rehabilitating offenders, incapacitating dangerous offenders, or reflecting community sensibilities of retribution. Further, the general utilitarian goal of reducing the cost of crimes is not being achieved because drug crimes have been contributing to the tremendous expense of mass incarceration. Therefore, calls for parity between crack and powder cocaine sentencing laws are missing the larger point—that cocaine sentencing laws, in general, are faulty and unprincipled. Therefore, it is “cracked” for reformers to argue for crack cocaine offenses to mirror the broken powder cocaine laws. While what follows is not an in-depth philosophical discussion of punishment theory, the subsequent sections are meant to raise questions regarding the soundness and effectiveness of cocaine sentencing laws and to reveal the problem with using powder cocaine as a sentencing benchmark for crack cocaine. Once it is acknowledged that cocaine sentencing is not serving any specific sentencing purpose, it will be more apparent that there is a need for Particular Purpose Sentencing.

A. *Retribution*

Retribution can be approached either in its deontological or its empirical form. While deontological retribution is attractive because it is informed by philosophical views on just desert and moral blameworthiness,¹³³ empirical retribution is testable. Empirical retribution focuses on the community’s view of blameworthiness and proportionality among offenses and offenders and can be studied through polls and surveys.¹³⁴ Legislators in some states have used these types of polls as fuel to propose

¹³² Holder Remarks, *supra* note 5.

¹³³ Deontological retribution focuses “on the blameworthiness of the offender, as drawn from the arguments and analyses of moral philosophy.” Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 148 (2008). This deontological approach to retribution comes from the work of Immanuel Kant. See generally IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* 100–02 (John Ladd trans., Macmillan Publ’g Co. 1965) (1797). For another traditional account of retribution, see G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 92–94 (S.W. Dyde trans., Batoche Books 2001) (1820). For a modern retributivist view, see Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001).

¹³⁴ Empirical retribution “focuses on the blameworthiness of the offender. But in determining the principles by which punishment is to be assessed, it looks not to philosophical analyses but rather to the community’s intuitions of justice.” Robinson, *supra* note 133, at 149; see also Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 217 (2012) (explaining “the crime-control benefits from distributing punishment according to people’s shared intuitions of justice”).

reform of their drug sentencing laws. For instance, a California legislator reintroduced a bill designed to reduce the punishment on low-level, non-violent drug offenders.¹³⁵ That reform was spurred by a statewide poll finding that 75% of Californians favored prevention and alternatives to jail for nonviolent offenders.¹³⁶ Similar studies have been conducted to test attitudes nationwide. Such polls have shown that federal drug sentencing is out of line with public sentiment in the Nation. In 2008, one poll reported that 60% of Americans disagreed with mandatory minimum sentencing laws.¹³⁷ The same is true for polls undertaken as recently as 2012. One survey of public sentiment in 2012 found that “[v]oters overwhelmingly support a variety of policy changes that shift non-violent offenders from prison to more effective, less expensive alternatives.”¹³⁸ Still, federal cocaine sentencing remains highly reliant on incarceration due to mandatory minimum sentencing laws, which is arguably out of line with empirical retribution.

B. Deterrence

Deterrence, like rehabilitation and incapacitation, is a utilitarian theory that is concerned with reducing the overall cost of crime.¹³⁹ Deterrence takes two forms—specific and general. The goal of specific deterrence is to “disincline individual offenders from repeating the same or other criminal acts.”¹⁴⁰ General deterrence seeks to dissuade others in society from engaging in similar conduct.¹⁴¹ Because there has not been a focus on sentencing purpose, it is unclear whether cocaine sentencing laws have been effective in achieving either aspect of deterrence. Thus, it is unclear whether cocaine sentencing laws should be adhered to or altered. What is clear, however, is that, if deterrence is the goal of cocaine sentencing, a focus on that particular purpose is needed in order to assess whether sentencing for crack and powder cocaine is appropriate.

¹³⁵ For reference to Senator Mark Leno’s proposed legislation, SB 649, see Press Release, Sen. Mark Leno, Leno Bill Implements New Drug Sentencing Reforms for California (Feb. 27, 2013), <http://sd11.senate.ca.gov/news/2013-02-27-leno-bill-implements-new-drug-sentencing-reforms-california>.

¹³⁶ *New CA Statewide Poll Results on Criminal Justice Issues*, TULCHIN RESEARCH (Sept. 28, 2012), <http://www.tulchinresearch.com/2012/09/28/new-ca-statewide-poll-results-on-criminal-justice-issues/>.

¹³⁷ See Amanda Paulson, *Most Americans Oppose Mandatory Minimum Sentences*, *Poll Says*, CHRISTIAN SCIENCE MONITOR, Sept. 25, 2008, at 2.

¹³⁸ PEW CTR. ON THE STATES, PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA 1, 3 (2012), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/PEW_NationalSurveyResearchPaper_FINAL.pdf.

¹³⁹ Though by “cost” theorists are usually referring to social costs, one could consider the economic costs of crime commission as well.

¹⁴⁰ ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 2:2, at 25 (2d ed. 1991).

¹⁴¹ See *id.*

1. *General Deterrence*

If cocaine sentencing were fulfilling the goal of general deterrence, we would expect to see a decline in cocaine offenses that corresponds to the period of harsh, mandatory minimum sentencing from 1986 to present. One way to measure whether this has happened is by studying the rates of cocaine use, which may indicate whether cocaine trafficking and sales are continuing or slowing down. It is true that cocaine use in the United States has been declining, but it is unclear whether this decline has anything to do with sentencing law.¹⁴² It has been estimated that in 1982—before the enactment of the Anti-Drug Abuse Act of 1986—there were approximately 10.5 million people in the United States that had used cocaine.¹⁴³ Reports put this number at 5.3 million by 2008.¹⁴⁴ Most of this decrease in use has happened since 2006, well after the imposition of the 1986 Drug Act’s mandatory minimum sentencing scheme.¹⁴⁵ According to the United Nations Office on Drugs and Crime (UNODC), in 2006, “2.5% of the US populations aged 12 and above was estimated to have used cocaine in the previous year. This figure dropped to 2.3% in 2007 and 2.1% in 2008.”¹⁴⁶ While these declines are encouraging, they do not correspond to any changes in cocaine sentencing law. The UNODC says that the “long-term decline in cocaine use in the USA over the 1985–2009 period has been attributed to a number of causes, including ‘social learning’ leading to a decline in demand.”¹⁴⁷ The more dramatic decline since 2006 has been attributed to “a severe cocaine shortage, reflected in rapidly falling purity levels and a consequent rise in the cost per unit of pure cocaine, doubling over the 2006–2009 period.”¹⁴⁸ This decline, while law enforcement related, seems to have little to nothing to do with penalties for cocaine trafficking offenses. Instead, the UNODC reports that, “in 2007, 5 of the 20 largest individual cocaine seizures ever made were rec-

¹⁴² Several studies and reports note this decline. See Press Release, U.S. Dep’t of Health & Human Serv., Substance Abuse & Mental Health Serv. Admin., New National Survey Reveals Cocaine, Methamphetamine Use Drop Among Young Adults; Prescription Drug Abuse Increases (Sept. 4, 2008), available at <http://www.oregon.gov/oha/amh/legislative-info/bill-info/natsurvey-cocaine-meth.pdf>; see also *Results from the 2011 National Survey on Drug Use and Health: Detailed Tables*, SUBSTANCE ABUSE & MENTAL HEALTH SER. ADMIN., <http://www.samhsa.gov/data/NSDUH/2011SummNatFindDetTables/NSDUH-DetTabsPDFWHTML2011/2k11DetailedTabs/Web/HTML/NSDUH-DetTabsSectIpeTabsIto46-2011.htm>.

¹⁴³ UN OFFICE ON DRUGS & CRIME, *THE GLOBALIZATION OF CRIME* 86 (2010), available at <http://www.unodc.org/documents/data-and-analysis/tocta/4.Cocaine.pdf>.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* This supply decline was also given as a reason for declined cocaine use in the National Drug Threat Assessment. U.S. DEP’T OF JUSTICE, NAT’L DRUG INTELLIGENCE CTR., NATIONAL DRUG THREAT ASSESSMENT 24 (2011), available at <http://www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf>.

orded,” causing large-scale disruption to the cocaine supply.¹⁴⁹ Additionally, there were declines in the production of cocaine in Colombia, which also may have contributed to the market effects in the United States.¹⁵⁰

Even if lengthy sentences for cocaine offenders had anything to do with deterring the sale of cocaine, we certainly have not won (nor are we in the process of winning) any drug war. As far as public perception is concerned, general deterrence goals are not being met. In January 2013, the Huffington Post reported that “53 percent of Americans say that the war on drugs has not been worth the costs, while only 19 percent say it has been. Another 28 percent are not sure.”¹⁵¹ This perceived failure to reduce the cost of crime by deterring drug offenses was also reflected in the August 2013 Rasmussen Reports national survey, which found that “[j]ust four percent (4%) of American Adults believe the United States is winning the war on drugs Eighty-two percent (82%) disagree. Another 13% are undecided.”¹⁵² However, one does not have to rely on public opinion surveys to conclude that drug sentencing generally, and cocaine sentencing specifically, is failing to deter cocaine crimes. The U.S. Department of Justice has issued reports that support the same conclusion.

The 2009 National Drug Threat Assessment issued by the U.S. Department of Justice’s National Drug Intelligence Center relayed that “[c]ocaine trafficking is the leading drug threat to the United States.”¹⁵³ Further, studies show that the United States is “the single largest national cocaine market in the world.”¹⁵⁴ The 2011 National Drug Threat Assessment reported that, though availability has diminished, “[c]ocaine is widely available throughout the country.”¹⁵⁵ Interestingly, on June 15, 2012, the National Drug Intelligence Center closed, and there are no longer any annual drug threat assessments issued, further stifling the prospect of measuring the deterrent effect of federal cocaine sentencing laws.¹⁵⁶ Arguably, then, if general deterrence is our goal, there is more

¹⁴⁹ UN OFFICE ON DRUGS & CRIME, *supra* note 143, at 86.

¹⁵⁰ *Id.*

¹⁵¹ Emily Swanson, *War on Drugs Has Not Been Worth the Costs: Poll*, HUFFINGTON POST (Jan. 18, 2013), http://www.huffingtonpost.com/2013/01/18/war-on-drugs-costs-poll_n_2504162.html.

¹⁵² *82% Say U.S. Not Winning War on Drugs*, RASMUSSEN REPORTS (Aug. 18, 2013), http://www.rasmussenreports.com/public_content/politics/general_politics/august_2013/82_say_u_s_not_winning_war_on_drugs.

¹⁵³ U.S. DEP’T OF JUSTICE, NAT’L DRUG INTELLIGENCE CTR., NATIONAL DRUG THREAT ASSESSMENT I (2009), <http://www.justice.gov/archive/ndic/pubs31/31379/31379p.pdf>.

¹⁵⁴ UN OFFICE ON DRUGS & CRIME, *supra* note 143, at 86.

¹⁵⁵ U.S. DEP’T OF JUSTICE, *supra* note 148, at 24.

¹⁵⁶ *See* National Drug Intelligence Center, U.S. DEP’T OF JUSTICE ARCHIVES, <http://www.justice.gov/archive/ndic/>.

work to do to study the most effective type and amount of punishment for cocaine offenses.¹⁵⁷

2. *Specific Deterrence*

Because specific deterrence deals with punishing one offender so that he or she will not commit the same crime again, recidivism rates may be the most telling in measuring the effectiveness of sentencing law. Though recidivism rates often fail to tell us whether a specific offender has reoffended, and instead tell us about a class of offenders as a whole, the numbers are still useful in giving an idea of how often offenders are returning to prison. The success of rehabilitation can also be assessed through the same recidivism rates, and therefore such rates will be discussed in the following rehabilitation section.

C. *Rehabilitation*

Rehabilitation seeks to impart to “the offender proper values and attitudes, by bolstering his respect for self and institutions.”¹⁵⁸ The idea is that, once punished, the offender will be reformed and will no longer commit criminal offenses. Much of the cocaine recidivism research focuses primarily on crack cocaine. In 2011, the U.S. Sentencing Commission reported that there was no evidence that the retroactive application of the 2007 Sentencing Guidelines Amendments reducing the punishment for crack cocaine had any effect on recidivism rates.¹⁵⁹ As the Commission explained, “the purpose of [the] study was to determine whether the reduction in prison sentences for offenders made pursuant to the retroactive application of the [Guidelines Amendments] had an impact on the recidivism rate for those offenders.”¹⁶⁰ The recidivism rates of the crack offenders receiving the shorter sentences were compared to crack offenders released from prison before the effective date of the Amendment. Ultimately, the Commission found no evidence suggesting that shorter sentences increased recidivism.¹⁶¹ In other words, offenders serving a shorter time in prison were not any less rehabilitated than those serving longer sentences under the older law. While this finding does not prove that sentence length does not affect the rehabilitative outcomes of imprisonment, it certainly raises the question of whether there is in fact a

¹⁵⁷ There is now an Office of National Drug Control Policy; however it focuses on a few drug abuse priorities and does not issue an annual drug threat assessment. *See About ONDCP*, OFFICE OF NAT’L DRUG CONTROL POLICY, <http://www.whitehouse.gov/ondcp/about>.

¹⁵⁸ 1 WHARTON’S CRIMINAL LAW § 4, at 18 (Charles E. Torcia ed., 15th ed. 1993).

¹⁵⁹ Memorandum on Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment to U.S. Sentencing Comm’rs 2 (May 31, 2011), *available at* http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

¹⁶⁰ *Id.* at 3.

¹⁶¹ *Id.* at 11.

connection between relatively long, mandatory sentence lengths—as in the cocaine context—and rates of reoffending.

Marc Mauer, the Executive Director of the Sentencing Project, touched on this point in his June 2007 testimony at a hearing before the Congressional Subcommittee on Crime, Terrorism, and Homeland Security.¹⁶² When asked whether mandatory minimum sentencing laws have any effect on recidivism rates, Mr. Mauer answered:

No, there is no evidence that shows that. And keeping people in prison longer does not reduce recidivism. People are going to make it or not make it based on their family and community support when they get out and what we do that is constructive in prison, but mandatory sentencing has no effect. And, if anything, one can argue that it is counterproductive. In States where you have a chance to earn some good time or parole release, there may be some incentive built in to participate in programming in prison which is taken away when you have a mandatory sentence.¹⁶³

Mauer's comments raise the bigger issue of whether imprisonment is an effective tool in decreasing recidivism at all. In a 1999 study, scholars at the Centre for Criminal Justice Studies, University of New Brunswick and the Department of Criminal Justice, University of Cincinnati, found that there is no evidence that longer incarceration reduces recidivism.¹⁶⁴ In fact, the study suggests that longer incarceration, compared to community supervision, may actually increase the likelihood that an offender will reoffend.¹⁶⁵ All in all, while the exact effect of cocaine sentencing lengths on cocaine offender recidivism is unclear, what is apparent is that there is no evidence plainly supporting that cocaine sentencing—or imprisonment in general—has any effect on recidivism rates. Until such a connection is made, it cannot be argued persuasively that cocaine sentencing fulfills the goal of either specific deterrence or rehabilitation.

D. *Incapacitation*

The goal of incapacitation is for “offenders [to be] rendered physically incapable of committing crime.”¹⁶⁶ Given the high rates of imprisonment for cocaine offenders, one might argue that incapacitation is the only theory of punishment that cocaine sentencing is actually fulfilling. However, where incapacitation is the sentencing purpose, the length of incarceration is measured by the dangerousness of the offender—with more serious offenders being incarcerated, and thus removed from socie-

¹⁶² *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 114, 142–43 (2007) (statement of Marc Mauer, Exec. Dir., The Sentencing Project).

¹⁶³ *Id.*

¹⁶⁴ PAUL GENDREAU ET AL., *THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM* (1999), available at <http://www.prisonpolicy.org/scans/e199912.htm>.

¹⁶⁵ *See id.*

¹⁶⁶ CAMPBELL, *supra* note 140, § 2:3, at 28.

ty, for a longer period of time than less serious offenders.¹⁶⁷ There is evidence that cocaine sentencing is not doing this well at all. In the previously mentioned Eastern District of Wisconsin case, *United States v. Smith*, Judge Adelman made this point with regard to crack cocaine specifically when he explained that the Sentencing Commission has found that two-thirds of crack cocaine defendants are “street level dealers” rather than “serious drug traffickers.”¹⁶⁸ Recently, Judge Weinstein made a similar point in another of his sentencing opinions that thoroughly addresses purposes of punishment. In his 2011 opinion in *United States v. Bannister*, he wrote:

[The Fair Sentencing Act of 2010] did nothing to remove the sentencing regime’s dependence on arbitrary drug quantities—not just with regard to crack cocaine but other drugs as well—that bear little relationship to the harm a defendant has done to society or to the danger of his inflicting further harm. Harsh, disproportionate mandatory sentences impose grave costs not only on the punished but on the moral credibility upon which our system of criminal justice depends. Such sentences, aimed at the drug trade’s lowest levels of labor, appear to have no effect on illegal drugs’ price or availability.¹⁶⁹

Judge Weinstein’s comments question whether cocaine sentencing is actually achieving the goal of incapacitating the most serious offenders. In 2010, the Sentencing Project echoed these concerns when it reported:

Even with an increased quantity threshold of 280 grams of crack cocaine to trigger the 10-year mandatory designed for major traffickers, the sentencing structure falls short. Because mandatory minimum sentences are focused solely on quantities, defendants with different levels of culpability are often lumped together and low-level offenders have been and will continue to be subject to severe prison terms.¹⁷⁰

As all of these comments indicate, when incapacitation is considered, along with deterrence, rehabilitation, and retribution, we should have serious doubts as to the purpose that cocaine sentencing is fulfilling. This is because there has not been a focus on any particular sentencing purpose. It is this important fact that calls for sentencing equality overshadow. One could argue that sentencing equality and fulfilling sentencing purposes are two goals that can work hand in hand. In other words, reform-

¹⁶⁷ See ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 5–7 (1985).

¹⁶⁸ *United States v. Smith*, 359 F. Supp. 2d 771, 778 (E.D. Wis. 2005) (citing Diana Murphy, *Statement to Senate Judiciary Committee, May 22, 2002*, reprinted in 14 FED. SENT’G REP. 236, 237 (Nov./Dec. 2001–Jan./Feb. 2002)); see also *Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. 14 (2002) (statement of Hon. Diana E. Murphy, Chair, U.S. Sentencing Comm’n).

¹⁶⁹ 786 F. Supp. 2d 617, 689 (E.D.N.Y. 2011) (citation omitted).

¹⁷⁰ THE SENTENCING PROJECT, *supra* note 1, at 3.

ers can push for sentencing equality, while at the same time questioning the purpose of cocaine sentencing laws. However, when the nature of equality is further explored, it becomes clearer that equivalent sentencing will result in an unsatisfying end. Consequently, Particular Purpose Sentencing provides a better mechanism for moving toward truly fair sentencing.

IV. SENTENCING IS DIFFERENT: THE FUNDAMENTAL PROBLEM WITH SENTENCING EQUALITY

While racial inequality in sentencing is real, the crack and powder cocaine debate that has been ongoing for decades illustrates the limits of sentencing equality. The problem with advocating for racial equality in sentencing is not that sentencing is already equal and just. It certainly is not. The difficulty is that equality as a concept, especially when measured through equalized sentences, is an ineffective sentencing goal. That is why Particular Purpose Sentencing should be pursued instead. Sentencing reformers have been asking for parity in sentencing and justifying such parity by arguing that it is necessary to achieve racial equality. However, even if parity in cocaine sentencing were achieved (and it has been in some states),¹⁷¹ the sort of racial equality in sentencing that would result does not have the same power as it arguably does in other equality-driven contexts. In her work, Professor Martha Fineman explained that equality must have context to have meaning.¹⁷² She writes:

One could argue that concepts such as equality require constant mediation between articulated values and current realities. In trying to understand the current contexts that shape our expectations for equality, we must be attentive to evolutions in our concepts and understandings of what we consider “just” and “fair.” Our views on justice should be evolving as societal knowledge, realizations, aspirations, and circumstances change.¹⁷³

The equality-themed advocates have, perhaps, adopted this thinking by arguing that equivalent crack/powder cocaine sentencing is necessary for sentencing to be “just” and “fair.” In some ways, this Article, too, endorses Professor Fineman’s context approach. Indeed, the arguments made in this Article are meant to present Fineman’s sentiment that “our views on justice should be evolving.” When it comes to sentencing, our views should evolve from a pre-occupation with sentencing equivalence to one about sentencing purpose in our quest for fair and just sentencing laws. To play on Professor Fineman’s words, as we gain more “societal knowledge” about the failures of cocaine sentencing laws, we should

¹⁷¹ Ohio is an example of a state that has reformed its laws to reflect a 1:1 ratio for crack and powder cocaine offenses. See OHIO REV. CODE ANN. § 2925.11 (West 2013).

¹⁷² Martha Albertson Fineman, *The Social Foundations of Law*, 54 EMORY L.J. (SPECIAL ED.) 201, 211–12 (2005).

¹⁷³ *Id.* at 211 (footnotes omitted).

come to the “realization” that our “aspirations” must be altered in order to see a real “circumstance change.” Until there is a focus on sentencing purpose, even the achievement of sentencing equivalence will be unfulfilling.

Professor Marc Miller also draws upon Martha Fineman’s work. In considering the context necessary to give weight to sentencing equality, he observed that “[a] system that embraces formal outcome inequality, or embraces only a rough equality of process, is ripe for an equality-based challenge.”¹⁷⁴ Equality-themed advocates seem to have agreed with this point as well by bringing equality based challenges against the federal sentencing scheme that has certainly resulted in outcome inequality. However, as revealed by Part II, there are limits to the successfulness of equality-based challenges to cocaine sentencing both before courts and Congress. Professor Miller similarly questions this goal of outcome equality and goes on to claim that “Congress did not limit conceptions of equality to formal outcome equality” when it passed the Sentencing Reform Act (SRA) ordering the Sentencing Commission to create the Sentencing Guidelines.¹⁷⁵ As Professor Miller explained, the SRA was not intended to “mandate the context free federal sentencing system that has developed.”¹⁷⁶ Miller concludes that the context needed to make equality a meaningful concept in sentencing can be achieved through “Reality. Practicality. Purpose.”¹⁷⁷ On the issue of purpose, Miller makes the point, as this Article has, that the Sentencing Commission failed to carry out the task given to them by Congress—to “assess the purposes to be served by different rules and sentences.”¹⁷⁸ Despite acknowledging the purposelessness of federal sentencing, Professor Miller still ultimately accepts equality as a worthwhile goal. Specifically, he states:

Perhaps equality has become either so narrowly constrained or so meaninglessly abstract that the concept has lost its charm, and the task of legal and policy leaders should be to find new concepts and terms that address different circumstances and opportunities. This is not where my reflections on sentencing take me Thus, the general answer to the obsession with formal outcome equality in sentencing should be to reveal the many contexts underlying and surrounding sentencing decisions.¹⁷⁹

While, like Miller, this Article criticizes the preoccupation with sentence outcome equality and touts that purpose is important in sentencing, this Article takes a different view on the context of sentencing, which is that sentencing is simply different. It does not provide the sort of context in which equality has meaning and value in the traditional sense.

¹⁷⁴ Miller, *supra* note 6, at 272.

¹⁷⁵ *Id.* at 281.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 287.

¹⁷⁸ *Id.* at 278.

¹⁷⁹ *Id.* at 284–85.

Equalized sentencing will not lead to reasoned outcomes as equality may do in other contexts. And, in that sense, equality has indeed “lost its charm.” This is mostly due to the unique nature of sentencing determinations. Because of the manner in which sentencing decisions are made, the context of cocaine crimes and law enforcement strategies in dealing with them, equalized sentencing laws may still result in racial disparate sentencing outcomes, making calls for equality an empty endeavor.

A. *Individualization and the Unique Nature of Sentencing Decisions*

Much of the difference between equality in the sentencing context and in other contexts is that the measurement of what is the “fair” and “just” treatment in sentencing is intimately tied to purpose. This Article maintains that a sentence cannot be a correct sentence unless it achieves some identified goal of sentencing. In other contexts, such as the workplace, what is right and just is measured by market standards and employment expectations. We can gauge the “right” salary by looking to what others in the same field or same position are earning. While salaries may be “commensurate with experience,” the measure of what salary levels are appropriate for which levels of experience is dependent upon others in the same company with the same experience or those in like industries with similar levels of experience. Therefore, an employee knows if she is getting an unfair or unjust salary if hers is out of line with other similarly situated employees in the marketplace. In other words, equality in salary outcome is based on a measurement of the right or fair salary.¹⁸⁰

This concept of treating “similarly situated” people similarly has been used in the sentencing context as well. The Federal Sentencing Guidelines explain that, in calling for their creation, “Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.”¹⁸¹ This understanding of uniformity, though, does not alone result in the correct sentence, the way the correct salary can be indicated by salary equivalence. Uniformity in the sentencing context means that, when we look at sentencing outcomes, offenders with the same criminal history, convicted of the same offenses, with the same offense characteristics are receiving the same type and length of sentences.¹⁸² This could be

¹⁸⁰ This view of equality is apparent in the Equal Pay Act which requires equal pay “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions” regardless of their sex. 29 U.S.C. § 206 (2006).

¹⁸¹ 2012 U.S. SENTENCING GUIDELINES § 1.A1.3 (2009).

¹⁸² Jelani Jefferson Exum, *Why March to a Uniform Beat? Adding Honesty and Proportionality to the Tune of Federal Sentencing*, 15 TEX. J. C.L. & C.R. 141, 143 (2010) (“Uniformity means that punishment is based on an offender’s real conduct and that similar offenders who have committed similar conduct receive the same punishment.”) (citing *United States v. Booker*, 543 U.S. 220, 250 (2005)) (“Congress’

achieved in a variety of ways that clearly would not lead to the “right” sentence or “just” sentencing. For instance, uniformity could easily be achieved by imposing the same sentence for all offenses—a conviction for murder, rape, theft, fraud, and any other offense would all receive a sentence of ten years in prison (or, choose any other sentence you like). We do not do this for several reasons. One reason is the concept of proportionality, which calls for punishment that tracks a grading of offenders and offenses.¹⁸³ Related to proportionality is the parsimony principle, which says that sentences should not be longer than necessary to receive a just result.¹⁸⁴ In the Sentencing Reform Act of 1984, which called for the creation of sentencing guidelines, Congress incorporated the parsimony principle by stating that courts “shall impose a sentence sufficient, but not greater than necessary,” to comply with the purposes of criminal sanctions.¹⁸⁵ Therefore, considering the previous example, it may take more than ten years in prison for a murder conviction to satisfy deterrence, rehabilitation, adequate incapacitation, and certainly appropriate retribution.¹⁸⁶ Likewise, 10 years in prison may be too long for other, less serious offenses such as minor theft. Many would agree that this sort of sentencing equality—absolute equality in sentencing outcomes—is out of step with notions of justice and fairness.¹⁸⁷ This is because, across offenses, not all of these offenders truly are similarly situated because they have created different types of harms.

If the focus is placed on offense similarity, uniformity in sentencing could be achieved by sentencing everyone convicted of the same offense to the same sentence. All murderers could receive life in prison, every bank robber would receive 15 years of incarceration, and each tax evader would receive 5 years behind bars. This method of achieving sentencing equality, though, is inconsistent with individualization, which has been and continues to be a foundational principle of sentencing due process in the United States. In 1932, the Supreme Court stressed the im-

basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.”).

¹⁸³ However, as the Supreme Court explained in *Harmelin v. Michigan*, “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” 501 U.S. 957, 1001 (1991) (citing *Solem v. Helm*, 463 U.S. 277, 288 (1983)).

¹⁸⁴ See George L. Blum, Annotation, *Construction and Application of “Parsimony Clause” of 18 U.S.C.A. § 3553(a), Providing That District Court Shall Impose Sentence Sufficient, But Not Greater than Necessary, to Comply with § 3553(a)(2)*, 38 A.L.R. FED. 2d 147, 159 (2009) (explaining the ways that the parsimony clause of the 18 U.S.C. § 3553(a) has been interpreted).

¹⁸⁵ 18 U.S.C. § 3553(a).

¹⁸⁶ Of course, when talking about both proportionality and the parsimony principle, one is faced with the reality that nothing about “just” sentencing makes sense without a focus on sentencing purposes.

¹⁸⁷ Professor Marc Miller agrees, stating that “[a]bsolute apparent equality can be demonstrably unjust.” Miller, *supra* note 6, at 275.

portance of individualization when it stated, “It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.”¹⁸⁸ The 1949 case *Williams v. New York* has become known for solidifying the place of individualized sentencing in this Nation.¹⁸⁹ In *Williams*, the Supreme Court explained that “modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.”¹⁹⁰ The *Williams* Court explained that sentencing individualization means that “[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.”¹⁹¹ In focusing on the possible differences among offenders, the Court stated, “Today’s philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders.”¹⁹² Today the Supreme Court continues to uphold the principles expressed in *Williams*.

In a 2011 case, *Pepper v. United States*, the Court explained that it was proper for a district court to consider evidence of a defendant’s post-sentencing rehabilitation at resentencing and to decide to depart from the Guidelines range as a result.¹⁹³ Quoting *Williams*, the *Pepper* Court specified that the Supreme Court “has long recognized that sentencing judges ‘exercise a wide discretion’ in the types of evidence they may consider when imposing sentence and that ‘[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.’”¹⁹⁴ The Court asserted that *Williams* stands for the still-recognized “principle that ‘the punishment should fit the offender and not merely the crime.’”¹⁹⁵ The Supreme Court has maintained that “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings.”¹⁹⁶

Ultimately then, American sentencing practice always allows for a distinction among individuals and punishes those individuals based on discrete characteristics. The Supreme Court has even said that “justice

¹⁸⁸ *Burns v. United States*, 287 U.S. 216, 220 (1932).

¹⁸⁹ 337 U.S. 241, 247 (1949).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 248.

¹⁹³ 131 S. Ct. 1229, 1236 (2011).

¹⁹⁴ *Id.* at 1235 (quoting *Williams*, 337 U.S. at 247).

¹⁹⁵ *Id.* at 1240 (quoting *Williams*, 337 U.S. at 247).

¹⁹⁶ *Id.* at 1239–40 (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)).

generally requires” such individualization.¹⁹⁷ Individualization is, of course, the crux of indeterminate sentencing systems.¹⁹⁸ However, even in more determinate sentencing schemes, such as the federal sentencing approach, the individualization requirement is built in to the sentencing determination process.¹⁹⁹ Apart from the aggravating and mitigating factors delineated in the Guidelines,²⁰⁰ judges are able to select a sentence from a narrow sentencing range based on their assessment of the individual offender and the particularities of the offense. Today, with the Guidelines being advisory, sentencing judges are even more able to individualize punishment as they decide to impose sentences below or above the applicable Guidelines range. In fact, this is what § 3553(a) tells judges to do—to consider the “nature and circumstances of the offense and the history and characteristics of the defendant.”²⁰¹ The individualization rule is also codified in 18 U.S.C. § 3661, which states that “no limitation shall be placed on the information concerning the [defendant’s] background, character, and conduct.”²⁰² All of this is all to say that whatever the sentencing approach—determinate, indeterminate, or something in between—sentencing individualization is required. With individualization comes discrepancy as different judges (or in some cases, parole boards) make different decisions about the relevance of various aspects of the offenders’ characteristics. This means that the sentencing determination process never applies equally—or exactly the same—to any two offenders, even if they have been convicted of the same offense. Given this reality, the individualization aspect of sentencing means that even if crack and powder cocaine sentences were equalized there still may not necessarily be racially equal sentencing outcomes.

¹⁹⁷ *Id.* at 1240 (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)).

¹⁹⁸ See Kate Stith, *Principles, Pragmatism, and Politics: The Evolution of Washington State’s Sentencing Guidelines*, 76 LAW & CONTEMP. PROBS. 105, 108 (2013) (“In a system of ‘indeterminate sentencing,’ a defendant’s release date is not set by the sentencing judge, but by the parole board. Because indeterminate sentencing allows state officials to make individualized determinations about a defendant’s potential for rehabilitation—and to adjust that determination in light of the defendant’s subsequent progress—this approach is tied both philosophically and historically to a commitment to rehabilitation as one of the goals of punishment.”).

¹⁹⁹ Senators Orrin G. Hatch, Edward Kennedy, and Diane Feinstein explained in their amicus curiae brief in *Booker* that the presumptive Federal Sentencing Guidelines “offered a middle-ground approach between sticking with the failed indeterminate system of sentencing and adopting a rigid system of determinate sentencing, in which Congress specified applicable sentences for federal offenses and judges simply imposed sentence without any individualized consideration of the offender or his criminal conduct.” Brief for the Honorable Orrin G. Hatch et al. as Amici Curiae in Support of Petitioner, *United States v. Booker*, 543 U.S. 220 (2005) (No. 04-104), 2004 WL 1950640, at *4-5.

²⁰⁰ See 2012 U.S. SENTENCING GUIDELINES ch. 3. Though mitigating factors are listed in this chapter, most of the adjustments allowed for by the Guidelines are aggravating factors.

²⁰¹ 18 U.S.C. § 3553(a)(1) (2006).

²⁰² *Id.* § 3661.

B. Equal Sentences May Still Yield Racially Disparate Results

In the crack cocaine context, though relevant sentencing factors should not include race,²⁰³ there may be other factors more associated with crack cocaine offenses or with powder cocaine offenses that may still lead to lengthier sentences for certain racial groups, even in a 1:1 ratio world. Once sentences are individualized, aggravating factors such as the role in the offense,²⁰⁴ use of violence,²⁰⁵ and presence of firearms²⁰⁶ may all tend to be more prevalent in crack prosecutions (though perhaps not in the reality of crack offenses) because of the focus of law enforcement and crack sales being street sales that are more open to detection.²⁰⁷ This is even if, in reality, the same factors are present in most powder cocaine transactions, because those factors may be less detectable in the powder cocaine context.²⁰⁸ Due to factors like these, individualization of sentences makes sentencing equality a difficult, if not impossible, goal to attain.

Even if automatic, non-discretionary sentencing were imposed, if those sentences are not achieving the purposes of sentencing, then minority communities will continue to carry the burden of irrational sentencing policies that are largely facilitated by unequal law enforcement and prosecution tactics.²⁰⁹ A large part of the racial disparities in sentenc-

²⁰³ 28 U.S.C. § 994 (2006) mandates that the Sentencing Commission “assure that the guidelines and policy statements are entirely neutral as to the race” of the offender.

²⁰⁴ See 2012 U.S. SENTENCING GUIDELINES § 3B1.1 (Aggravating Role) and § 3B1.2 (Mitigating Role).

²⁰⁵ See *id.* § 2D1.1(b)(2) (listing the use of violence as a specific offense characteristic that adds to the base offense level for drug offenses).

²⁰⁶ See *id.* § 2D1.1(b)(1) (listing the use of a firearm as a specific offense characteristic that adds to the base offense level for drug offenses).

²⁰⁷ The Sentencing Project reports that the “[Sentencing] Commission concluded that the violence associated with crack is primarily related to the drug trade and not to the effects of the drug itself, and that both powder and crack cocaine cause distribution-related violence, as do all drug markets,” and that “the frequency with which weapons are ‘accessible, possessed, or used by the offender’ is extremely low, 0.8% of powder cases and 2.9% of crack cases.” THE SENTENCING PROJECT, *supra* note 1, at 6 (quoting 2007 U.S. SENTENCING COMM’N REPORT, *supra* note 27, at 33); see also *United States v. Smith*, 359 F. Supp. 2d 771, 779 (E.D. Wis. 2005) (“Second, although legislators may have believed that crack was associated with other harmful conduct, Commission data indicate that ‘aggravating conduct occurs in only a small minority of crack cocaine offenses. For example, an important basis for the establishment of the 100-to-1 drug quantity ratio was the understanding that crack cocaine trafficking was highly associated with violence. More recent data indicate that significantly less systemic violence . . . is associated with crack cocaine trafficking than was reported earlier.’ More importantly, the prevalence of aggravating factors in crack cases ‘does not differ substantially from the prevalence in powder cocaine offenses.’”) (citation omitted) (quoting Murphy, *supra* note 168, at 238).

²⁰⁸ For an informative explanation of the typical structure of the crack distribution culture, see William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1263–65 (1996).

²⁰⁹ In its publication, *Federal Justice Statistics*, the U.S. Department of Justice’s Bureau of Justice Statistics reported that “[t]hree-quarters (75%) of crack cocaine suspects were black.” Mark Motivans, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL

ing can be attributed to factors other than the sentencing laws themselves. Uneven law enforcement and prosecution decisions will (and do) still lead to more prosecutions of blacks for crack offenses even though studies show that people of all races use and sell drugs at the same rates.²¹⁰ The Sentencing Commission's Report for fiscal year 2011 conveyed that 83% of crack defendants were black, 10% Hispanic, and 6% white.²¹¹ This is even though "[g]overnment data demonstrate that drug use rates are similar among all racial and ethnic groups" and that "[f]or crack cocaine, two-thirds of users in the U.S. are white or Hispanic."²¹² Equalized sentencing laws will not get rid of such a problem. Even if equalized sentences were attained, the fairness that equality advocates seek will remain elusive because crack offenders will not necessarily have attained an effective sentence, and race-based disparities in law enforcement and prosecution may still exist. Therefore, when it comes to sentencing reform specifically, fairness is more adequately achieved through Particular Purpose Sentencing, not simply "equality" in sentencing measured through sentencing parity for those who end up being convicted of cocaine crimes.

C. Equalized Sentencing Will Not Equal Proper Sentencing—Questioning Powder Cocaine as the Benchmark for Crack Sentencing

In the sentencing context, if the equality-themed argument wins, then the resulting victory is a 1:1 ratio for crack and powder cocaine sentencing that still does not ensure effective drug sentencing. When crack and powder cocaine are sentenced equally, it will still remain unclear why the current powder cocaine sentencing laws are actually desirable. As Part III addressed, there is little evidence that powder cocaine sentencing has achieved deterrence, rehabilitation, or that punishment levels are in

JUSTICE STATISTICS 3 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf>. This same sort of unequal law enforcement as well as disparate prosecution decisions were noted in the 1990s as well. As Former Philadelphia Assistant District Attorney William Spade explained, "Another explanation for the disparate impact has to do with police and prosecutorial discretion. According to one study which investigated the racial disparity caused by the 100:1 ratio and the mandatory minimum sentencing statutes, blacks made up 42% of all drug arrests in 1991, even though they comprised only 12% of the population. In 1992, blacks were four times as likely as whites to be arrested on drug charges, even though there were only 1.6 million black drug users and 8.7 million white drug users." Spade, *supra* note 208, at 1268–69. These disparate arrests and charging decisions are particularly troubling given statistics reported by The Substance Abuse and Mental Health Services Administration (SAMHSA) indicating that Whites constitute 67% of crack users, Blacks 18%, and Latinos 9%. CTR. FOR BEHAVIORAL HEALTH STATISTICS & QUALITY, SUBSTANCE ABUSE AND MENTAL HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERV., NAT'L SURVEY ON DRUG USE AND HEALTH, Table 1.34A (2012), available at <http://samhsa.gov/data/NSDUH/2012SummNatFindDetTables/Index.aspx>.

²¹⁰ See CTR. FOR BEHAVIORAL HEALTH STATISTICS, *supra* note 209, at Table 1.35B.

²¹¹ 2011 U.S. SENTENCING COMM'N REPORT, *supra* note 68, at 37.

²¹² THE SENTENCING PROJECT, *supra* note 1, at 5.

line with societal notions of retribution and appropriate levels of incapacitation. Therefore, even when a 1:1 ratio is achieved, the system will be left with crack cocaine and powder cocaine offenses subject to equally bad sentencing. Egalitarian theorists often argue that there is a benefit in equally wrong treatment. In other words, “sometimes a person should be treated wrongly simply because another, identically situated person has been treated wrongly.”²¹³ This is one interpretation of what justice requires. However, even when this approach is applied to sentencing, this argument leaves much to be desired.

When the 1:1 cocaine sentencing ratio is achieved, the power of the sentencing equality argument is immediately diminished, and cocaine defendants are left with a limited victory. Perhaps the crack defendant will receive a shorter sentence,²¹⁴ which may be what the defendant ultimately wanted, but he still has not achieved the “right” sentence. When the justice aspect of equality is considered, equally wrong sentences cannot really be what sentencing reformers want to accomplish. The equality-themed sentencing debate is about achieving racial parity in sentencing, but equal crack and powder cocaine sentences will not necessarily correct racially disparate sentencing outcomes. Because sentencing is an individualized process, even by “equalizing” sentencing laws, completely equal sentencing outcomes cannot be achieved without imposing inflexible sentencing guidelines. Even then, racial disparities may persist. This is more evident when one questions the use of powder cocaine sentencing laws as a benchmark for crack sentencing. Thus, sentencing equality through equalized sentencing, which will yield equally wrong sentencing, is a faulty goal.

1. *The Problematic Weight-Based Sentencing Approach*

Arguments that crack and powder cocaine should be sentenced equivalently rest in assumptions that cocaine is the appropriate baseline for crack offenses. There are several reasons to doubt the soundness of powder cocaine sentencing. One main issue is the curious weight-based approach to which powder cocaine sentencing is subject.²¹⁵ In criticizing this quantity-based approach for crack offenses, William Spade, a former Assistant District Attorney in Philadelphia, wrote:

²¹³ Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1212 (1997).

²¹⁴ Whether crack/powder cocaine sentencing parity will be achieved by reducing the sentences applicable to crack offenses is not guaranteed. States such as Ohio equalized cocaine penalties by increasing the powder cocaine penalties to match that of crack cocaine penalties. In such a case, crack defendants would not even achieve a shorter sentence as the result of gaining sentence equivalence. See OHIO REV. CODE ANN. § 2925.11 (West 2013).

²¹⁵ This is also a critique of federal drug sentencing in general for which punishment is based on quantity. In fact, the arguments made in this Article are meant to reach beyond the crack/powder cocaine debate to all of drug sentencing, and even to sentencing of any type of offense.

Punishing crack defendants based solely on the drug type and amount results in a problem that is common to all mandatory minimum sentences—unwarranted uniformity. Offenders who differ in terms of danger to the community, culpability, or in other ways relevant to the purposes of sentencing but not listed in the statute, are treated the same. This “tariff” approach to sentencing was rejected historically because too many important distinctions among defendants are obscured by the single, flat punishment criterion.²¹⁶

Though Spade was criticizing the disproportionately harsh crack penalties, his reasoning undoubtedly applies to powder cocaine sentencing as well. Focusing on the amount of powder cocaine as the main basis for determining the appropriate level of punishment leaves out many factors that may tell us much more about the harmfulness of the actual cocaine offense and offender in a particular situation than the amount of drugs involved.²¹⁷ While Spade was disagreeing with weight-based mandatory minimum sentencing, Second Circuit Judge Jon Newman has repeatedly expressed disapproval of the adoption of this weight-based approach by the Sentencing Guidelines. As Judge Newman explains:

One fundamental mistake was the Commission’s attempt to fashion a uniform mechanism for determining sentences according to every detail of a crime. This “incremental immorality” theory is lunacy. For example, the guidelines table for sentencing drug crimes sets two to three grams at level twenty, three to four grams at level twenty-two, four to five grams at level twenty-four, and so on. Every two levels adds a year in jail. This system is ludicrous because the number of grams a defendant happens to possess at the moment of arrest has nothing to do with her morality or culpability.²¹⁸

Judge Newman’s comments express appropriate skepticism about the soundness of drug sentencing in general. His doubt about the reasonableness of drug sentencing and Spade’s critique of crack cocaine sentencing certainly apply to powder cocaine sentencing as well.

2. *Turning the Focus to the Crime*

Even for those who may believe that powder cocaine sentencing is appropriate, it is still unclear why it should be the measuring stick for crack offenses. Of course, the typical argument is that they are the same

²¹⁶ Spade, *supra* note 208, at 1272 (footnotes omitted).

²¹⁷ For instance, Professor Ronald Wright has advised that the “Guidelines should look to a drug defendant’s place in the distribution organization and to the duration and scope of the activity, with amount serving as only one indicator.” Wright, *supra* note 13, at 200.

²¹⁸ *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2072–73 (remarks of Jon O. Newman) (1992); see also *U.S. Sentencing Comm’n Hearing of July 9, 2009* (statement of Judge Jon O. Newman), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Public_Hearing_Transcript.pdf. Judge Newman also refers to “incremental morality” in his opinions in *United States v. Martinez-Rios*, 143 F.3d 662, 670 (2d Cir. 1998), and *United States v. Dallas*, 229 F.3d 105, 107 (2d Cir. 2000).

drug and one is not necessarily more harmful or more of a cause of violence than the other.²¹⁹ While it is true that crack and powder cocaine are the same drug, the more relevant question is whether crack and powder cocaine offenses are the *same crime*. While thinking about crack and powder cocaine offenses in this manner comes dangerously close to the sort of thinking that led to the 100:1 powder to crack cocaine ratio in the first place, considering punishment in terms of offenses is useful in demonstrating that there actually may be reason to sentence crack offenses and powder cocaine offenses differently. First, some of the reasons for seeing crack offenses as more serious than powder cocaine offenses were popular during the decade following the adoption of the Anti-Drug Abuse Act of 1986, when the equality-themed arguments against the 100:1 ratio were being brought before courts. In the 1995 case *United States v. Singleterry*, the First Circuit took the following position:

Even if there is no telling difference in the health effects associated with the use of different types of cocaine, it would be rational to treat cocaine base offenses more harshly for other reasons. For example, Congress could rationally seek to strengthen the deterrent effect of the narcotics laws by increasing the “cost” to a criminal of using or selling a cocaine substance that, like cocaine base, is sold at a cheaper unit price than other cocaine substances. Indeed, of the four citations to the Congressional Record that [the Defendant] offers in his opening brief as probative of congressional intent, each suggests that Congress has been concerned that the low price of cocaine base (in the absolute sense as well as relative to cocaine) would lead to an explosion in drug use.²²⁰

In other words, the court was saying that although crack and powder cocaine as drugs do not have different health effects, it is reasonable to conclude that the differences between crack and powder cocaine offenses lead to different societal effects. In the court’s view, the conclusion that Congress reached regarding crack offenses as more serious crimes than powder cocaine offenses was rational.

Likewise, in 1995, members of the Sentencing Commission who opposed a reduction from the 100:1 ratio to a 1:1 ratio discussed the differences between crack and powder cocaine offenses. Judge Deanell Tacha of the Tenth Circuit Court of Appeals, one such dissenter, found fault in the focus on the similarities between crack and powder cocaine as drugs, and instead identified the “market, the dosages, the prices, and the means of distribution” as factors making crack offenses more serious than powder cocaine offenses.²²¹ On the issue of racial disparity, she explained that “sentencing policy based on thoughtful, appropriate, and race-

²¹⁹ See *supra* Introduction and Part I for discussions of the argument that crack and powder cocaine are the same drug.

²²⁰ *United States v. Singleterry*, 29 F.3d 733, 740 (1st Cir. 1994).

²²¹ The Bureau of National Affairs, U.S. Sentencing Commission: Materials Concerning Sentencing for Crack Cocaine Offenses, 57 CRIM. L. REP. 2127, 2131 (May 31, 1995).

neutral factors may result in differing impacts on defendants according to race, socioeconomic group, and geographic area,” and that consequence “cannot divert attention from our objective judgments about the underlying criminal activity and the attendant societal interests.”²²² Again, the sentiment expressed was that crack offenses were different from (and more serious than) powder cocaine offenses, though the drugs are essentially the same.

In 1995, William Spade, in his capacity as Assistant District Attorney in Philadelphia, also joined this discussion, saying that a 20:1 ratio was “the correct ratio” because of the differences he saw between crack and cocaine offenses.²²³ Among those differences, Spade noted “crack’s increased marketability” and “organizational and market differences that distinguish crack from powder cocaine.”²²⁴ This line of reasoning has persisted. In 2005, in the Eastern District of Wisconsin case, *United States v. Smith*, the district court noted, “At least some evidence suggests that crack is psychologically (if not physically) more addictive than powder (when inhaled).”²²⁵ This may sound like the court is going to fall back on arguments differentiating between the two drugs. The court, though, goes on to add, “and its lower cost per dose may also make crack dealing somewhat more harmful than trafficking in powder.”²²⁶ Therefore, the court is actually talking about the relative effects of the offenses. To support its position, the court cited several court cases that also link the effects of crack cocaine to the harmfulness of crack offenses as compared to powder cocaine.²²⁷ However, while some differences between crack and powder cocaine offenses point to sentencing crack cocaine crimes more harshly, not all reasons favor powder cocaine offenses as the least serious of the offenses.

Though it is the less usual course, arguments can be made that powder cocaine offenses should be sentenced more harshly than crack cocaine offenses. As William Spade explained:

Another way of illustrating the problem is that five grams of crack, which triggers a five-year mandatory minimum sentence, represents only 10–50 doses with an average retail price of \$225–\$750 for the total five grams. In contrast, a powder cocaine defendant must traf-

²²² *Id.* at 2132.

²²³ Spade, *supra* note 208, at 1284.

²²⁴ *Id.* at 1285–86.

²²⁵ 359 F. Supp. 2d 771, 781 (E.D. Wis. 2005).

²²⁶ *Id.*

²²⁷ *Id.* (citing *United States v. Maske*, 840 F. Supp. 151, 157 (D.D.C. 1993) (“Because crack is prepared in concentrated doses, it magnifies the effect of one gram of cocaine to such a degree that dealers can sell very potent doses cheaply.”); *United States v. Patillo*, 817 F. Supp. 839, 843 n.6 (C.D. Cal. 1993) (“[S]ound reasons exist for treating crack more severely than powder cocaine.”) ((citing *United States v. Harding*, 971 F.2d 410, 413 (9th Cir. 1992) (“Congress’ decision to treat crack more severely than cocaine is based on its more profound physiological and psychological effects, including addictiveness, and the manner in which it is distributed.”)))).

fic in 500 grams of powder, representing 2500–5000 doses with an average retail price of \$32,500–\$50,000, in order to receive the same five-year sentence. The 500 grams of cocaine that can send one powder defendant to prison for five years can be distributed to eighty-nine street dealers who, if they converted it to crack, could make enough crack to trigger the five year mandatory minimum for each defendant. The result is that local-level crack dealers get average sentences quite similar to intrastate and interstate powder cocaine dealers; and both intra- and interstate crack dealers get average sentences that are longer than international powder cocaine dealers.²²⁸

While these statements were a discussion of the former 100:1 ratio, the point remains the same even after the Fair Sentencing Act's reduction of that ratio—crack offenses and cocaine offenses exhibit themselves as very different looking crimes. Powder cocaine is sold in units that cost more on average than the common units for crack cocaine.²²⁹ Therefore, an argument could be made that greater punishment should be imposed on the offender who stands to profit more from his offense, or who was willing to spend more money to commit the offense. Likewise, because crack is made by adding sodium bicarbonate to powder cocaine, it can be argued that powder cocaine offenses often involve more pure cocaine than do crack offenses. If we continue to impose weight-based punishment for drug offenses, then perhaps the amount of pure cocaine at issue in the offense should guide the amount of punishment that the offender will receive. Further, cocaine sales and use are measured in doses to the user. The U.S. Sentencing Commission has explained that 5 grams of crack cocaine (the weight of less than two packets of sugar) yields about 10 to 50 doses, while 500 grams of powder cocaine yields between 2,500 and 5,000 doses.²³⁰ By those measurements, 5 grams of crack should have never been seen as equal to 500 grams of powder cocaine, and neither should 28 grams of crack as the Fair Sentencing Act of 2010 sets forth. Overall, however, this back and forth about whether crack offenses or powder cocaine offenses are more serious still falls into the trap of using powder cocaine as a constant against which to measure crack—even if what we are doing is measuring the seriousness of crack offenses against

²²⁸ Spade, *supra* note 208, at 1273 (footnote omitted). The court in *United States v. Smith* quoted this language. 359 F. Supp. 2d at 779.

²²⁹ Indiana's Clark County Prosecutor's Office reports that the "common street selling price of cocaine hydrochloride powder is \$80–\$100 per gram" and "common street prices" for a crack rock weighing one-fourth gram is \$40 (or \$10–\$25 for one-tenth of a gram). CLARK CNTY. PROSECUTING ATT'Y, *Controlled Substances: Drugs of Abuse—Cocaine/Crack*, <http://www.clarkprosecutor.org/html/substnce/crack.htm>; *see also Cocaine Prices*, CRACK-COCAINE.ORG, <http://www.crack-cocaine.org/cocaine-prices.htm>. Though in weight crack prices and powder cocaine prices are similar, the quantities sold are not. Crack is purchased by the rock (so it can be purchased for as low as \$10 in many areas) while powder cocaine is purchased by the gram (so purchasers spend at least \$80 in most areas).

²³⁰ *See* 2007 U.S. SENTENCING COMM'N REPORT, *supra* note 27, at 63.

the harmfulness of cocaine offenses. What this discussion reveals is that a decision about the appropriate types and amounts of sentences for these offenses can never be reached without an understanding of why the offenses are being punished in the first place. In other words, what is the purpose of sentencing these offenses? If these can truly be seen as separate offenses, they ought to have purposes that support the punishment of each, without reference to one another. Unfortunately, that articulation of purpose has been relegated to the background of the crack/powder cocaine discourse. This is why Particular Purpose Sentencing is crucial.

V. IMPLEMENTING PARTICULAR PURPOSE SENTENCING

In order to actually move toward fairness in sentencing, the priority should be demanding Particular Purpose Sentencing, enforced through measures of accountability. When it comes to cocaine, Particular Purpose Sentencing can be implemented by Congress selecting and providing in the sentencing statutes a goal for drug sentencing, whether that be deterrence, incapacitation, rehabilitation, or retribution. Through 18 U.S.C. § 3553(a), Congress has stated that all sentencing purposes should be considered by sentencing judges with no one factor taking precedence over the others. Each of the § 3553(a)(2) factors can be mapped onto a sentencing purpose. Retribution is captured by the requirement that sentences imposed “provide just punishment.”²³¹ Pursuant to § 3553(a)(2)(B), sentences must “afford adequate deterrence to criminal conduct.”²³² Incapacitation, while clearly the primary mode of punishment adopted by the Guidelines, is also apparent in the directive “to protect the public from further crimes of the defendant.”²³³ And, a concern for rehabilitation is evident in the order that courts select sentences that will “provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”²³⁴ However, simply saying that all purposes should be considered is in actuality being vague, rather than particular, about purpose. It is a way to hide the fact that meaningful discussions about sentencing purpose have not occurred. The late District Judge Marvin E. Frankel, the visionary who gave the inspiration for the Sentencing Commission,²³⁵

²³¹ 18 U.S.C. § 3553(a)(2)(A) (2006).

²³² *Id.* § 3553(a)(2)(B).

²³³ *Id.* § 3553(a)(2)(C).

²³⁴ *Id.* § 3553(a)(2)(D).

²³⁵ In his famous book, Judge Frankel, then on the bench in the Southern District of New York, pictured a structured sentencing system in which a “Commission on Sentencing” would operate as a politically insulated body that would consist of “lawyers, judges, penologists, and criminologists” and also “sociologists, psychologists, business people, artists, and . . . former or present prison inmates.” MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER*, 119–20 (1973). This Commission would create “binding guides” that would provide “meaningful criteria” to sentencing judges.

said it well when he admonished “[b]ut for now we ought at least to keep in mind the pervasiveness of our ignorance. We still scarcely know what we’re doing, or why we’re doing it, when we inflict punishment for crime. We are certainly far from agreement on what we *claim* to be doing.”²³⁶ It is figuring out what we “*claim* to be doing” that Particular Purpose Sentencing addresses.

In order to implement Particular Purpose Sentencing, sentencing statutes must state what specific punishment purpose legislators seek to achieve through the sentencing of certain offenses. For example, for homicide, the particular purpose of punishment may be retribution while it may be deterrence for certain drug crimes. Additionally, sentencing statutes must mandate that judges take that particular purpose into account in imposing a sentence. In keeping with the parsimony principle, sentencing judges would be required to select the least severe punishment possible to fulfill that particular purpose.²³⁷ Sentencing judges would be required to articulate their reasons for imposing a certain sentence, whether within or outside of the Guidelines range, and those reasons must make reference to the statutory purpose for that offense or offenses.²³⁸ It would be the job of appellate courts to police the sufficiency and credibility of that statement of reasons.²³⁹ For Particular Purpose Sentencing to be effective, however, there must be a system of accountability. This can be achieved by Congress authorizing the U.S. Sentencing Commission to study, review, and amend sentencing laws as it learns that the main purpose is or is not being achieved for various offenses. None of this works, though, without Congress actually selecting a particular purpose for each offense or offense category (for example, the punishment for all theft crimes may have the same guiding purpose) and follow-

The Sentencing Reform Act establishing the U.S. Sentencing Commission was enacted 11 years later. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2 § 211, 98 Stat. 1987, 1987 (1984).

²³⁶ Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 *YALE L.J.* 2043, 2051 (1992).

²³⁷ 18 U.S.C. § 3553(a) already states that “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes” set forth in the statute. This parsimony clause would simply refer to the particular purpose set forth for each offense.

²³⁸ The sentencing statute already calls for the articulation of reasons in § 3553(c), which provides: “Statement of Reasons for Imposing a Sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment . . .” 18 U.S.C. § 3553(c). 18 U.S.C. § 3553(a)(4) directs district courts to consider the applicable Guidelines range in determining an appropriate sentence.

²³⁹ While this Article does not cover the full range of issues that will arise on appellate review for Particular Purpose Sentencing, the Author is in the early stages of a follow-up project, which will explore “A Purpose-Focused Theory of Reasonableness Review” more fully.

ing the Sentencing Commission studies. In order to avoid slow legislative change and the limits of legislative compromise, the Sentencing Commission should be empowered to be the body that identifies the appropriate purposes for the punishment of offenses. At the very least, the Commission should be trusted with studying whether those goals are being met if Congress identifies the goals itself. While this may seem like a daunting task—and it will in no way be a perfect endeavor—it is a better approach to sentencing justice than calls for sentencing equality have been.

In the case that Congress may find several purposes to be relevant, it is imperative for Particular Purpose Sentencing that Congress set one purpose as the overriding concern. In explaining why it did not choose between retributivism and utilitarianism as guiding purposes for the Sentencing Guidelines, the Sentencing Commission erroneously claimed that, “[a]s a practical matter . . . this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.”²⁴⁰ However, one can imagine several situations in which sentencing purposes may conflict and call for different sentencing outcomes. A look at an example of how sentencing decisions are made without Particular Purpose Sentencing in place easily reveals the Commission’s blunder.

A. *Sentencing Decisions Without Particular Purpose Sentencing*

Without Particular Purpose Sentencing, judges make their own decisions, within unexplained statutory minimum and maximum and Guidelines sentencing ranges, about how sentencing purposes ought to apply to each case before them. Many judges do not give a thorough articulation of why they have selected any particular sentence.²⁴¹ Therefore, any opportunity for meaningful sentencing accountability is lost. Even when judges thoroughly explain their reasons for imposing a sentence, the fact

²⁴⁰ 2012 U.S. SENTENCING GUIDELINES ch. 1, pt. A, 4.

²⁴¹ The manner in which circuit courts have reviewed whether sentencing judges have adequately explained how the imposed sentence satisfies the § 3553(a) factors makes it evident that little emphasis has been placed on a thorough articulation of reasons for imposing a sentence. For example, the Second Circuit has determined that “what is adequate to fulfill [the requirement that a sentence be tied to the § 3553(a) factors] necessarily depends on the circumstances” but declined to “require ‘robotic incantations’ that the district court has considered each of the § 3553(a) factors.” *United States v. Cavera*, 550 F.3d 180, 193 (2d Cir. 2008) (quoting *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005)) (citing *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006)). The Seventh Circuit has taken a similar approach. *See United States v. Shannon*, 518 F.3d 494, 496 (7th Cir. 2008) (“The court need not address every § 3553(a) factor in checklist fashion, explicitly articulating its conclusions regarding each one.”). Additionally, the Eighth Circuit simply presumes that “district judges know the law and understand their obligation to consider all of the § 3553(a) factors,” and requires no true articulation or reasons at all. *United States v. Jenkins*, 321 F. App’x 544, 546–47 (8th Cir. 2009) (citing *United States v. Gray*, 533 F.3d 942, 943 (8th Cir. 2008)).

that judges have been instructed to consider the § 3553(a) factors, which encompass all of the sentencing purposes, means that the exact goal sought to be achieved through sentencing remains muddled and unclear. Therefore, even when a judge does his or her job at sentencing, a clear sentencing purpose cannot shine through and the potential for learning whether cocaine sentencing is actually effective is lost.

Judge Jack Weinstein of the United States District Court for the Eastern District of New York provides an extraordinary example of a sentencing judge taking the time to comprehensively address purposes of punishment in his sentencing opinions.²⁴² His efforts show that theories of punishment often conflict. In a lengthy opinion, Judge Weinstein discusses the philosophical underpinnings of the theories of punishment.²⁴³ He then explains the Commission's failure to select among those theories, and concludes that, "[s]ince the Sentencing Commission did not say how competing rationales should shape individual sentencing decisions, courts are left to make that judgment."²⁴⁴ Taking this task to heart, Judge Weinstein moves into a discussion of how the facts of the case before him implicate each sentencing purpose.²⁴⁵ According to Judge Weinstein's analysis, only two theories of punishment supported sentencing the two defendants before him harshly—general deterrence and retribution.²⁴⁶ In this particular case, incapacitation, rehabilitation, and specific deterrence did not call for any additional punishment of the offenders, according to Judge Weinstein.²⁴⁷ In the end, the Judge used this reasoning plus other relevant factors to depart downward from the Sentencing Guidelines in each defendant's case.²⁴⁸ However, despite Judge Weinstein's meticulous evaluation of sentencing purposes, his approach demonstrates that putting such purpose decisions in the hands of individual judges leaves the door open for a variety of opinions on how to weigh those purposes, especially when they conflict, without any indication of an exact goal that was intended to be accomplished by the imposition of the resultant sentence. Consequently, we are left with sentencing outcomes that cannot be tested for effectiveness because there is no consensus on the goals of punishment or how effectiveness would be measured. It should be up to

²⁴² See *United States v. Blarek*, 7 F. Supp. 2d 192, 195 (E.D.N.Y. 1998). The two defendants in this case were convicted of conspiracy to commit racketeering and money laundering, based on their laundering of funds for a Colombian drug lord, and one of the defendants was also convicted of interstate travel in aid of racketeering.

²⁴³ *Id.* at 199–204.

²⁴⁴ *Id.* at 204.

²⁴⁵ *Id.* at 209–10.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 213–14. In considering whether a departure from the Guidelines range was appropriate, Judge Weinstein also considered: whether this case fell within the "heartland" of cases in that offense category; the vulnerability of the defendants; one defendant's medical condition; duress, family circumstances, and reduced culpability; and collateral consequences of conviction. See *id.* at 210–13.

Congress—preferably with the help of the Sentencing Commission—to articulate those goals in a meaningful way. Telling a judge to consider all possible purposes of sentencing is not guidance at all. Instead, Congress should decide what it seeks to attain in the punishment of each type of offense. Through this type of Particular Purpose Sentencing, federal sentencing can move toward a more reasoned system.

B. Dealing with Legislative Compromise and the Use of the Sentencing Commission

While this Particular Purpose Sentencing could potentially run into the same slow legislative response and compromised approach that calls for sentencing equality have encountered, the difference is the built-in accountability aspect of this approach. Once Congress agrees upon a purpose, whatever that purpose is, sentences will have to be decided with that purpose in mind. This must be reflected in statutory sentencing lengths as well as in the Sentencing Guidelines and in the sentences ultimately imposed by sentencing judges. Though judges will still be bound by whatever sentencing floors and ceilings Congress has imposed in sentencing statutes, these boundaries should also reflect sentencing purposes.²⁴⁹ Even if it takes a while for Congress to agree on the appropriate purpose, and even if their ultimate decision is born of compromise, the end-goal of selecting a purpose is what is most important. With this approach, it almost does not matter what purpose Congress selects or why it ultimately settles upon that purpose. As with any legislative measure, if future sessions of Congress are not pleased with the purpose selected, the law can be amended. Furthermore, this approach gives the public more input. If a legislator's constituents are not satisfied with the purpose selected by Congress, they can make that known and lobby for change.²⁵⁰ What is more important is the effort to think reasonably about sentencing by acknowledging that purposeless sentencing is an abdication of congressional responsibility. Congress is quite capable of undertaking this task. In the current sentencing statutes, Congress decided which sentencing purposes *do not apply* to certain sentencing determinations. In 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k), Congress tells sentencing judges that rehabilitation cannot be a consideration in deciding the length of

²⁴⁹ This is not to say that the Author agrees with the wisdom of mandatory minimum sentencing laws (which she does not). However, this Article is suggesting that Particular Purpose Sentencing can work within a mandatory sentencing scheme, so long as those mandatory minimum sentences are fulfilling the particular purpose of punishment for that offense.

²⁵⁰ This may sound simplistic and unrealistic. Of course, there are many voices that will never reach the ear of Congress, and some groups, due to financial superiority, certainly have greater influence over legislative decisions. However, under the Particular Purpose Sentencing approach, the public will be in no worse position than they are now. Further, due to this approach being about embracing the continual reform of sentencing, the public may have more of an opportunity to give input as the Sentencing Commission seeks to improve upon sentencing practice.

imprisonment.²⁵¹ When it comes to deciding on the terms of supervised release, Congress has said that all of the sentencing purposes, except retribution, are relevant.²⁵² In the same way that Congress has excluded sentencing purposes in certain instances, it can decide which particular purpose is behind sentences for specific offenses as well. The most plausible argument for why this is not done is that it is not politically feasible because no single legislator wants to take the lead in such a potentially controversial endeavor.²⁵³

The problem of political feasibility of such an approach can be taken care of by using the Sentencing Commission, rather than Congress, to select the appropriate sentencing purpose for each offense. This should have been done when the Sentencing Commission first created the Sentencing Guidelines. Instead, though, the Commission shirked this duty. The Commission itself explains:

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down.²⁵⁴

In this way, the Commission missed a crucial opportunity to create sentencing guidance that is actually tethered to purpose.²⁵⁵ It is not that the Commission said that such a decision was impossible. Rather, the Commission decided that such a decision would be unpopular. The Commission admits that “adherents of each of these points of view [retributivism and utilitarianism] urged the Commission to choose between them and accord one primacy over the other.”²⁵⁶ By deciding to not select even a guiding purpose, the Commission freed itself from the responsibility of determining whether its sentencing guidance has actually been effective. Judge Frankel expressed dismay with the Commission’s failure as well. He said:

²⁵¹ The Supreme Court interpreted § 3582(a) this way in *Tapia v. United States*, 131 S. Ct. 2382, 2388, 2390 (2011).

²⁵² 18 U.S.C. § 3583(c) and (d)(1) tell judges fashioning supervised release to consider all of the § 3553(a)(2) factors, except § 3553(a)(2)(A)—the factor that is most closely in line with retribution because it tells judges to consider just punishment.

²⁵³ Professor Marc Miller has expressed dissatisfaction with this inaction, writing, “And what about Congress? There have been no leaders in the Senate from among those closely associated with the SRA (or anyone elected thereafter) who have made a similar call to bring purpose and context to the federal guidelines.” Miller, *supra* note 6, at 286.

²⁵⁴ 2012 U.S. SENTENCING GUIDELINES ch. 1, pt. A(3), 4.

²⁵⁵ This failure has been noted by others as well. See, e.g., Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L.J. 1773, 1778 (1992) The Commission “did not articulate the purposes that ought to govern future sentencing, and as a result, it could not structure its guidelines to achieve particular results.”

²⁵⁶ 2012 U.S. SENTENCING GUIDELINES ch. 1, pt. A(3), 4.

I cannot help mentioning at the end that the Commission has done little or nothing about the hardest problem of all: it has not advanced the education of Congress, or any of us, about what we mean to achieve, and what we may in fact achieve, as we continue to mete out long prison sentences. That may still be too tall an order for any person or group in our present state of ignorance. Still, the Commission ought to be helping us grope toward a philosophy. One hopes it will embark soon on that effort.²⁵⁷

As Judge Frankel pointed out, the Commission should take the lead in educating Congress about what the sentencing goals should be for the federal criminal justice system. The Commission has tried to take the lead in federal sentencing, but these efforts have not included the essential task of dealing with sentencing purpose in a meaningful way. On August 15, 2013, the Sentencing Commission announced that it has unanimously voted on its list of priorities for the 2013–2014 Guidelines amendment cycle.²⁵⁸ It set as its top priority working with Congress to reduce the severity of mandatory minimum penalties.²⁵⁹ The Commission also recognized what it called the “important new priority” of “reviewing the sentencing guidelines applicable to drug offenses, including consideration of changing the guideline levels based on drug quantities.”²⁶⁰ While it may seem that the Commission is following Judge Frankel’s past advice that it advance the education of Congress, it is not doing so by “helping us grope toward a philosophy” as Judge Frankel had hoped. The closest reference to a sentencing purpose in the Commission’s press release is that the Commission will continue “to comprehensively study recidivism.”²⁶¹ Particular Purpose Sentencing requires that the Commission does more than this. It necessitates that, in reviewing the drug offense Guidelines, the Commission identifies how those sentences will serve their particular purpose. Once Congress mandates that the Commission selects a particular purpose (at least for each offense, if not for punishment overall), or selects the purposes for the Commission, the Commission would no longer be able to “eschew[] analysis in . . . the Guidelines.”²⁶² Instead, the Commission will have to ensure that the sentencing law and practice remain accountable to their purported purposes.

The accountability portion of this approach requires that once sentences are set to reflect the particular purpose for each offense, the Sentencing Commission must test whether those sentences are in fact fulfilling the selected purpose over time. In fact, Congress has already

²⁵⁷ Frankel, *supra* note 236, at 2051.

²⁵⁸ Press Release, U.S. Sentencing Comm’n, *U.S. Sentencing Commission Selects Policy Priorities for 2013–2014 Guidelines Amendment Cycle 1* (Aug. 15, 2013), http://www.usc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20130815_Press_Release.pdf.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 2.

²⁶² *United States v. Blarek*, 7 F. Supp. 2d 192, 204 (E.D.N.Y. 1998).

authorized the Sentencing Commission to take on such a role, stating in the Sentencing Reform Act that “[t]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.”²⁶³ The Sentencing Commission also understands its responsibility in this way. It has explained that Congress has empowered it to continually “monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs.”²⁶⁴ As the Commission further explains, this monitoring role is essential because “sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.”²⁶⁵ In other words, sentencing is meant to be accountable to its outcomes. This is what the accountability prong of Particular Purpose Sentences recognizes as well.

If sentencing effectiveness is not being achieved, then the Sentencing Commission must recommend changes to the sentences for those offenses and Congress should respond appropriately by amending the sentencing laws and approving changes to the Sentencing Guidelines. Again, doing this already fits within the Sentencing Commission’s responsibilities, which are:

*establish a research and development program . . . [to] serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; . . . publish data concerning the sentencing process; collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code; [and] collect systematically and disseminate information regarding effectiveness of sentences imposed.*²⁶⁶

As the Supreme Court acknowledged in *Kimbrough*, by “[c]arrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to ‘base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.’”²⁶⁷ The Commission does not have to carry out this role in isolation. By collecting and publishing data on sentencing effectiveness, the Commission can seek input from “Congress, state legislatures, state sentencing commissions, sentencing judges, appellate judges, prosecutors, defense attorneys, probation officers, and scholars” as well as other sentencing advocates in its quest for “sentencing wisdom” regarding pur-

²⁶³ 28 U.S.C. § 994(o) (2006).

²⁶⁴ 2012 U.S. SENTENCING GUIDELINES ch. 1, pt. A, 12.

²⁶⁵ *Id.*

²⁶⁶ 28 U.S.C. § 995(a)(12)(A), § 995(a)(14)–(16) (emphasis added).

²⁶⁷ *Kimbrough v. United States*, 552 U.S. 85, 108–09 (2007) (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

pose-based sentencing efficiency.²⁶⁸ In a Particular Purpose Sentencing system, the Commission would perform as the group of sentencing experts that it should be, and Congress would trust it to execute this function or select and monitor purposes on its own.

C. *Selecting Sentences*

Of course, all of this may seem to assume that there are “correct” sentences and that it is possible to test whether sentencing outcomes match up to purposes. Though it may sound like it, Particular Purpose Sentencing is not necessarily an endorsement of the evidence-based sentencing movement. Evidence-based practices (EBP) have been described as “corrections practices that have been demonstrated by rigorous research to reduce offender recidivism.”²⁶⁹ Research organizations, such as the National Council for State Courts, have advocated for “improv[ing] the effectiveness of sentencing outcomes by promoting the use of programs that work, evidence-based practices, and offender risk and needs assessment tools.”²⁷⁰ EBP, then, has a specific goal in mind—the utilitarian purpose of reducing crime. By measuring crime reduction through recidivism rates, EBP advocates have focused on rehabilitation, and perhaps incarceration and specific deterrence, as the most important of the sentencing purposes. Particular Purpose Sentencing is meant to require the adoption of a sentencing purpose. The EBP movement is one method of testing whether certain purposes, if chosen, are being achieved. If one of the other purposes is selected—general deterrence or retribution—other assessment tools will have to be developed to test the effectiveness of current sentencing laws. While it may be impossible to say that one specific sentence is the perfect sentence that will clearly deter crimes or appropriately reflect community sentiments about punishment, it is certainly possible to think of ways to measure whether crime rates have decreased in a certain time period and to assess constituent views about appropriate punishment.²⁷¹ The EBP movement shows that this sort of scientific and reasoned approach to sentencing is not unthinkable.

²⁶⁸ Marc L. Miller & Ronald F. Wright, “*The Wisdom We Have Lost*”: *Sentencing Information and Its Uses*, 58 STAN. L. REV. 361, 362–63 (2005) (“Congress can improve the federal sentencing system by directing the U.S. Sentencing Commission to provide better and more timely information and to link that information explicitly to a broader range of specified users and uses.”).

²⁶⁹ Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 IND. L.J. (SPECIAL ISSUE) 1307, 1308 (2007).

²⁷⁰ TRACY W. PETERS & ROGER K. WARREN, NAT’L CTR. FOR STATE COURTS, GETTING SMARTER ABOUT SENTENCING: NCSC’S SENTENCING REFORM SURVEY 10 (2006), <http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/criminal/id/131/rec/7>.

²⁷¹ In fact, Congress has already acknowledged that the Commission is capable of assessing retribution and deterrence. In 28 U.S.C. § 994(s), Congress requires that “[t]he Commission . . . give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant,

Particular Purpose Sentencing also seems to assume that judges are able to select sentences that will actually effectuate the articulated purpose or that all judges will understand each sentencing purpose similarly.²⁷² While there likely is not one right sentence for any given scenario, if given guidance as to the appropriate sentencing purpose, at least judges can all be likeminded about the goals, though they may come to different sentencing conclusions in any given case.²⁷³ In this way, the sentencing purpose will become “the starting point and the initial benchmark”—a position that the Supreme Court has said the Guidelines now occupy.²⁷⁴ Sentencing statutes and the Sentencing Guidelines will reflect this focus on particular purpose as well, giving judges reasonable guidance, rather than the unprincipled laws and policies that now exist. Appellate courts, in their review of sentences for reasonableness, will ensure that sentencing judges are following this mandate.²⁷⁵ Even if judges differ in how they interpret what amount of imprisonment, if any, will fulfill the stated sentencing purpose, each judge’s attempts to fulfill the same sentencing purpose will provide valuable information to the Sentencing Commission as it studies the efficacy of sentencing law. In this way, Particular Purpose

including changes in—(1) the community view of the gravity of the offense; (2) the public concern generated by the offense; and (3) the deterrent effect particular sentences may have on the commission of the offense by others.” For an excellent example of how to use community sentiment about punishment to grade offenses, see Paul H. Robinson, et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709 (2010).

²⁷² The Author is not ignoring the issue of judicial bias, which will undoubtedly enter sentencing decisions, even in a Particular Purpose Sentencing system. However, in any sentencing approach that includes individualization of punishment, judicial bias will be a reality. In this Author’s opinion, the best way to deal with judicial bias and prejudice is through more rigorous appellate review accomplished through strict articulation requirements for sentencing judges, education (and shaming) of the bench, and more specific enumeration of factors that cannot be considered during sentencing that may be a proxy for race (such as education, family responsibilities, employment record, and community ties). For the current treatment of these factors in the Federal Sentencing Guidelines, see 28 U.S.C. § 994(d) (2006) and 2012 U.S. SENTENCING GUIDELINES § 5H1.2, 1.5, 1.6.

²⁷³ This “inherent conundrum[] in applying punishment theory” was explained well in the case book, SENTENCING LAW AND POLICY. The authors wrote, “Though selection of multiple purposes creates the added challenge of establishing priorities, even a jurisdiction’s decision to pursue only one theory of punishment does not magically simplify the conundrums inherent in developing a sound sentencing system. For one thing, each theory of punishment has conceptual variations.” NORA V. DEMLEITNER, ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 9 (2d ed. 2007). The passage then goes on to describe those variations in interpretation among each theory of punishment. This Article recognizes this difficulty. However, the Author maintains that there is value in attempting to select and study a particular purpose over proceeding with a purposeless system or one that pretends to serve all purposes. By actually attempting to achieve purpose in sentencing, we will undoubtedly learn from studying the results of the sentences selected.

²⁷⁴ *Gall v. United States*, 552 U.S. 38, 49 (2007).

²⁷⁵ See *United States v. Booker*, 543 U.S. 220, 261 (2005) (instructing appellate courts to review sentences for “unreasonableness”).

Sentencing may address racial disparities as well. If the sentences that are being imposed for certain offenses seem to be doing nothing other than creating racial disparities in punishment, it would be the Commission's charge to revise the sentences applicable for those crimes so that they begin to accomplish their particular purpose.

CONCLUSION

Today's equality-themed discourse about crack cocaine sentencing has done little to move sentencing law toward a reasoned approach. While racial disparities in sentencing are real and unacceptable (especially since they are not justified by any claim of effective sentencing), the lack of an identifiable sentencing goal is the biggest problem in the sentencing of crack and powder cocaine offenders. The "cracked" cocaine debate has taught that a preoccupation with sentencing inequality misses valuable opportunities to improve cocaine sentencing all together. Indeed, this failure to identify what sentencing law is attempting to achieve is problematic across offenses of all types. Without the selection of particular purpose and accountability in outcomes, equality advocates are merely fighting for equally bad sentencing. Without direction and a sense of whether goals are being accomplished, the resulting racial disparities are unjustifiable.²⁷⁶ With direction and particular purpose, we may find that the racial disparities that have plagued sentencing for so long will be diminished as sentencing becomes more reasoned and less reliant upon knee-jerk reactions to perceived societal threats—which our history has shown always falls disproportionately on the shoulders of racial minorities and poor, marginalized communities.

²⁷⁶ One might ask whether racial disparities can ever be justified. In the context of sentencing outcomes, there may be situations in which, due to the social context of the offense, we may see a statistical disparity in the racial identity of individuals who are being sentenced for those offenses and the specific sentence that they receive. For instance, of federal inmates in 2004 "White inmates (29%) were 6 times more likely than Hispanics (5%) to report using methamphetamines. Black inmates (1%) reported low use of methamphetamines." CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, 3 (2006), available at <http://www.bjs.gov/content/pub/pdf/dudsfp04.pdf>. If specific deterrence were the particular purpose selected for drug offenses, the sentencing lengths and types for methamphetamine ("meth") offenses would be based on studies of what punishment is necessary to deter offenders. And, because there may be more white meth users than users of other races, thus more white offenders to deter from committing this offense, we would expect to see more whites sentenced for methamphetamine possession. If the sentencing laws and practices for these offenses that truly have a racial disparity in their commission are based on achieving specific sentencing purposes, those racial disparities are arguably not *unjustified*. In truth, though, they still should not be considered completely justified because the underlying social contexts that cause these disparities are often based on social injustices.

For some time, scholars have been engaged in a healthy debate about the most effective sentencing approach.²⁷⁷ It is far past time to begin actually testing these approaches in real-life sentencing decisions. Therefore, reformers should forget sentencing equality and instead call for Congress to adopt Particular Purpose Sentencing in order to truly achieve fairness in crack and powder cocaine sentencing that can be extended to true, sustainable reform throughout federal sentencing law.

²⁷⁷ One of the most vigorous debates regards the effectiveness of an empirical retributivist approach to sentencing. For support of this theory, see PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 175–76, 248–49 (2008) (making the case for empirical desert as the best approach for achieving crime control); Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 *STAN. L. REV.* 77, 122 (2013) (presenting doubts about the empirical desert theory). Particular Purpose Sentencing presents a mechanism for testing the effectiveness of an empirical desert approach versus other approaches. After study, Congress may find that while it preferred a particular purpose for a certain offense, adhering to that purpose results in unintended consequences or that it is unable to fashion sentences that actually achieve the stated goal. If this is the case, then Congress must move on to another purpose to justify the punishment for that offense. If no achievable purpose can be identified, it may be that the particular offense should not be a criminal offense at all (this line of reasoning may be especially compelling in the advocacy to decriminalization marijuana, for instance). This Article merely introduces the idea of selecting particular purposes to move sentencing in a fairer direction. Much more work needs to be done to educate Congress and the Sentencing Commission about the best purposes to select to achieve the desired penological outcomes.