

# Crack, Policy, and Advocacy: A Case Analysis Illustrating the Need to Monitor Emergent Public Health-Related Policy and Engage in Persistent Evidence-Based Advocacy

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## Abstract

While utilizing the case of the crack cocaine epidemic, this article analyzes the quarter century of drug policy that began with the Anti-Drug Abuse Act of 1986, while ending with the Fair Sentencing Act of 2010 that took effect November 1, 2011. The analysis illustrates the importance of those working in public health engaging in both the monitoring of emergent health-related policy and persistent evidence-based advocacy in order to reverse and replace flawed or unjust policy. The analysis covers the following: (1) the importance of paying attention to policy, relevant public health questions, and illustrative answers when analyzing the Anti-Drug Abuse Act of 1986; (2) the social context surrounding passage of the Anti-Drug Abuse Act of 1986 and the controversial 100-to-1 drug quantity ratio; (3) the Anti-Drug Abuse Act of 1988—which added insult to the prior injury embodied in the Anti-Drug Abuse Act of 1986; (4) the resultant racial disparities in sentencing, law enforcement, prosecution, and cumulative racial disparities; (5) significant developments in the new millennium that highlighted the need for urgent change across the criminal justice system; (6) the Fair Sentencing act of 2010 that went into effect November 1, 2011—25 years after the 1986 Act; (7) the issue of retroactive application of the new sentencing guidelines and the risk of ongoing injustice; (8) the thousands of incarcerated mostly Black males waiting for justice, as evidence of ongoing national impact from the crack epidemic and racial disparities in sentencing; (9) the 2013 case of the *United States v. Blewett* and retroactive application of the Fair Sentencing Act of 2010; and (10) guiding principles regarding policy in response to epidemics and other recommendations.

Keywords: crack cocaine, policy, advocacy, epidemics, social injustice, knowledge transfer

In acknowledging the 30<sup>th</sup> anniversary of the dawning of a nation-wide crack cocaine epidemic in the United States in 1984, it is appropriate to dedicate attention to the unprecedented role of Congress in 1986 in establishing national drug policy. It was in October 1986 that Congress rushed to judgment and hastily passed the Anti-Drug Abuse Act of 1986.

The 1986 Act was eventually viewed as flawed because of a key provision: one had to be in possession of 100 times more powder cocaine than crack cocaine in order to trigger the same statutory mandatory minimum penalties. The 1986 Act resulted in the common reference to the controversial “100-to-1 drug quantity ratio.” Especially controversial was a consequence that followed from the 100-to-1 ratio: racial disparities in sentencing that disproportionately impacted African America males,

leading to their mass incarceration (Beaver, 2010).

The Anti-Drug Abuse Act of 1986 was written, debated, and passed within a one-month period, largely in response to media hype about the crack cocaine epidemic; moreover, this action was taken within an atmosphere of media-propagated fear, hysteria, and social stigmatization with

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resultant societal support for a get-tough-on-crime approach (Stanberry & Montague, 2011; Tonry, 2011; Alexander, 2010; Hubbard, 2010; Beaver, 2010; Mauer, 2006; Cooper, 2002; Tonry, 1995). The historical context included accusations by Republicans in the 1984 presidential election season that Democrats were soft on crime (Hubbard, 2010). The historic Anti-Drug Abuse Act of 1986 was quickly passed, given how crack emerged as a “safe” issue, permitting all politicians from both parties to take “tough stands;” and, to the benefit of members of both parties, the crack issue arrived just in time for a crucial November, 1986 election (Reinarman & Levine, 1997).

Before Congress’ role in passing the Anti-Drug Abuse Act of 1986, there were other historical precedents in establishing national drug policy. On June 24, 1982, President Reagan declared the War on Drugs and created the White House Office of Drug Abuse Policy to pursue the war (Cooper, 2002). In the year 1986, President Reagan “signed a directive acknowledging drugs as a national security threat,” consistent with his waging war (Scott & Marshall, 1998, p. 2). At the onset, the Reagan administration’s War on Drugs placed the focus upon a racial underclass seen as the group threatening the moral integrity of the nation (Elkins, 2010). The War on Drugs turned from an overworked metaphor into a dangerous reality (Scott & Marshall, 1998). President Reagan depicted the War on Drugs as a “life-and-death struggle between good and evil, between moral abstainers and immoral users” (Glaser & Siegel, 1997, p. 233).

Even before the national spotlight was placed on the crack cocaine epidemic, the War on Drugs had been analyzed and declared a failure, necessitating calls for major reform in drug policy (Inciardi, 1986; Wisotsky, 1986). Despite such calls, the Anti-Drug Abuse Act of 1986 constituted a policy that prevailed for a quarter century. The 1986 Act was the driving force behind what has been described as not only a War on Drugs in the United States, but, more specifically, a war on the Black male (Tonry, 1995), a war on the Black female (Bush-

Baskette, 1998), and a war on women (Chesney-Lind, 1995).

Others have called attention to a secret war (Webb, 1998; Scott & Marshall, 1998; Schou, 2006). Cooper (2002) cited assertions that the crack epidemic had roots in the Nicaragua War and a drug pipeline that helped finance the CIA-backed Contras. Webb’s (1998) investigative reporting detailed the following: in a 1984 meeting with Drug Enforcement Agency (DEA) officials Oliver North proposed taking \$1.5 million in cocaine cash to be seized from a cartel in a DEA operation and turning it over to the Contras; North created a network of offshore bank accounts to conceal money sources to sustain the Contras through a Congressional funding cutoff; drug dealers admitted under oath giving money to the Contras, while passing polygraph tests; pilots admitted flying weapons down and cocaine and marijuana back, including landing at least once at the Homestead Air Force base in Florida; a major Contra fund-raiser sold cocaine to the biggest crack dealer in South Central Los Angeles; and, the leader of South Central Los Angeles’ first major crack distribution ring escalated from selling fractions of an ounce of cocaine to shipping multimillion-dollar cocaine shipments across the United States in just four years. Webb (1998) concluded that “it is undeniable that a wildly successful conspiracy to import cocaine existed for many years, and that innumerable American citizens—most of them poor and black—paid an enormous price as a result” (p. xiii).

Bowden (2006) deduced that “the CIA has for decades knowingly dealt with drug dealers and justified these actions by citing national security” (p. viii). Scott and Marshall (1998) surmised that a drug policy is needed that does not permit the President or Congress to proclaim national security in order to protect drug traffickers.

Thus, there are many perspectives on the nature, dimensions, and extent of government drug policy—both overt and covert, including the impact of that policy. More specifically, for those concerned about public health, as well as reducing and eliminating

disparities in health, there is much to learn by focusing upon drug policy.

For example, it has been asserted that much may be learned from an analysis of case examples of how policy emerged in response to public health crises (Sivaramakrishnan, 2011); hence, there is a rationale for the present article.

This article will analyze the quarter century of drug policy that began with the Anti-Drug Abuse Act of 1986, while ending with the Fair Sentencing Act of 2010 that took effect November 1, 2011. This article's analysis will utilize the case of the crack cocaine epidemic that dawned across the United States in 1984 and was the impetus for the 1986 Act. The intent is to offer an analysis that illustrates the importance of those working in public health engaging in monitoring of emergent public health-related policy and persistent evidence-based advocacy—in order to reverse and replace any flawed or unjust policy.

More specifically, this article's analysis will cover the following topics: (1) the importance of paying attention to policy, relevant public health questions, and illustrative answers when analyzing the Anti-Drug Abuse Act of 1986; (2) the social context surrounding passage of the Anti-Drug Abuse Act of 1986 and the controversial 100-to-1 drug quantity ratio; (3) the Anti-Drug Abuse Act of 1988—which added insult to the prior injury embodied in the Anti-Drug Abuse Act of 1986; (4) the resultant racial disparities in sentencing, law enforcement, prosecution, and cumulative racial disparities; (5) significant developments in the new millennium that highlighted the need for urgent change across the criminal justice system; (6) the Fair Sentencing act of 2010 that went into effect November 1, 2011—25 years after the 1986 Act; (7) the issue of retroactive application of the new sentencing guidelines and the risk of ongoing injustice; (8) the thousands of incarcerated mostly Black males waiting for justice, as evidence of ongoing national impact from the crack epidemic and racial disparities in sentencing; (9) the 2013 case of the *United States v.*

*Blewett* and retroactive application of the Fair Sentencing Act of 2010; and (10) guiding principles regarding policy in response to epidemics and other recommendations.

### **1) The Importance of Paying Attention to Policy, Relevant Public Health Questions, and Illustrative Answers when Analyzing the Anti-Drug Abuse Act of 1986**

The case of the crack cocaine epidemic and the policy hastily enacted via the Act of 1986 by those with political motivations raises numerous public health questions, as per the line of inquiry initiated by Sivaramakrishnan (2011)—as follows: What is an appropriate response to public health crises? What can happen during the potential panic of an epidemic? Do the social and health policies that emerge in response to the crisis reflect political agendas and competing priorities? How do upstream and downstream factors interact and operate? Are the responses to the public health crisis evidence-based? Is there a gap between research and policy? Is the policy consistent with social justice or unjust? What kind of long-term effects does research reveal as following from policy, especially when the policy is unjust? How can public health remain the practice of social justice in the face of unjust policy? Are there collaborations and strong partnerships operating among researchers, practitioners, and community members, thereby enabling the collection of meaningful data and evidence-based advocacy? What is the role of evidence-based advocacy in responding to failed policy and social injustice?

There are answers to these public health questions worth noting, while analyzing the Anti-Drug Abuse Act of 1986. The 1986 Act codified a national policy that prevailed for a quarter of a century—which *was not* an appropriate response to a public health crisis. The 1986 Act was passed during the panic of an epidemic, while reflecting political agendas and competing priorities.

The policy also had long-term effects. Researchers have characterized the era, as follows: as a travesty of justice (Stanberry & Motague, 2011); a race to incarcerate (Mauer, 2006); a long period of injustice with racial disparities in incarceration (Mauer, 2011a); a period of punishing race (Tonry, 2011); a mean season of mass incarceration (Haney, 2006); a period of racial discrimination (Human Rights Watch, 2000, 2011); a period of racial injustice and social inequality (Clear, 2007); an era of massive social injustice (Drucker, 2006); a time that gave rise to the new Jim Crow and racial caste system (Alexander, 2010); a period dominated by a system of criminal (in)justice (Golembeski & Fullilove, 2005); an era that gave rise to the modern day enslaved held under criminal justice system supervision (Wallace, 2006); and, a period characterized as spawning invisible punishments of collateral consequences from mass incarceration (Mauer & Chesney-Lind, 2002).

Gaps between research and policy did emerge. Research suggested that an expansion in community-based drug-treatment would be a more effective response to crack cocaine offenders, while also being more cost effective (Caulkins et al, 1997). There was a tremendous gap between research which supported community-based drug treatment for drug offenders and the policy enacted within the War on Drugs (Wallace, 2012). The War on Drugs involved a highly political process and “not a scientific one” (Hesley, 1997, p. 1428).

As a result of policy, upstream factors operated in such a way that there was a tremendous negative impact upon downstream factors. The downstream factors impacted ranged from processes in the courts, to those throughout the criminal justice system, to those within communities, and families. Researchers documented the resultant crisis of concentrated incarceration among young, poor, minority men—and to a lesser extent among women—especially from impoverished communities (Alexander, 2010; Mauer & Chesney-Lind, 2002). Repercussions from policy included the high

toll taken on families, communities and children from damaged and compromised social networks and support systems (Clear, 2007). Well-documented are the lives of children taken away from parents who were criminalized for their drug involvement, the despair of parents who experienced termination of parental rights, and the stress upon grandparents who took over the care of their grandchildren (Gallagher et al, 2010; Ross & Aday, 2006; Minkler et al, 1997; Wallace, 1996; Minkler & Roe, 1993; Minkler et al, 1992). All of this constituted massive family and community trauma and disruption occurring downstream. These events followed from flawed policy enacted up-stream.

The policy enacted also led to an era of inconsistent federal drug sentencing by judges. Courts grappled with flaws in the Anti-Drug Abuse Act of 1986. There was a split among U.S. courts of appeals, regarding interpretations of the Act (Graham, 2011; Hubbard, 2010; Beaver, 2010). Arbitrariness, inconsistency, and blatant racial disparities threatened to destroy the public trust in the judicial and criminal justice systems.

In response to failed policy and social injustice, there were others who endeavored to make public health the practice of social justice in the face of unjust policy. Public health endeavored to remain the practice of social justice within a population approach, focusing on the health consequences of unjust policy and potential solutions, while seeking to change policy (Fullilove, 2006; Braithwaite & Arriola, 2003).

Other responses to failed policy included collaborations and strong partnerships among researchers, practitioners, and community members—including data collection to support evidence-based advocacy. Such advocacy was engaged in by the Sentencing Project on behalf of those languishing in the nation’s prisons and jails, as a consequence of the 1986 Act; the goal of advocacy was to bring an end to racial injustice in the United States’ criminal justice system (Mauer, 2011a,b). Advocacy for justice also came from various civil rights and social justice groups, including Families Against

Mandatory Minimums, the American Civil Liberties Union—together with the U.S. Sentencing Commission and the American Bar Association (Beaver, 2010). Results of sustained advocacy included the Fair Sentencing Act of 2010 that went into effect November 1, 2011, finally providing redress to the 1986 Act.

## **2) The Social Context Surrounding Passage of the Anti-Drug Abuse Act of 1986 and the Controversial 100-to-1 Drug Quantity Ratio**

The social context for the Anti-Drug Abuse Act of 1986 directly involved the Democratic political leader, Speaker of the House, “Tip” O’Neil of Boston, Massachusetts (Hubbard, 2010). O’Neill was inundated by constituents who were reacting to news of the June 1986 death of Len Bias—a first-round draft pick of the Boston Celtics basketball team; Bias died from cocaine intoxication in his college dormitory room within 48 hours of being chosen by the Celtics. The media hype rose, and Bias became a catalyst for new legislation, while his death was erroneously attributed to crack. “O’Neill knew, however, for the Democrats to take credit any bill would have to get out of both Houses and be signed by early October before the November elections” (Hubbard, 2010, p. 66). The law was passed in time to be featured in 1986 election campaign speeches (Reinarman & Levine, 1997, p. 39).

Others identified the role played by a police investigator who was lionized by prosecutors in Washington, D.C. as the resident narcotics officer of the Superior Court of the District of Columbia: i.e. Johnny St. Valentine Brown (Beaver, 2010). Given that he had a strong reputation among D.C. prosecutors, Brown testified before Congress. Brown, as “expert” witness, claimed to have a doctorate in pharmacology from Howard University and board certification in pharmacology. Of note, having testified in narcotics trials for twenty years, it later turned out that Brown had

fabricated his expert credentials, pleading guilty to perjury and being sentenced to one year in prison. Yet, he had played a role in offering testimony based on his own independent research; he asserted that possession of twenty grams of crack was comparable in danger to having one thousand grams of powder cocaine. Brown’s testimony partly influenced Congress in arriving at the 100-to-1 ratio at the heart of what was passed as the Anti-Drug Abuse Act of 1986 (Beaver, 2010). Thus, one may justifiably criticize “the caliber of information Congress relied upon while drafting an act that changed the landscape of drug enforcement”—as it was “ambiguous and speculative” (Beaver, 2010, p. 2534).

The United States Sentencing Commission (USSC, 2011) described the penalty structure for federal cocaine offenses, and the specific statutory penalties for powder cocaine and crack cocaine offenses that took effect, as follows:

The Anti-Drug Abuse Act of 1986 establishes the basic framework of statutory penalties....applicable to federal drug trafficking offenses... [T]he Act specifies separate statutory ranges for trafficking offenses involving various quantities of crack cocaine and powder cocaine...[F]or a first-time trafficking offense involving less than five grams of crack cocaine or less than 500 grams of powder cocaine, the statutory penalty range was zero to 20 years of imprisonment. For a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, the statutory penalty range was five to 40 years of imprisonment. For a first-time trafficking offense involving 50 or more grams of crack cocaine or 5,000 or more grams of powder cocaine, the statutory penalty range was 10 years to life imprisonment. Because it took 100 times more powder cocaine than crack cocaine to trigger the same statutory mandatory minimum

penalties, this penalty structure was commonly referred to as the “100-to-1 drug quantity ratio.”... (p. 2)

Five justifications were proffered by Congress for the 100-to-1 ratio in the proposed 1986 Act (Beaver, 2010): (1) the addictive quality of crack cocaine was cited; (2) associations between crack cocaine and violence were identified; (3) the use of crack cocaine among pregnant women was identified as posing threats to children in utero; (4) there were assertions that more young people were using crack cocaine; and, (5) focus was placed upon information that “the low cost of crack cocaine made it especially prevalent and more likely to be consumed in large quantities” (p. 2546).

Rare in the debate was opposition to the Act. The Congressional Black Caucus supported it (Stanberry & Montague, 2011), despite later acknowledging the travesty of justice in which they had participated. Senator Daniel Evans of Washington did oppose it, pointing out that unbalanced media attention had served to exaggerate the insidiousness of crack cocaine (Beaver, 2010). Despite such arguments against the 1986 Act, passage of the omnibus bill called for by O’Neill occurred with an unusual and extraordinary process that abandoned “the careful deliberative practices of the Congress” (Hubbard, 2010, p. 68). Indeed, Congress acted in an “almost hysteria-like” atmosphere upon “certain beliefs” that crack was “more dangerous than powder cocaine,” and “decided to punish crack more severely than powder” (Hubbard, 2010, p. 68). As a hasty decision, it took just one month for the Anti-Drug Abuse of 1986 to go through all the steps of being drafted, debated, and passed with bipartisan support (Beaver, 2010). Only 16 Congressman voted against the Anti-Drug Abuse Act of 1986. President Reagan signed the new legislation into law on October 27<sup>th</sup>, 1986, asserting at the bill signing ceremony that the “American people want their government to get tough and to go on the offensive. And that’s exactly what we intend, with more ferocity than ever before” (Hubbard, 2010, p. 66).

The Act of 1986 also included budgetary allocations by Congress that were exhausted long ago. Meanwhile, what persisted was the controversial 100-to-1 penalty scheme (Beaver, 2010).

The Act of 1986 set the stage for a travesty of justice, as crack-related drug offenses were more common among African Americans. Whites were more likely to engage in powder cocaine drug offenses, being able to escape the much harsh penalties reserved for crack drug offenders. The Anti-Drug Abuse Act of 1988 would continue the pattern of a disproportionately negative impact upon crack drug offenders who tended to be African American.

### **3) The Anti-Drug Abuse Act of 1988—Which Added Insult to the Prior Injury Embodied in the Anti-Drug Abuse Act of 1986**

The issue of getting tough on crime returned during the 1988 election primaries and 1988 presidential election—while also permitting attacks against those deemed “soft on drugs” (Reinarman & Levine, 1997, p. 39). While Reagan was still President, and further escalating the era of get tough on crime legislation, Congress passed the Anti-Drug Abuse Act of 1988 (Alexander, 2010). The following disparities in sentencing were a part of the 1988 legislation, as per the USSC (2011):

The Anti-Drug Abuse Act of 1988 also established a mandatory minimum penalty for simple possession of crack cocaine...[T]he statutory penalty range for first-time simple possession of five grams or less of crack cocaine was not more than one year of imprisonment. The statutory penalty range for first-time simple possession of more than five grams of crack cocaine was five to 20 years of imprisonment. The statutory penalty range for first-time simple possession of powder cocaine, regardless of the quantity, was not

more than one year of imprisonment... (p. 3)

Thus, the Anti-Drug Abuse Act of 1988 eliminated the one year imprisonment maximum sentence for mere possession of *any* drug. Meanwhile, the Act imposed not only a five-year mandatory minimum sentence for possession (without intent to sale/distribute) of crack—even for first time drug offenders; but, also included new civil penalties for drug offenders. For example, convicted drug offenders lost access to federal benefits (e.g., student loans). Other civil penalties included public housing authorities having the new power to evict tenants found to be allowing any drug-related criminal activity on or near their housing (Alexander, 2010).

The harm and injury from the Anti-Drug Abuse Act of 1986 Act had already begun to proliferate—having a disproportionately negative impact on crack drug offenders who tended to be African American. The 1988 Act added insult to that prior injury, leading to even greater disproportionate harm for African Americans, including negative impacts from the civil penalties.

#### **4) Resultant Racial Disparities in Sentencing, Law Enforcement, Prosecution, and Cumulative Disparities**

**Negative Impacts Documented in 1991 Data.** In contrast to the 1986 media and popular attention given to the stigmatized users in the crack cocaine epidemic, within five years there was a shift in attention; focus turned to the disparities in sentencing between powder cocaine and crack, and the longer sentences given to those prosecuted for making or selling crack (Graham, 2011). Negative impacts were rather immediate from the 1986 and 1988 Anti-Drug Abuse legislation (Alexander, 2010). An unintended consequence from the 100-to-1 ratio was almost immediate in the form of racial disparities in sentencing (Beaver, 2010).

By 1991, the Sentencing Project had announced findings that the United States led

the world with the highest known rate of incarceration; in addition, Black males were incarcerated at a rate greater than four times that of Black males in South Africa during Apartheid—i.e., 3,109 Black prisoners per 100,000 in the United States versus 729 per 100,000 in South Africa (Glasser & Siegel, 1997). Moreover, by 1991 one fourth of young African American men in the United States were “under the control of the criminal justice system” (p. 55). This was indicative of how the War on Drugs was, in effect, a war on the Black male (Tonry, 1995). As further documentation of racial injustice, for the entire United States, 67% of those incarcerated in state prisons for drug offenses were African Americans (Nadelmann, 1997). There were negative impacts upon both the criminal justice system and low income communities, in particular (Mauer, 2008).

Further, by 1991 evidence was accumulating that even those selling small amounts of crack were ending up incarcerated as a result of being given lengthy prison sentences—with the majority being African American (Graham, 2011). In 1991, in the case of *State v. Russell*, the Minnesota Supreme Court “held that the state’s 10:3 powder-to-crack ratio failed for want of a rational basis behind the distinction” (p. 782). Keep in mind that this 10:3 state ratio exemplifies how “penalties for use of crack cocaine mandated by the federal sentencing guidelines are substantially harsher than the penalties provided under many state statutes” (Walker et al, 2011, p. 225). Ruling in the case of *State v. Russell*, the Minnesota Supreme Court indicated that: while “loathe to intrude or even inquire into the legislative process,” they were concerned about the “gross disparity in resulting punishment” being given out, especially as “virtually all of the defendants being sentenced for crack offenses in Minnesota were African-American” (Graham, 2011, p. 782).

**1993—Calls for Change.** Across the country the vast majority of courts refused to strike down stiff mandatory minimum

sentences, and by 1993 it was clear that “change would have to come from Congress” in altering the 100-to-1 federal ratio (Graham, 2011, p. 783). In 1993 the United States Sentencing Commission joined Attorney General Janet Reno in expressing concern about the 100-to-1 ratio. Representative Charles Rangel of New York sought to reverse the impact of the 1986 Act he had voted for, proposing House Bill 3277—the Crack-Cocaine Equitable Sentencing Act of 1993; however, the bill died in committee (Graham, 2011).

**By 1995—Disproportionality Still Not Relieved.** In 1995 the United States Sentencing Commission recognized the disproportionate impact on one segment of the population (i.e. African Americans), and proposed an amendment to the Guidelines; their intent was to eliminate the “categorically disparate treatment of powder cocaine and crack” (p. Graham, 2011, p. 784). For example, while possession of 25 grams of powder cocaine led to an average sentence of 14 months, possession of less than 25 grams of crack led to an average sentence of 65 months (Beaver, 2010). However, Congress rejected the amendment (i.e., House of Representatives voted 332-83) and President Clinton signed the measure rejecting the amendment; President Clinton refused to give the message that “the cost of doing business is going down” (Graham, 2011, p. 784).

**Dawning of the New Millennium—Racial Disparities in Rates of Incarceration.** By the year 2000, over 80% of crack offenders were African American, while less than 6% were White (Beaver, 2010). The year 2003 saw the number of incarcerated drug offenders in prison or jail rise to 500,000, as a dramatic increase from 41,000 in 1980 (Mauer, 2011a). This data was analyzed against other evidence of “differential involvement in crime (as measured by arrests)—which still only partly explained a “significant portion of high rates of African American imprisonment” (p. 91S). This

suggested *racial disparities in rates of incarceration*.

**Gender Disparities.** Yet, there were also gender disparities. The growth from 1980 to 2000 in the prison population for women was nearly double that for men (Mauer & Chesney-Lind, 2002b). This pattern substantiates the claim that the War on Drugs was also a war on women (Chesney-Lind, 1995).

**2006—Overwhelming Racial Disparities in Sentencing.** Regarding the evidence on *racial disparities in sentencing*, by 2006 “for every ten African Americans tried for crack cocaine possession” only one White defendant was so charged (Beaver, 2010, p. 2549). The 100-to-1 ratio and greater usage of crack by African Americans meant a greater chance of being sentenced to prison, in light of the average quantities involved. In order to illustrate this, the “median amount of crack cocaine” for which a defendant was charged was 52 grams, triggering the statutory sentence of 10 years; while on the other hand, “the median amount of powder cocaine” for which a defendant was charged was the much higher 340 grams—yet this amount was “insufficient to warrant a prison sentence” (Beaver, 2010, p. 2549).

Also, by 2006, other laws were also contributing to racial disparities in sentencing. Consider how school zone drug laws have been applied in cases of drug sales between two adults during non-school hours; meanwhile, densely populated urban areas increase the likelihood that a drug offense occurred within a school zone district. These laws disproportionately impacted African Americans and Latinos via enhanced penalties. Consider data released in 2006 showing 96% of those incarcerated under such laws for the year 2005 were African American or Latino; such disparities supported the case of state legislatures needing to return sentencing discretion to judges for such cases (Mauer, 2011a).

Data showed that rates of incarceration rates for Black males of all ages were 5 to 7 times greater than those for White males in

the same age groups (Harrison & Beck, 2006). The same trends were found among females across all age groups, given year end 2005 data; this data revealed a rate of incarceration of 347 per 100,000 for Black females relative to 144 per 100,000 for Hispanic females, and 88 per 100,000 for White females (Harrison & Beck, 2006).

Thus, by 2006 the data supporting racial disparities in sentencing was clear-cut. The data also supported the claim that the War on Drugs was not only a war on the Black male (Tonry, 1995), but also a war on the Black female (Bush-Baskette, 1998).

**2009—Racial Disparities in Law Enforcement.** The year 2009 permitted an analysis of yet other *racial disparities in law enforcement*. Contributing to racial disparities at the law enforcement level, there was also a record of police traffic and pedestrian stops with disproportionate searches by police of African Americans and Hispanics; this included the use of racial profiling (Human Rights Watch, 2000; Alexander, 2010; Murray, 2010).

In 2009, African Americans still accounted for 34% of all arrests in the United States—being disproportionate to their representation in the national population. This stood in contrast to the pre-crack epidemic and pre-1986 Act era; consider how, in 1980, African Americans accounted for 21% of drug arrests, rising to 36% in 1992 (Mauer et al, 2011a). Data show that the number of drug arrests nearly tripled from 1980 (581,000) to 2009 (1,663,000); also, problems in policing practices suggested the use of racial profiling, as with state police on the New Jersey Turnpike in the 1990s (Mauer et al, 2011a).

In addition, by 2009 more data served to justify claims of ongoing racial disparities in the criminal justice system at the level of law enforcement, or arrests; this data showed that African Americans used drugs at the same proportions as Whites and Latinos (Mauer, 2011a). In a similar vein, Walker et al (2011) cited a school based survey by the Centers for Disease Control and Prevention showing self-reported lifetime crack use was highest

among Hispanic students, whereas Whites had the next highest percentage, followed by African Americans.

Of note, this exact same pattern persists, specifically for contemporary crack use (Palamar & Ompad, 2014). This persistent pattern reveals how the African Americans surveyed use crack at the lowest rates relative to Hispanics and Whites; this stands in contrast to African American over-representation in the criminal justice system—as a consequence of the enforcement of drug laws.

There was also relevant data that demonstrated how drug selling activity across six cities suggested purchasers utilized a supplier matching their own race/ethnicity. Hence, one might expect, all things being equal, that one would observe arrest rates for drug possession that reflect these trends (Mauer et al, 2011a). Yet, African Americans were over-represented in disproportionate arrest rates. Thus, there was evidence of racial disparities in drug arrests, or at the level of law enforcement.

**Evidence of Racial Disparities in Prosecution.** There is also evidence of *racial disparities in prosecution*. State prosecutors are “more likely to refer crack cases involving racial minorities to the federal system for prosecution;” and, those penalties for use of crack cocaine mandated under federal sentencing guidelines are much harsher than those penalties under many state statutes (Walker et al, 2011, p. 225). Thus, there is “selective prosecution in drug cases” (p. 225). There is data on prosecutors being more likely to offer White defendants a negotiated plea below the mandatory minimum relative to African American and Latino defendants (Mauer, 2011a).

**Evidence Racial Disparities are Cumulative.** Other evidence suggests that within the criminal justice system there are *cumulative racial disparities*. Those detained longer in jail pre-trial face a greater likelihood of being convicted, and a greater chance of receiving lengthier prison terms—

relative to those released on bond (Mauer et al, 2011a).

### **5) Significant Developments in the New Millennium: The Need for Urgent Change across the Criminal Justice System**

**A Year 2000 Seminal Report from Human Rights Watch.** The dilemma involving the miscarriage of justice in the United States drew the attention of Human Rights Watch, culminating in a major report released at the dawning of the new millennium. Urgent action emerged as much needed, given the analysis and subsequent recommendations advanced by Human Rights Watch (2000), as follows: (1) every state and the federal government needed to reassess their public policy approaches to drug use and sales, while also reassessing law enforcement strategies in order to make them more racially equitable; (2) there was a need to change all state and federal policies that caused significant and unwarranted racial disparities; (3) it was vital to eliminate mandatory minimum sentencing laws with requisite prison sentences for specified quantities of drugs and in light of prior records; (4) it was important to permit judges to exercise discretion in sentencing, relying upon their informed judgment to ensure effective and proportionate sentences on a case by case basis; (5) steps needed to be taken to increase the availability of special drug courts that provided treatment alternatives to incarceration, and to increase the availability of community-based and prison-based substance abuse treatment, as well as prevention; (6) another critical step involved requiring police to collect and publicly share data on the reason for all stops and frisks (i.e. searches), and on all those arrested for drug offenses by arrest location, including the race of those stopped—while eliminating the use of racial profiling; and, (7) it was deemed important to begin requiring the Bureau of Justice Statistics of the U.S. Department of Justice to compile and publish statistics by state on arrests, convictions, sentences, admissions to prison,

and prison populations, in or order to permit analyses by race.

**Prison Overcrowding and the High Cost of Incarceration—as Competition with Education Budgets.** In this manner, with the dawning of the new millennium, change was deemed as urgent. The pressure for change arose not only in response to evidence of racial disparities in the criminal justice system, but also given other pressing realities: overcrowding in the prison system and related problems; and, the high cost of mass imprisonment in the United States.

Contemporary federal prison facilities were 36% above rated capacity, necessitating efforts to expand the budget to build new prisons (Mauer, 2011b). Prison overcrowding became a serious issue, especially in light of potential health and safety risks. For example, prisons remain places where sexual victimization occurs (Wallace, Conner & Dass-Brailsford, 2011; McCartan & Gunnison, 2010; Wolf & Shi, 2010; McDaniels-Wilson & Belknap, 2008). Consider data for the period October 2008 to December 2009 showing that 88,500 prison and jail inmates had been victimized (Human Rights Watch, 2011). Prisons were also cited as places where there is a risk of HIV and hepatitis transmission, given that the prevalence of these diseases is significantly higher than found among the non-incarcerated population; in addition, prevention strategies such as the provision of condoms are largely unavailable (Human Rights Watch, 2011).

Well into the new millennium, given data compiled June 2009, the United States continued to distinguish itself with “the largest incarcerated population (2,297,400, a decrease of 0.5 percent since December 2008) and the highest per capita incarceration rate in the world (748 inmates per 100,000 residents)” (Human Rights Watch, 2011, p. 613). Not surprisingly, prison overcrowding was a resultant pressing issue.

The problem of prison overcrowding was exemplified in legislation that went into effect in January 2010 in the state of

California. This legislation provided more good time credits to prisoners, and diverted certain categories of parole and probation violators from prison—all in an effort to reduce the prison population (Human Rights Watch, 2011). California was facing a federal court order to reduce the state's prison population, in order to ensure that prisoners received constitutionally adequate medical and mental health care, even as the state had appealed this decision to the United States Supreme Court (Human Rights Watch, 2011). Clearly, prison overcrowding placed vulnerable inmates at risk for medical and mental health problems, given risks for violence and interpersonal trauma in prison, as well as risks for sexually transmitted diseases, including HIV (Wallace, Conner & Dass-Brailsford, 2011; Wolf & Shi, 2010; Burns, 2010; Boxer et al, 2009; Haney, 2006; Robertson, 2004).

The rising cost of incarceration also became a critical issue. Consider how the 100-to-1 ratio results in an estimated \$25,000+ per prisoner per year in a federal prison, or about \$125,000 for a 5 year mandatory minimum sentence, and about \$250,000 for a 10 year mandatory minimum sentence (Mauer, 2008); noteworthy, is how court supervised treatment would be a wiser and more cost effective use of funds (Mauer, 2008). Scott (2013) cited data for an average annual incarceration cost of \$28,284 per prisoner per year. This suggests even higher costs for a 5 or 10 year mandatory minimum sentence—as costs which keep rising.

Without wise investments in the much more cost effective alternative of supervised community-based addiction treatment, the high financial cost of incarceration of drug offenders became unsustainable, given state fiscal constraints (Mauer, 2011a; Clear, 2007; Mauer, 2006). Political leaders across the country faced the quandary of severe fiscal constraints, given the rising cost of incarceration; this was not desired, especially when considered in light of the negative impact on state supported higher education and other services deemed vital (Mauer, 2011a). As a case in point, in 2010 the California Governor, Schwarzenegger,

“announced that he would advocate for a constitutional amendment prohibiting the percentage of the state budget earmarked for prisons from exceeding what is set aside for the public university system” (p. 96S). States across the nation began to find a rationale for supporting the repeal of mandatory minimum sentences, given the rising costs of incarceration relative to their education costs.

### **A Crisis of Trust in the Legitimacy of the Judicial and Criminal Justice System.**

A nation-wide crisis of trust in the criminal justice system also became a factor in the new millennium. The 100-to-1 disparity symbolized the “continuing legacy of racism in the criminal justice system” with “sentencing policy and practice contributing” to produce racial disparities that permeated the American justice system (Mauer, 2008, p. 5). The criminal justice system emerged as lacking legitimacy, given the erosion of public trust (Mauer, 2011a).

Logic could no longer sustain the unjust 100-to-1 disparity that Congress had established through the Anti-Drug Abuse Act of 1986. It became possible to systematically reject all of the premises that Congress used to enact the Anti-Drug Abuse Act of 1986 (Beaver, 2010). What is the logic in an Act that does not target the criminals trafficking high volumes of drug? In essence, some twenty-five years later, none of the justifications behind the 1986 Act were persuasive, and the need to eliminate the ratios clearly apparent (Beaver, 2010).

### **The Burden Pushing Congress and the Judiciary to Change.**

The resultant burden to resolve the dilemmas caused by the Act of 1986 was seen as being the burden of Congress, requiring action (Beaver, 2010). Meanwhile, it was envisioned that even with a new Fair Sentencing Act, the judiciary would also have to contribute to the process of correcting the decades of disproportionate sentencing; and, judges would have to refrain from choosing to impose their own ratios, while also making decisions on a case-by-case base, exercising discretion (Beaver, 2010).

Supreme Court decisions in the new millennium (i.e., *Booker*, *Kimbrough*, *United States v. Spears*) led to the view that sentencing Guidelines were advisory and not mandatory, including the 100-to-1 powder cocaine to crack ratio (Hubbard, 2010). This view permitted sentencing judges to voice reasonable categorical disagreement with the ratio and sentence defendants below the Guidelines—providing they still applied any applicable mandatory minimum terms (Graham, 2011). The results included federal district courts adopting ratios of 10-to-1 and even 1-to-1 ratios, while other federal sentencing judges adhered to the 100-to-1 ratio. These disparate practices produced great variability in sentences handed out, depending upon the luck of the draw, as cases were randomly assigned to judges; thus, this was seen as an era of judicial “arbitrariness” which prevailed (Graham, 2011, p. 790).

**Results of Sustained Advocacy.** Hence, significant developments in the new millennium and substantial evidence supported the need for urgent change across the criminal justice system. Key among the significant influential factors in bringing about change was advocacy. For example, there was a quarter century of sustained advocacy by groups such as the Sentencing Project (Mauer, 2011a,b). Other groups had also engaged in decades of advocacy for change—including Families Against Mandatory Minimums, the American Civil Liberties Union, the U.S. Sentencing Commission, and the American Bar Association (Beaver, 2010).

**Atmosphere for Change in 2010.** Thus, by the new millennium, and the end of the first decade of the twenty-first century, there had been many significant developments that contributed to an atmosphere supportive of major change in legislative policy on the matter of cases involving crack drug offenders. This was the context in which Congress took up new legislation that was to become the Fair Sentencing Act of 2010.

## **6) The Fair Sentencing Act of 2010: Effective November 1, 2011—25 Years after the 1986 Act**

Seeking to reverse a quarter century of blight upon a criminal justice system that embodied massive injustice, the Fair Sentencing Act of 2010 was signed into law by President Barack Obama on August 3, 2010; it took effect on November 1, 2011. The August, 2010 signing of the Act by President Obama was truly historic. Yet, the Fair Sentencing Act was a “long-overdue and necessary step in overhauling a flawed drug policy” (Beaver, 2010, p 2575) associated with the War on Drugs declared by President Reagan in 1982 (Alexander, 2010). Unfortunately, the Fair Sentencing Act of 2010 “did not go as far as the unsuccessful bill proposed by Obama in 2007” (Steiker, 2013, p. 36).

Congress effectively said “sorry” with the Fair Sentencing Act, taking decades to do so. This suggested how “sorry” seemed to be the “hardest word” to articulate through tangible remedial action (Graham 2011).

According to Senator Richard Durbin, the author of the Fair Sentencing Act of 2010, Congress’s goals in passing the Act included: (1) reducing the racial disparities in drug sentencing; (2) increasing the public trust in the criminal justice system that had been eroded by a quarter century of flawed drug policy, especially in light of the negative impact on minority communities; (3) reducing the unprecedented over-incarceration of non-violent drug offenders that followed from the 1986 Act; and, (4) serving to shift the focus of federal drug enforcement to high-level drug kingpins and away from low-level offenders (Mauer, 2011b).

**New Mandatory Minimums and the New 18-to-1 Drug Quantity Ratio—Changed from 100-to-1.** The Fair Sentencing Act of 2010 raised the threshold for triggering a mandatory minimum sentence for crack cocaine to 28 grams (from 5 grams) and left the powder cocaine quantity at 500 grams (Mauer, 2011a). The

Fair Sentencing Act (FSA) of 2010 specified the following:

...Specifically, the FSA changed the quantities of crack cocaine that trigger the five- and ten-year statutory mandatory minimum penalties. As a consequence, first-time trafficking offenses involving less than 28 grams of crack cocaine [corresponds to approximately one ounce) are subject to a statutory penalty range of zero to 20 years of imprisonment. First-time trafficking offenses involving between 28 and 280 grams of crack cocaine are subject to a statutory penalty range of five to 40 years of imprisonment... A first-time trafficking offense involving 280 or more grams of crack cocaine is subject to a statutory penalty range of 10 years to life imprisonment...

In addition, the FSA repealed the separate statutory penalty range of five to 20 years of imprisonment for first-time simple possession of more than five grams of crack cocaine. As a result, a first conviction for simple possession of any amount of crack cocaine, like simple possession of powder cocaine, is subject to a statutory penalty range of zero to one year of imprisonment regardless of quantity. (USSC, 2011, pp. 7-8)

Thus, the Fair Sentencing Act of 2010 served to eliminate the mandatory minimum penalty for simple possession of crack cocaine that had been established via the Anti-Drug Abuse Act of 1988. The 2010 Act ended the miscarriage of justice that had reigned for 22 years (Steiker, 2013).

Yet, at the heart of the Act of 2010 was the new 18-to-1 ratio. The USSC (2011) explained that because “it now takes approximately 18 times more powder cocaine than crack cocaine to trigger the same statutory mandatory minimum penalties, some may refer to this penalty structure as an “18-to-1” drug quantity ratio” (p. 8). Despite limitations in the 2010 Act, it

did serve to reduce the crack-to-powder ratio from 100-to-1 to 18-to-1 (Steiker, 2013).

**A Milestone and Ongoing Injustice.** Injustice still prevailed, given the goal stated by some members of Congress: to see powder and crack cocaine treated in an *identical* manner for “sentencing purposes” (Graham 2011, p. 768). The disparity between powder cocaine and crack was only *reduced*; the “gap” was not eliminated (p. 2011).

Nonetheless, the Fair Sentencing Act of 2010 was referred to as a “milestone in advancing more proportional and fairer sentences in the federal criminal justice system” (Mauer, 2011b, p. 4). In effect, the Act of 2010 substantiated the excessive nature and unfairness of the earlier 1986 law (Mauer, 2011b, p. 4).

### **7) The Issue of Retroactive Application of the New Sentencing Guidelines: The Risk of Ongoing Injustice**

What remained at issue was whether or not the courts should retroactively apply the sentencing guidelines that were to take effect on November 1, 2011; the central concern was whether criminals should face sentencing under the prevailing law (i.e. sentencing guidelines) in effect at the time when their crime was committed (Leonard, 2011).

**Congress’ Failure to Specify Retroactivity in 2010.** With regard to the issue of retroactive application of the new sentencing guidelines in the Fair Sentencing Act of 2010, Hubbard (2010) concluded as follows: since “the 100-to-1 ratio is perhaps the single *worst* symbol of unfairness in our federal criminal justice system, it will only be a half-victory for justice not to provide for retroactively” (p. 76).

Half justice did prevail in the year 2010. No retroactivity was specified by Congress when passing the Fair Sentencing Act of 2010.

It has been noted that, typically, Congress indicates if a new law applies retroactively (Liptak, 2011). Judges have questioned the logic in Congress *not* making the law apply retroactively, once they declared the prior sentencing guidelines unfair. Also, judges called the logic perverse in their having to follow the prior unfair sentencing guidelines for those who committed their offense *before* the law became effective (Liptak, 2011).

**The USSC Votes for Retroactivity in 2011.** Fortunately, the United States Sentencing Commission voted unanimously on June 30, 2011 for retroactive application of the Fair Sentencing Act of 2010. This retroactive application of the Fair Sentencing Act of 2010 also took effect on November 1, 2011.

According to Human Rights Watch (2011), this action on the part of the United States Sentencing Commission was consistent with internationally recognized human rights principles. These include the right to benefit from reductions in sentence made after commission of a crime, as well as the right to freedom from racial discrimination. Human Rights Watch (2011) indicated that more reform was needed in order to bring the United States into full compliance with their international human rights obligations. These include an obligation for the United States to amend, rescind, or nullify laws that perpetuate racial discrimination (i.e. the International Convention on the Elimination of All Forms of Racial Discrimination).

**The 2012 Supreme Court Ruling on Retroactivity.** Conflict resulted among circuit courts, as some rejected retroactive application of the Fair Sentencing Act of 2010. Fortunately, the Supreme Court “resolved this conflict among the circuits in June of 2012” via a 5-to-4 decision (Steiker, 2013, p. 36). In their decision, it was held that “Congress intended the Fair Sentencing Act’s provisions to apply to those whose criminal conduct occurred before the effective date of the Act but whose sentencing occurred after that date” (p. 36).

### **8) The Thousands of Incarcerated Mostly Black Males Waiting for Justice: Evidence of Ongoing National Impact from the Crack Epidemic and Racial Disparities in Sentencing**

Retroactive application would also allow the Fair Sentencing Act of 2010 to apply “to the many thousands currently incarcerated for a crack cocaine offense under the old sentencing structure” (Mauer, 201b, p. 4). There are, indeed, thousands waiting for justice, as revealed by data provided by the United States Sentencing Commission (USSC, 2011).

The “total number of crack cocaine offenders incarcerated on November 1, 2011, who were estimated to be eligible to receive a reduced sentence under 18 U.S.C. § 3582(c)(2) is 12,040” (p. 13). The majority are African American (85.1%) and male (94.5%) citizens of the United States (94.9%) with a mean age of 36 years (a November 1, 2011 age calculation).

The USSC (2011) found that for the total 12,040 eligible crack offenders, the number eligible *per fiscal year* was found to be, as follows: for 2010, 1,630 (13.5%); for 2009, 1,866 (15.5%); for 2008, 1,531 (12.7%); for 2007, 1,211 (10.1%); for 2006, 1,028 (8.5%); for 2005, 894 (7.4%); for 2004, 630 (5.2%); for 2003, 532 (4.4%); for 2002, 389 (3.2%); for 2001, 308 (2.6%); for 2000, 252 (2.1%); for 1999, 285 (2.4%); for 1998, 296 (2.5%); for 1997, 285 (2.4%); for 1996, 225 (1.9%); for 1995, 204 (1.7%); for 1994, 221 (1.8%); for 1993, 156 (1.3%); and for 1992, 97 (0.8%).

Illustrating the geographic distribution of the 12,040 eligible crack offenders across the nation, see the number eligible within the *top 22 states* (USSC, 2011): 1) Eastern Virginia, 884 (7.3%); 2) South Carolina, 433 (3.6%); 3) Middle Florida, 309 (3.3%); 4) Eastern North Carolina, 381 (3.2%); 5) Northern Illinois, 325 (2.7%); 6) Western Texas, 314 (2.6%); 7) Western North Carolina, 296 (2.5%); 8) Middle Pennsylvania, 278 (2.3%); 9) Western Virginia, 273 (2.3%); 10) Southern Florida, 261 (2.2%); 11) Eastern Texas, 258 (2.1%); 12) Middle North

Carolina, 250 (2.1%); 13) Southern Georgia, 235 (2.0); 14) Northern Florida, 232 (1.9%); 15) Northern Texas, 219 (1.8%); 16) Northern West Virginia, 214 (1.7%); 17) Maryland, 209 (1.7%); 18) Eastern Tennessee, 202, 1.7; 19) Eastern Missouri, 196 (1.6); 20) Southern Alabama, 190 (1.6%); 21) Southern New York, 190 (1.6%); and, 22) Central Illinois, 187 (1.6%).

**What Do the 12,040 Waiting for Justice Reveal?** The body of data provided on the 12,040 waiting for justice provides a snapshot of how drug policy operated in the United States from 1992 to 2010. The 1992-2010 data reflects: ongoing involvement with crack; the enduring presence of crack offenders across the United States; and, ongoing racial disparities in the criminal justice system, as the vast majority are African American males.

**9) The 2013 Case of the *United States v. Blewett* and Retroactive Application of the Fair Sentencing Act of 2010**

Among the 12,040 mostly African American males estimated to be eligible as of November 1, 2011 to receive a reduced sentence under 18 U.S.C. § 3582(c)(2), there were the Blewett cousins, Cornelius and Jarreous; they were sentenced by a United States District Court for the Western District of Kentucky at Bowling Green in 2005. They each received a mandatory minimum of ten years. They sought retroactive sentencing under the new sentencing guidelines provided by the Fair Sentencing Act of 2010. In the case of the *United States v. Blewett*, Circuit Judge Merritt offered the opinion for the U.S. Court of Appeals for the Sixth Circuit (May, 17, 2013), as follows:

This is a crack cocaine case brought by two currently incarcerated defendants seeking retroactive relief from racially discriminatory mandatory minimum sentences imposed on them in 2005. The Fair Sentencing Act was passed in August 2010 to “restore fairness to

Federal cocaine sentencing” laws that had unfairly impacted blacks for almost 25 years. The Fair Sentencing Act repealed portions of the Anti-Drug Abuse Act of 1986 that instituted a 100-to-1 ratio between crack and powder cocaine, treating one gram of crack as equivalent to 100 grams of powder cocaine for sentencing purposes. The 100-to-1 ratio had long been acknowledged by many in the legal system to be unjustified and adopted without empirical support. The Fair Sentencing Act lowered the ratio to a more lenient 18-to-1 ratio. However, thousands of inmates, most black, languish in prison under the old, discredited ratio because the Fair Sentencing Act was not made explicitly retroactive by Congress.

In this case, we hold, *inter alia*, that the federal judicial perpetuation of the racially discriminatory mandatory minimum crack sentences for those defendants sentenced under the old crack sentencing law, as the government advocates, would violate the Equal Protection Clause, as incorporated into the Fifth Amendment by the doctrine of *Bolling v. Sharpe*, 347 U.S. 497 (1954) (Fifth Amendment forbids federal racial discrimination in the same way as the Fourteenth Amendment forbids state racial discrimination). As Professor William J. Stuntz, the late Harvard criminal law professor, has observed, “persistent bias occurred with respect to the contemporary enforcement of drug laws where, in the 1990s and early 2000s, blacks constituted a minority of regular users of crack cocaine but more than 80 percent of crack defendants.” *The Collapse of American Criminal Justice* 184 (2011). He recommended that we “redress that discrimination” with “the underused concept of ‘equal protection of the laws.’” *Id.* at 297.

In this opinion, we will set out both the constitutional and statutory reasons the old, racially discriminatory crack sentencing law must now be set aside in favor of the new sentencing law enacted by Congress as the Fair Sentencing Act of 2010. The Act should apply to all defendants, including those sentenced prior to its passage. We therefore reverse the judgment of the district court and remand for resentencing. (pp. 1-2)

**New Hope for the Incarcerated.** This ruling provided hope to the thousands of mostly Black males waiting for justice, while still incarcerated under unjust sentences. Meanwhile, there is still much suffering from the long-term impact of the failed and unjust policy embodied in the old racially discriminatory crack sentencing guidelines.

**A Lesson to be Learned.** Yet, consider how the past quarter century of suffering could have been avoided if evidence-based policy had prevailed instead of policy driven by media hysteria and politics. Consider what might have occurred if a public health approach had prevailed. Instead of a War on Drugs, an evidence-based public health approach would have ensured access to community-based drug treatment for offenders, as an alternative to incarceration, including that which was mandated (Wallace, 2012; Wallace, 2005; Human Rights Watch, 2000; Caulkins et al, 1997).

## 10) Guiding Principles Regarding Policy in Response to Epidemics and Other Recommendations

There is much to be learned from the public health case of the crack cocaine epidemic and the long-term impact of failed and unjust policy. In the new millennium, public health and community health researchers, practitioners, and workers will continue to face major national and global public health challenges. This article's

analysis has highlighted how those working in public and community health need to pay attention to the policy that is arising in response to a public health crisis or epidemic.

**The Four Guiding Principles Regarding Policy.** Given the analysis of this case, four major guiding principles regarding policy in response to public health crises and epidemics may be identified. These guiding principles follow:

- 1) **Monitor.** It is vital to monitor on an ongoing basis the policy that arises in response to public health crises and epidemics.
- 2) **Advocate.** If the policy is flawed or unjust, then time must be spent engaging advocacy to seek redress and the enactment of appropriate policy—even if it means persevering for years and even decades, as evidence is collected to support evidence-based advocacy.
- 3) **Collaborate.** It is important to forge collaborations and strong partnerships among researchers, practitioners, and community members, thereby enabling the collection of meaningful data and evidence-based advocacy.
- 4) **Propose.** As opposed to being in reaction mode to flawed or unjust policy, the ideal is to also be engaged with collaborators in proposing policy that is evidence-based and reflects the transfer of knowledge; again, this may mean persevering for years and even decades, until what is being proposed is adopted.

**Five Recommendations When Proposing Policy.** These recommendations are akin to best practices for proposing and establishing policy in response to public health crises and epidemics. Consider the five recommendations, below:

**I. Ideally, Policy is Evidence-Based and Reflects Knowledge Transfer.** The goal is for public health to be an evidence-based practice; the evidence needs to be useful for generating policy and interventions (Wallace,

2012; Kansagra & Farley, 2011). All too often, there is a considerable gap between what research suggests is an appropriate response to a public health issue and the policies actually enacted and enforced; the resultant policies may end up rooted in laws, regulations, judicial decrees, agency guidelines, or budget priorities—despite a lack of supportive evidence (Brownson et al, 2009). This was powerfully illustrated via the case analyzed in this article.

An important task involves translating research findings to the real world, or transferring knowledge so that it can be practically applied (Wallace, 2012; Kansagra & Farley, 2011; Trickett, 2011; Koh et al, 2010). Practical applications of research include policy. This is the ideal way in which policy should arise.

Policy has a “vast impact” on the daily lives of societal members and on public health indicators, given long-term effects from policy. This necessitates the following goals: to further evidence-based policy; to use the best available evidence; to “expand the role of researchers and practitioners to communicate evidence” that is appropriately packaged and tailored for various audiences; and to “document outcomes to improve, expand, or terminate policy” (Brownson et al, 2009, p. 1581).

**II. Adopt the Whole-Stream Strategy to Reduce Health Disparities.** An additional goal of public health involves reducing health disparities, which requires a whole-stream strategy (Koh, et al, 2010). The whole-stream approach seeks to address both upstream factors (i.e. societal level, such as policies) and downstream factors (i.e., individual level, such as behavior)—as part of “an integrated, multilevel, social determinants approach” (Koh et al, 2010, p. S73).

**III. Consider Social Determinants, Taking a Population Approach, and Social Justice.** The integrated social determinants approach considers “social and economic factors, social support networks, physical and social environment, access to health

services, and social and health policies” (Koh et al, 2010, p. S73). Also, adopting a “socioecological and social-determinants framework” assures adequate attention is paid to key determinants of inadequate health: “poverty, racism, unemployment, and a variety of conditions associated with unacceptable health disparities” (Walker, 2008, p. 1934). A consequence of adopting such a framework involves public health taking a population-based approach as the “practice of social justice” (Walker, 2008, p. 1934).

**IV. Participate in Community Collaboration and Collect Data.** While seeking to be evidence-based, the public health approach may consider various forms of evidence (Trickett, 2011; Kansagra, 2011). Perhaps, the best evidence may result from research conducted where health professionals and community members have worked together in collaboration. This is consistent with the drive for evidence-based approaches and community-based participatory research within efforts to achieve health equity and justice (Wallace, 2008).

**V. Engage in Evidence-Based Advocacy within Partnerships.** Frequently outcomes from policy documented through research indicate a need to improve or terminate policy. Advocacy is among the factors that can influence modifications in policy (Brownson et al, 2009). In particular, there is evidence-based advocacy, involving movement from research findings to advocacy; and, a role for strong partnerships between researchers and advocates. These partnerships can help to ensure that policies are grounded in science—and that messages about policy are effectively tailored to the target audience (Brownson, et al 2009).

## Conclusion

This article followed from the premise that much may be learned from an analysis of case examples of how policy emerged in response to public health crises

(Sivaramakrishnan, 2011). It is hoped that much was learned via this article's analysis of the case of the crack cocaine epidemic and the flawed and unjust policy inherent in the Anti-Drug Abuse Act of 1986. The intent of this article was to offer an analysis that illustrated the importance of monitoring emergent public health-related policy and engaging in persistent evidence-based advocacy in order to reverse and replace flawed or unjust policy.

In an era of public health pandemics, it is appropriate to ask the following question: Whose voice counts more during a public health crisis, and what are the beliefs and anxieties—both contemporary as well as historic—that “color responses to outbreaks” (Sivaramakrishnan, 2011, p, 1032)? These are important considerations, since a public health crisis may represent an opportunity for some to “project their political agenda and competing priorities” (p. 1032). This was powerfully illustrated through this article's analysis of the social context surrounding the emergence of the Anti-Drug Abuse Act of 1986.

Moreover, in the case of the crack epidemic, the historic and contemporary beliefs and anxieties that drive and sustain institutionalized racism, oppression, and discrimination in America prevailed. These beliefs and anxieties effectively served to “color responses” to the public health crisis, turning the War on Drugs into a war on Blacks. The war waged impacted most perniciously African American men, as well as women, and their communities, overall. It was as if the same historic beliefs and anxieties that permitted the prior traumatic eras of African enslavement, forced labor and sex on plantations, lynching, and legalized segregation effectively sustained the quarter century of legalized injustice supported by national drug policy embodied in the Anti-Drug Act of 1986.

The article substantiated how there are “several concentric circles within which public health and its politics exist, and the overlap among them must be analyzed to more efficiently respond to outbreaks of

epidemics” (Sivaramakrishnan, 2011,p. 1032).

In conclusion, may readers never be blind or naïve to this reality of “several concentric circles”—including historical influences. This should follow as vital awareness, given the analysis provided in this article. What may also follow is a deeper understanding and appreciation among all working in public and community health regarding how flawed and unjust policy can cause decades of damage that is difficult to redress. Worse of all, in the case of the crack epidemic, the damage is incalculable in light of the havoc and trauma imposed upon the lives of incarcerated men and women, their partners/spouses, children, families, and communities. Also, the flawed and unjust policy embodied in the Anti-Drug Act of 1986 served to rip the very fabric of national life. All of this damage was a consequence of the massive social injustice and institutionalized racism, oppression, and discrimination that reigned for a quarter century due to flawed policy. So many across the spectrum of society became complicit in the social injustice that followed from flawed policy; those complicit range from all who supported getting-tough-on-crime to those who benefitted socio-economically from the massive expansion of the prison-industrial complex in America. Meanwhile negative impacts from flawed policy will reverberate for generations to come. Understanding the potential broad impact of policy emerges as essential from this analysis.

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