

Chapter 5

COCAINE AND CRIME

A. INTRODUCTION

There is widespread belief that cocaine in general and crack cocaine in particular "causes crime to go up at a tremendously increased rate."¹ During debate about the Anti-Drug Abuse Act of 1986, for example, members of Congress expressed deep concern about increased crime related to crack cocaine. This chapter provides an overview of the current understanding of the connection between both powder and crack cocaine and crime. Sources reviewed here include empirical analyses, published and unpublished, and public testimony received by the Sentencing Commission.²

Section B summarizes the limited conclusions drawn by researchers to date on crime and cocaine through a framework that has been widely recognized as helpful in understanding and analyzing the relationship between drugs and crime. Section C provides some context for assessing the association between cocaine and crime. This is done through analyses of the social context surrounding cocaine distribution, how violence associated with both powder and crack cocaine compares historically to violence associated with other "drug eras," and how crime associated with both powder and crack cocaine compares to that associated with other drugs.

There are at least two important limitations concerning the research relied on in this chapter and in research on the relationship between drugs and crime in general. First, conducting research in this area and drawing conclusions from it is complex and otherwise difficult. Determining, for example, whether trafficking in a specific drug has a causal relationship with crime requires studies that disentangle trafficking in that drug from all concurrently influencing factors. It also requires that

¹ See 134 Cong. Rec. S17,301 (Oct. 21, 1988) (statement of Sen. Helms, urging that crack cocaine offenses be subject to mandatory minimum penalties in part because "crack [cocaine] has been linked to violent crime"); 134 Cong. Rec. E2,701 (Aug. 10, 1988) (statement of Rep. Miller, expressing concern over the link between the crack cocaine trade and gang activity); 132 Cong. Rec. 31,330 (Oct. 15, 1986) (statement of Sen. Chiles); Hearing on Crack Cocaine, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Congress; C. Reinerman and H. Levine, "The Crack Attack: Politics and Media in America's Latest Drug Scare," in J. Best (Ed.), *Images Typifying Contemporary Social Problems* 117 (1989). See also, I. Wilkerson, "Crack's Legacy of Guns and Death Lives On," *The New York Times* A1 (Dec. 13, 1994).

² United States Sentencing Commission, *Hearing on Crack Cocaine* (Nov. 1993) (hereinafter "Commission Hearing").

conclusions based on a particular sample, at a particular time, and in a particular place, not be readily generalized to the broader population.

Second, in part because of the complexity, little reliable research is available on specific drugs and their relationships to criminal activity. Moreover, there is even less research available on the differences in varying forms of a single drug, such as crack and powder cocaine. This chapter thus relies on the handful of currently available studies that investigate cocaine and crime. The Commission recognizes, as should readers of this report, the limitations of the available research data.

While there is little doubt that an association between drugs and crime can be found, the literature on the drugs/crime connection still provides no consensus as to whether drug use causes crime, involvement in crime causes drug use, or other factors cause both. To inform policy better in this important area, the Sentencing Commission, in conjunction with Florida State University, has recently initiated an examination of causal relationships between drugs and violent crime. The study will distill the body of literature on drugs and violent crime and conduct independent research to build on currently available research. The study is expected to be completed in early 1996.

B. DRUGS, CRIME, AND THE TRIPARTITE FRAMEWORK

In 1985, Dr. Paul J. Goldstein of the University of Illinois School of Public Health described "a tripartite conceptual framework" for analyzing drug-related crime, especially violent crime.³ The Goldstein framework increasingly has been recognized by researchers and others as helpful in understanding the nature of drug/crime associations.⁴ The Goldstein framework sets out three principal types of drug-related crime: systemic crime, psychopharmacologically driven crime, and economically compulsive crime.⁵ Although this framework was developed with violent crime in mind, its economic-compulsive prong is useful and relevant in considering nonviolent drug-related crime as well.

³ P. Goldstein, "The Drugs/Violence Nexus: A Tripartite Conceptual Framework," 14 Journal of Drug Issues 493 (Fall 1985).

⁴ See J. Inciardi, "The Crack-Violence Connection Within a Population of Hard-Core Adolescent Offenders," in M. de la Rosa, B. Gropper, and E. Lambert (Eds.), Drugs and Violence: Causes, Correlates and Consequences 92 (1990) (hereinafter "1990 Inciardi Adolescent Study"); K. Chin and J. Fagan, "Violence as Regulation and Social Control in the Distribution of Crack," in M. de la Rosa, B. Gropper, and E. Lambert (Eds.), Drugs and Violence: Causes, Correlates and Consequences 36 (1990) (hereinafter "1990 Fagan/Chin Study"); A. Reiss and J. Roth, Alcohol, Other Psychoactive Drugs, and Violence in Understanding and Preventing Violence (1993); J. Fagan, "Intoxication and Aggression" in M. Tonry and J.Q. Wilson Drugs and Crime (1990) (hereinafter "1990 Fagan Intoxication Study").

⁵ P. Goldstein, "Drugs and Violent Crime," Pathways to Criminal Violence 16, 24 (Neil A. Weiner *et. al.*, eds., 1989) (hereinafter "1989 Goldstein Violent Crime Study").

1. Systemic Crime

Systemic crime arises out of the system of drug distribution.⁶ It includes:

disputes over territory between rival drug dealers, assaults and homicides committed within dealing hierarchies as a means of enforcing normative codes, robberies of drug dealers and the usually violent retaliation by the dealers or their bosses, elimination of informers, disputes over drugs and/or drug paraphernalia, punishment for selling adulterated or phony drugs, punishment for failing to pay one's debts, and robbery violence related to the social ecology of copping areas.⁷

Systemic violence has been referred to as a means to achieve "economic regulation and control" in an illicit market.⁸ As one expert at the Sentencing Commission hearing on crack cocaine explained regarding this type of crime, "[i]n an underground economy, you can't sue. So you use violence to enforce your breaches of contract or perceived breaches of contract."⁹

a. Empirical Findings on Crack and Powder Cocaine and Systemic Crime

As noted in Chapter 4, many retail powder cocaine distributors also distribute crack. Thus, pulling apart the systemic crime associated with crack cocaine versus powder cocaine is difficult, if not impossible. As one study noted, "it is the frequency of selling cocaine products, not just selling in its smokeable form, that seems to best explain violence in [cocaine] selling."¹⁰

At the Sentencing Commission hearing on crack cocaine, a panel of noted researchers¹¹ addressed the specific topic of crack cocaine and its relationship to violent crime. The panel uniformly agreed that currently, "the primary association between [crack] cocaine and violence is

⁶ *Id.* at 30.

⁷ *Id.*

⁸ 1990 Fagan/Chin Study, *supra* note 4, at 36.

⁹ Commission Hearing, *supra* note 2, at 72 (testimony of Jerome H. Skolnick).

¹⁰ *See* 1990 Fagan/Chin Study, *supra* note 4, at 27.

¹¹ The panelists were Steven Belenko, Senior Research Fellow at the New York City Criminal Justice Agency; Jerome H. Skolnick, Professor of Law at the University of California, Berkeley; and Paul J. Goldstein, Associate Professor at the School of Public Health at the University of Illinois, Chicago Circle.

systemic. It is the violence associated with the black market and distribution."¹² Dr. Steven Belenko explained that such factors as the "volatile and jittery" nature of the early crack cocaine market, its tendency to attract younger, presumably more crime-prone sellers, and later attempts by organized dealer groups to exert control all led to an atmosphere in which participants in the crack cocaine trade were apt to "use . . . violence to maintain discipline, resolve disputes, and enforce control."¹³

The violent nature of the crack cocaine marketplace has been documented in three recent studies. A study of homicides in New York City during 1988 reported by Goldstein *et al.*,¹⁴ found that of 118 crack-related homicides that were studied, 85 percent were systemic in nature.¹⁵ The study examined over 400 New York City homicides during 1988 and found that about 53 percent were "drug related"; of these, about 60 percent were related to crack.¹⁶ Twenty-nine percent of the homicide perpetrators and 34 percent of victims were identified by authorities as drug traffickers, the "vast majority" of whom were considered to be "low level traffickers."¹⁷ The study found that seven crack-related homicides were "multi-dimensional," with systemic being one of the dimensions.¹⁸

The 1990 Inciardi Delinquent Adolescent Study of "seriously delinquent" adolescent offenders in Miami from 1985 to 1988¹⁹ also found an association between crack selling and violent crime. The sample consisted of 611 adolescents who had committed at least ten FBI "index" offenses,²⁰ or 100

¹² Commission Hearing, *supra* note 2, at 67.

¹³ *Id.* at 55-56.

¹⁴ P. Goldstein, H. Brownstein, P. Ryan, and P. Belluci, "Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis," 16 Contemporary Drug Problems 650 (Winter 1989) (hereinafter "1988 Goldstein *et al.*, Homicide Study").

¹⁵ *Id.* at 664 (table 2).

¹⁶ *Id.* at 662-663.

¹⁷ *Id.* at 661. Another study found that street-level dealers, who typically carry smaller quantities of crack cocaine and money, were less likely to be involved with violence than dealers at a higher level in the distribution chain. See M. Klein, C. Maxson, and L. Cunningham, "Crack, Street Gangs, and Violence," 29(4) Criminology 623-650 (1991). The DEA has reported, however, that street-level crack cocaine sales may involve a heightened risk of violence because street sellers conduct business in uncontrolled situations and may be unfamiliar with their customers. See U.S. Department of Justice, Drug Enforcement Administration, DEA Drug Situation Report: Crack Cocaine iii, 10 (November 4, 1993) (draft).

¹⁸ *Id.* at 675-78.

¹⁹ 1990 Inciardi Delinquent Adolescent Study, *supra* note 4, at 92.

²⁰ The author reports that "index" offenses, in the FBI's *Uniform Crime Reports*, include criminal homicide, forcible rape, aggravated assault, robbery, burglary, larceny/theft, motor vehicle theft, and arson. *Id.* at 92.

lesser crimes, in the preceding 12 months. A second criterion for the sample was that the subjects used some kind of illegal drug regularly at any time during the 90-day period prior to the study.²¹ The study reported that 29.8 percent of the adolescents used crack cocaine regularly, and 29.3 percent used powder cocaine regularly. It also reported that those involved in dealing crack cocaine committed significantly more robberies than those who were not so involved.²² However, the study reported that higher rates of crack use and distribution do not necessarily translate into higher homicide rates (except in Washington, DC).²³ The study suggested that "the current focus on crack-related violence may be more the result of a media event than an emergent trend."²⁴

A 1990 study by Jeffrey Fagan and Ko-lin Chin found evidence that violence is associated specifically with the "economic regulation and control" of the cocaine marketplace.²⁵ The study compared results for crack and powder cocaine sellers and found that significant percentages of both regularly engaged in a range of violent interpersonal conflicts associated with selling (*e.g.*, assaults to collect debts, fights with other sellers over drug quality).²⁶ The study noted that any increased violence in the crack market was due to two factors:

First, crack selling was concentrated in neighborhoods where social controls had been weakened by intensified social and economic dislocations in the decade preceding the emergence of crack. Second, the rapid development of new drug-selling groups, following the introduction of crack brought with it competition. Accordingly, violence within new selling groups *internally* to maintain control and violence and *externally* to maintain selling territory . . . was more likely to characterize the unstable crack markets than more established drug markets and distribution systems.²⁷

Systemic violence also has been found in analyses of powder cocaine markets. For example, as Inciardi reports, in the late 1970s and early 1980s, Miami's cocaine distribution network experienced vast systemic crime. Prior to this period, Colombians had shipped powder cocaine to

²¹ *Id.*

²² *Id.* at 104.

²³ *Id.* at 107.

²⁴ *Id.* at 105.

²⁵ *Id.* at 36.

²⁶ *Id.* at table 6.

²⁷ See 1990 Fagan/Chin Study, *supra* note 4, at 25.

Miami, where middlemen distributed it locally or transhipped it elsewhere.²⁸ In the late 1970s, the Colombian drug kingpins moved to control the market without the middlemen and to take over cocaine distribution in South Florida. According to the study, this led to vastly increased systemic violence as territory was carved out among distributors. The murder rate rose to an all-time high of 621 murders (or 58.8 murders per 100,000 people) in 1981.²⁹ After the market stabilized and the Colombians gained control, the murder rate dropped by a third, down to a low of 33.2 murders per 100,000 people in 1987.³⁰ As crack distribution increased, however, the murder rate rose again after 1987 to 42.5 murders per 100,000 in 1988 and 40.5 in 1989.³¹

2. Psychopharmacologically Driven Crime

Psychopharmacologically driven crime occurs when "individuals, as a result of short- or long-term ingestion of specific substances, become excitable, and/or irrational and exhibit violent behavior."³² In short, use of the drug directly affects behavior, one consequence of which is criminal conduct.

Goldstein cites as an example of psychopharmacologically driven crime his study of heroin-using prostitutes, who may behave more like robbers than prostitutes if they are experiencing withdrawal symptoms. In this state, the women reported "they might attack the client, take his money, purchase sufficient heroin to 'get straight,' and then go back out on the street" to return to "regular" prostitution.³³

Goldstein notes that drugs also may have a psychopharmacological effect if they are used to boost courage to commit crimes, either because they affect the brain in this manner directly or because the user expects the drugs to have this effect and, through a process of "self-fulfilling prophecy," they do.³⁴ In addition, psychopharmacologically driven violence may stem from drug use by the victim as well as the perpetrator. In other words, "drug use may contribute to a person

²⁸ See 1990 Inciardi Delinquent Adolescent Study, *supra* note 4, at 108.

²⁹ *Id.* at 107.

³⁰ *Id.* at 108 (table 9).

³¹ *Id.*

³² 1989 Goldstein Violent Crime Study, *supra* note 5, at 24.

³³ *Id.* at 25.

³⁴ *Id.* at 26.

behaving violently or it may alter a person's behavior in such a manner as to bring about that person's violent victimization."³⁵

As discussed in Chapter 2, powder and crack cocaine contain the same active ingredients and thus the psychopharmacological effects of the two are qualitatively the same. The psychopharmacological effects of cocaine use, however, can differ dramatically as a result of the quantity used, the time period over which the use occurs, and the method of consumption (*see* Chapter 2).

a. Empirical Findings on Crack and Powder Cocaine and Psychopharmacologically Driven Crime

The limited evidence to date suggests that psychopharmacologically driven crime may be least important in explaining the association between crime and both crack and powder cocaine. With respect to violent crime, the 1990 Goldstein *et al.*, Homicide Study found that only three of the 118 exclusively crack-related homicides in the study were psychopharmacological in nature, and in two of these three cases the victim precipitated the crime. The study concluded that there were another two psychopharmacologically driven homicides in which crack was involved. However, alcohol also was involved in these two cases, and overall, some 21 alcohol-only homicides were considered to be psychopharmacologically driven – considerably more than for any other drug – suggesting that alcohol may have played a significant role in these two crack-related cases.³⁶

The 1990 Inciardi Delinquent Adolescent study found that only 5.4 percent of its sample of seriously delinquent adolescents – adolescents who commonly (but not necessarily exclusively or even primarily) used crack cocaine – reported "involvement" in psychopharmacologically driven violence at least once in the prior 12 months.³⁷ Given that nearly 80 percent of the sample also reported involvement in "major felonies" during the same time period – a total of 18,477 such felonies committed by 611 adolescents in the 12-month time frame³⁸ – the reported incidence of psychopharmacologically driven violence is relatively low.

³⁵ *Id.*

³⁶ *Id.* at 664 (table 2), 665.

³⁷ 1990 Inciardi Delinquent Adolescent Study, *supra* note 4, at 98.

³⁸ *Id.* at table 5.

A 1990 study by Fagan also generally concluded that "to date, there has been no systematic research linking crack cocaine use with increased [psychopharmacologically driven] violence."³⁹ Fagan went on to note, however, that "there is evidence of a sudden and precipitous depression following crack use."⁴⁰ He surmised this depression may be more causally related to subsequent economically compulsive crime than to psychopharmacologically driven crime.⁴¹

3. Economically Compulsive Crime

Economically compulsive crime is committed by persons who are financially driven to the criminal activity by financial needs brought about by drug consumption – for example, robbery that is committed by drug users "in order to support costly drug use."⁴² Goldstein notes:

Economically compulsive actors are not primarily motivated by impulses to act out violently. Rather, their primary motivation is to obtain money to purchase drugs. Violence generally results from . . . [s]uch factors [as] . . . the perpetrator's own nervousness, the victim's reaction, [the presence of] weaponry . . . and so on.⁴³

a. Empirical Findings on Crack and Economically Compulsive Crime

A recent study by Inciardi and Pottieger⁴⁴ focused on the criminal activities of the users of crack cocaine. The study found that male "street users" (users from neighborhoods with high rates of cocaine use) engaged in a large number of criminal offenses,⁴⁵ the vast majority of which – more than 98 percent – were retail drug sales.⁴⁶ Most of these street users also reported that some of their

³⁹ 1990 Fagan Intoxication Study, *supra* note 4, at 241, 257.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 1989 Goldstein Violent Crime Study, *supra* note 5, at 27.

⁴³ *Id.*

⁴⁴ J. Inciardi and A. Pottieger, "Crack-Cocaine Use and Street Crime," *Journal of Drug Issues* (forthcoming 1994) (on file with University of Delaware Center for Drug and Alcohol Studies) (hereinafter "Forthcoming Inciardi/Pottieger Users Study").

⁴⁵ *Id.* at 15.

⁴⁶ *Id.*

living expenses and over 90 percent of their drug use were financed by crime, suggesting that street users rely on frequent, relatively small drug sales to support their crack cocaine habit.⁴⁷

This is not to say, the authors noted, that street users did not engage in other criminal activity to generate cash. The study found, in fact, that 48 percent of the men and 62 percent of the women committed, on average, one "petty property crime" (*e.g.*, shoplifting) per week, and some 69 percent of women users "were trading sex for money or drugs, or helping a prostitute partner do so."⁴⁸ The authors also reported that "a significant minority of the men were engaged in fairly high numbers of violent or potentially violent offenses, most commonly as an adjunct to their drug business offenses."⁴⁹ Relatively speaking, however, the criminal conduct of the street users was tilted heavily toward retail crack cocaine selling.

The authors' profile of these offenders as primarily users who sold crack to support their crack consumption – as opposed to sellers who used crack incidentally to their trade – appeared to be supported by a finding that while every male subject (and 94% of female subjects) reported making some retail drug sales, no subjects reported manufacturing or wholesaling crack cocaine.⁵⁰ The study did find, though, that male users in the street user sample who were "engaged in fairly high numbers of violent or potentially violent offenses . . . most commonly [committed such crimes] as an adjunct to their drug business offenses," suggesting a largely systemic component.⁵¹

The fact that many retail crack cocaine sellers are users who deal primarily to finance their consumption of crack is supported by other studies as well. About 61 percent of crack cocaine dealers in one Detroit study cited the desire to consume crack as the principal motivation for their dealing.⁵² In a Miami study, 80 percent of delinquent youths who used crack cocaine also sold it.⁵³

A different analysis of crack users in drug treatment – "treatment sample" – suggested that these crack users are relatively less likely to have engaged in retail drug sales and more likely to have

⁴⁷ *See id.* at 29.

⁴⁸ *Id.* at 18-19.

⁴⁹ *Id.* at 19.

⁵⁰ *See id.* at tables 4 and 6.

⁵¹ Forthcoming Inciardi/Pottieger User Study, *supra* note 44, at 19.

⁵² T. Mieczkowski, "Crack Distribution in Detroit," 17 Contemporary Drug Problems 9, 23 (1990).

⁵³ J. Inciardi and A. Pottieger, "Kids, Crack, and Crime," 21 (2) The Journal of Drug Issues 257, 260 (1991).

committed "large numbers of petty property crimes" prior to treatment.⁵⁴ The authors surmised that the difference in retail drug selling activity by the street and treatment samples could be due to the fact that:

the street sample consisted of the crack users who happened to be in good locations in which to support their crack use and other expenses by dealing. The treatment sample, on the other hand, may be more representative of the customer base of these dealers, and hence more representative of all crack users.⁵⁵

The 1988 Goldstein *et al.* Homicide Study, discussed above, concluded that eight of the 118 exclusively crack-related homicides in the study were economically compulsive crimes. Six of the eight murders involved the murder of elderly persons during a robbery or burglary. One involved an attempted robbery of one crack user by another. The last murder allegedly was victim-precipitated; the victim allegedly was murdered trying to steal auto parts to support his crack habit.⁵⁶

As discussed earlier, there is evidence of increased involvement in prostitution by crack users. Women often trade sex for money or drugs, and some men become "pimps" to support their crack habit.⁵⁷ However, studies further indicate that prostitution is an economically compulsive crime for women who use both crack and powder cocaine (*see* Chapter 3).

4. Crime Indirectly Related to Crack

The Goldstein tripartite framework seeks to explain crime that is drug related, either because the crime is an adjunct to the unregulated marketplace (systemic), is a means to support drug consumption (economically compulsive), or occurs because of the drug's direct (or assumed) psychopharmacological effects on behavior. The tripartite framework, however, does not answer the question as to whether drug sellers, including cocaine sellers, have a tendency to use violence outside the drug context. Nor do other data at this point appear to offer a clear explanation of this association.

⁵⁴ *Id.* at 19.

⁵⁵ *Id.* at 24.

⁵⁶ 1988 Goldstein *et al.* Homicide Study, *supra* note 14, at 666-67.

⁵⁷ K. Chin and J. Fagan, The Impact of Crack on Criminal Careers: Crime and Drug Involvement Following Initiation Into Cocaine Smoking (Aug. 1992) (unpublished, on file with Rutgers University School of Criminal Justice) (hereinafter "1992 Chin/Fagan Study").

Researchers have speculated, however, that nondrug violence may be "intensified"⁵⁸ by the cocaine marketplace (and specifically the crack cocaine marketplace) because systemic violence creates a setting in which violent behavior generally is deemed acceptable.⁵⁹ Others point to the socioeconomic status of innercity neighborhoods as contributing to the extension of market violence to nondrug settings (*see* Section C, *infra*). Nonetheless, empirical studies conducted to date tend to find an association between crack cocaine involvement and the commission of other kinds of crime. This is true regardless of whether involvement is gauged by using or selling crack cocaine.

In one such study, Steven Belenko *et al.*⁶⁰ examined a group of New York City "crack arrestees," an undifferentiated group of crack cocaine users and sellers. Overall, the study found "both an increased incidence of violent arrest post-[crack] initiation for new offenders and an accelerated rate of violent arrests for those with prior records of violence."⁶¹ The study concluded that the arrestees' increased violence was "not limited to the context of the drug transaction," but rather could occur in other settings.⁶²

The Chin and Fagan⁶³ study, discussed above, was consistent with Belenko but contained a noteworthy refinement. The study distinguished between samples of crack cocaine "users" and "users/sellers" drawn from two New York City neighborhoods with high concentrations of crack cocaine activity. (The "users/sellers" category was denominated as such because the authors were unable to identify sellers who had not also used crack cocaine.)⁶⁴

The authors found that following involvement with crack cocaine, users reported significant increases in aggravated assault, theft, and, among women, prostitution.⁶⁵ The authors also reported,

⁵⁸ *See also* 1990 Fagan/Chin Study, *supra* note 4, at 36. ("The crack market apparently has intensified the social processes that sustain both drug-related and other violence.")

⁵⁹ S. Belenko, J. Fagan, and K. Chin, Typologies of Criminal Careers Among Crack Arrestees (Nov. 1989) (hereinafter "1989 Belenko *et al.*, Study"); Commission Hearing, *supra* note 2, at 59 (testimony of Steven Belenko).

⁶⁰ 1989 Belenko, *et al.*, Study, *supra* note 59.

⁶¹ *Id.* at 21.

⁶² *Id.* at 25.

⁶³ 1992 Chin/Fagan Study, *supra* note 57, at 13-14.

⁶⁴ *Id.* at 5.

⁶⁵ *Id.* at 11.

however, that "no users reported initiation into any form of crime following crack initiation. Instead, it appears from this study that crack intensifies the behaviors in which users already were involved."⁶⁶

The picture among users/sellers was somewhat different. Female users/sellers, who typically held only low-level trafficking positions, also reported increased prostitution following crack involvement; but male users/sellers, in contrast to users, reported significant increases in crime only with respect to selling stolen goods,⁶⁷ and their commission of burglaries appeared to drop.⁶⁸

On the other hand, while the data generally did not show that users/sellers increased their commission of violent and other crimes following crack initiation, "[users/sellers] were [already] extensively involved in crimes both within and outside the context of drug selling prior to initiation into crack."⁶⁹ This finding led the authors to conclude that "processes of social or self-selection seemed to attract active offenders into [that] marketplace."⁷⁰ In short, in the authors' view, the direct effect of crack on violent behavior seems to be less clear because of the users'/sellers' prior involvement in these behaviors and their general participation in the often violent world of drug selling.⁷¹

In their study, Chin and Fagan found that crack and powder cocaine both attracted younger people to drug selling and violence. They found that "arrest and conviction data suggest that violence and participation in drug selling are more strongly associated with crack than with cocaine [powder]."

C. COCAINE IN CONTEXT

This section provides additional context for evaluating the crime associated with cocaine.

1. The Social Context of Cocaine Distribution

⁶⁶ *Id.* at 16.

⁶⁷ *Id.* at 12.

⁶⁸ *See id.* at table 2.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 16-17.

All three panelists testifying on the association between crack cocaine and violence at the Sentencing Commission hearing stressed that crack/crime associations cannot be assessed in isolation from the social environment in which the marketplaces for these drugs occur.⁷² Dr. Skolnick stressed the importance of the varying gang cultures in which cocaine trafficking, including crack cocaine, is often a part. He observed that it is "the underlying culture of the gangs in a particular area that accounts for the violence more than anything else."⁷³

Dr. Belenko pointed to a range of concurrent non-cocaine forces that he indicated undermine a conclusion that cocaine in general and crack cocaine in particular cause crime:

[W]hile the crack subculture can be characterized as more violent and crime-involved compared with previous or parallel drug subcultures, the reasons for this are quite complex and probably not a function of any psychopharmacological effects. Thus, the media and public fears of a direct causal relationship between crack and other crimes do not seem to be confirmed by empirical data. Rather, the levels of violence and crime associated with crack appear to reflect parallel and other interactive forces that are related to the relative immaturity and volatility of the crack markets, the ages and types of persons initially attracted to crack distribution, the increasing social and economic disorganization of the nation's inner cities beginning in the 1980's, and the mounting proliferation of more powerful guns, as well as a spread of cheaper powder cocaine during the same period of time.⁷⁴

Other researchers have made similar observations about the importance of non-crack factors. Socioeconomic factors, for example, are thought by many to impact directly on the drug/violence relationship. Some sociologists theorize that deviant behavior is more likely to occur in a situation in which individuals lack access to legitimate means to achieve their economic goals.⁷⁵ Others postulate that "in conditions in which law and governmental social control are least developed, violence would be more evident as a form of social control."⁷⁶ The 1990 Fagan and Chin study discussed these theories in relation to the crack economy in the innercity.

⁷² Commission Hearing, *supra* note 2, at 80.

⁷³ *Id.* at 70. Dr. Skolnick's observation appears supported by a recently released study conducted for the National Institute of Justice. E. Walsh, "Chicago Street Gang Study Shows Fearful Toll of Powerful Weapons," *Washington Post* A4 (Nov. 29, 1993) (citing to study conducted by Carolyn Rebecca Black and Richard Black). That study concluded that gang turf battles in many areas were more likely to lead to homicides than drug trafficking disputes.

⁷⁴ *Id.* at 59.

⁷⁵ See 1990 Fagan Intoxication Study, *supra* note 4, at 274.

⁷⁶ See 1990 Fagan/Chin Study, *supra* note 4, at 13.

Fagan and Chin considered crack cocaine development during a concurrent decline in the lawful economy of innercity neighborhoods. Citing evidence of heavy innercity job loss during a time of job creation in surrounding suburbs and the fact that small-scale sellers were able to participate in the income-generating crack cocaine market, the authors observed that crack cocaine distribution attracted participants at a time when economic and social counterweights to the underground economy were seriously diminishing.⁷⁷

Noting "that the vast majority of [residents] in inner-city communities are not cocaine or heroin abusers or criminals," Bruce Johnson *et al.* similarly found that such factors as the prospects of employment in the crack trade for young persons "who most likely would be otherwise unemployed" played a role in expanding "the criminal underclass subculture."⁷⁸ In sum, whatever the precise effects of social and environmental factors, a number of researchers stress their relevance in considering both the rapid development of crack cocaine and crack's association with crime.

2. Cocaine and Other Illicit Drug Markets

The association between drugs and crime is not unique to cocaine. Research previously has found associations between violent crime and marijuana, heroin, and other drug trafficking.⁷⁹ Research conducted since the 1920s has suggested "that while the use of . . . [illicit] drugs does not necessarily initiate criminal careers, it tends to intensify and perpetuate them."⁸⁰

Few researchers who have explored cocaine/crime associations have also directly compared the associations of crime to other drugs. Researchers who have made such comparisons paint a somewhat mixed picture. As stated above, the Goldstein *et al.* Homicide Study found that 60 percent of drug-related homicides in New York City in 1988 were related to crack cocaine. However, because crack cocaine was a particularly popular drug during this period, this finding by itself sheds limited light on crack's relative association with drug-related violence.

The 1990 Inciardi Delinquent Adolescent Study and a companion study⁸¹ suggest a more definite answer. These studies compared crime patterns of "seriously delinquent" adolescent

⁷⁷ 1990 Fagan/Chin Study, *supra* note 4, at 10-12.

⁷⁸ B. Johnson, T. Williams, K. Dei, and H. Sanabaria, "Drug Abuse in the Inner City: Impact of Hard-Drug Use and Sales on Low Income Communities," in M. Tonry and J. Wilson (Eds.), 13 Crime and Justice, An Annual Review of Research 9-68 (1990) (hereinafter "1990 Johnson *et al.* Inner City Study").

⁷⁹ See authorities cited in 1992 Chin/Fagan Study, *supra* note 57, at 4.

⁸⁰ Forthcoming Inciardi/Pottieger Users Study, *supra* note 44, at 5.

⁸¹ J. Inciardi and A. E. Pottieger, *supra* note 53, at 257.

offenders depending on the offenders' "proximity to the crack market." The studies concluded that proximity to crack trafficking correlated with increased commission of major felonies and property crimes.

In particular, it should be noted that these data suggest that it is not drug sales in general but specifically the crack business which is so highly problematic. . . . 86 percent of the non-crack business group were selling *some* drug, averaging around 200 sales per year. But the involvement of this group in major felonies and petty property crime was distinctly lower than that of youths with even minor involvement in the crack business, let alone compared to that of crack dealers.⁸²

This characterization is consistent with testimony of Steven Belenko at the Sentencing Commission's crack hearing.⁸³ Dr. Belenko stated that he had analyzed arrest data for crack cocaine sellers and determined that, relative to powder cocaine sellers, crack cocaine sellers had higher arrest rates for both "nondrug and violent crimes."⁸⁴

The Commission's own data on federal cocaine offenders suggest that crack cocaine distributors are more violent than most other federal drug offenders. Federal crack cocaine offenders are more likely to possess a weapon and also more likely to have an extensive criminal record. (*See* Chapter 7 for a more detailed discussion of the characteristics of federal drug offenses and offenders.)

Cutting the other direction, perhaps, are findings in the 1990 Fagan/Chin Study.⁸⁵ This study analyzed systemic violence engaged in by drug sellers from two New York City neighborhoods with high concentrations of crack cocaine selling.⁸⁶ Noting that sellers in the study frequently sold more than one drug, the study found that retail crack cocaine sellers reported no more systemic violence than marijuana or heroin sellers.⁸⁷ The study found that those who sold powder cocaine in these neighborhoods – whether with crack cocaine or other drugs – reported the highest levels of systemic crime.⁸⁸

⁸² *Id.* at 268.

⁸³ Commission Hearing, *supra* note 2, at 49-60.

⁸⁴ *Id.* at 57.

⁸⁵ 1990 Fagan/Chin Study, *supra* note 4.

⁸⁶ *Id.* at 13-14.

⁸⁷ *Id.* at 25.

⁸⁸ *Id.* at 27.

The Inciardi/Pottieger User Study compared economically compulsive crime committed by crack users in Miami with that committed by a comparable sample of heroin users a decade earlier. As noted, this study found that more than 98 percent of the crimes committed by male "street" users of crack cocaine consisted of small retail drug sales; less than two percent were property or other crimes. In contrast, the authors found that "dealing represented 51 percent of total offenses for male heroin users, among whom another 34 percent of all crimes were thefts and other property crimes."⁸⁹ These data show a distinction between the economically compulsive crime most associated with the study's sample of crack cocaine users (retail drug sales) and that associated with the sample of heroin users (a broader mix of drug and property crimes).

3. Violence Associated with the Current Cocaine "Epidemic"

At the Sentencing Commission hearing, Dr. Goldstein commented that systemic violence is not unexpected in a newly developing drug market such as crack cocaine:

Systemic violence fluctuates with phases of the illicit market economy. Rates of homicidal violence were high when a new market was being forged for powder cocaine. Wars between Colombian and Cuban syndicates for control of middle-level cocaine distribution contributed substantially to rising homicide rates in the late 1970s and early 1980s. When these wars were over, even though there was plenty of cocaine on the streets in the mid-1980s, homicide rates declined. The peak level of homicidal violence caused by the crack wars is similar to the peak caused by the powder cocaine wars which is, in turn, similar to the peak caused by the alcohol wars during prohibition.⁹⁰

Whatever conclusions are drawn about current levels of systemic violence in the crack cocaine market relative to levels for the current powder cocaine market, researchers have tended to agree that, from a historical perspective, crack cocaine is not unique. Dr. Goldstein testified that the national homicide rate (based on the number of homicides per 100,000 population) had "changed very little over the last 25 years." In 1992, he stated, the homicide rate was lower than in 1980, when systemic violence arising out of the newly developing powder cocaine market was about at its peak, and lower than in 1933, at the end of prohibition.⁹¹

D. THE DRUGS/VIOLENCE TASK FORCE

⁸⁹ Forthcoming Inciardi/Pottieger Users Study, *supra* note 44, at 17.

⁹⁰ *Id.* at 67.

⁹¹ *Id.* at 65.

In June 1993, in Washington, D.C., the Sentencing Commission held a Symposium on Drugs and Violence in America. One conclusion of the symposium was, as stated earlier, that the currently available research data on the relationship between drugs and violence is limited. As a result, the Commission, together with the School of Criminology and Criminal Justice at Florida State University, is now sponsoring a task force to acquire a better understanding of the drugs/violence relationship.

The task force plans to conduct an in-depth examination of the issues related to the drugs/violence relationship by bringing together the accumulated knowledge and expertise of state and municipal leaders, academia, related federal agencies, Congress, criminal justice professionals, and concerned citizens. This expertise will be used to examine existing research and other information and to oversee several research projects aimed at clarifying specific matters of concern. The task force will present findings and policy recommendations that will help guide the response to drugs and violence in the future. The task force is expected to issue its report in early 1996.

Chapter 6

THE NATIONAL LEGISLATIVE AND LAW ENFORCEMENT RESPONSE TO COCAINE

A. INTRODUCTION

For at least a century, federal, state, and local governments have responded to drug use. The responses have been shaped by numerous factors, including constitutional and other divisions of governmental responsibility, the extent and nature of the immediate drug use problem, and public concern over the problem. This chapter examines the national legislative and law enforcement response to cocaine, including both federal and state responses.

To give some context, Section B first traces the history of national legislative and law enforcement efforts surrounding cocaine and other drugs. Section C lays out the congressional response to the evolving cocaine problem over the last two decades or so. This section includes a discussion of the reemergence of determinate sentencing in the federal system through the Sentencing Reform Act of 1984, mandatory minimum prison sentences and the Anti-Drug Abuse Acts of 1986 and 1988, and the distinctions made in federal legislation between crack cocaine and powder cocaine. Section D sets forth how the United States Sentencing Commission established sentencing guidelines for cocaine offenses in light of congressional action. Section E addresses the role of federal law enforcement agencies today in the national drug control strategy. Section F lays out the legislative responses of the states to cocaine. Finally, Section G considers the impact of prosecutorial and investigative discretion on cocaine offenders and sentences in the face of federal and state laws.

B. THE HISTORY OF LEGISLATIVE AND LAW ENFORCEMENT EFFORTS

1. An Earlier Cocaine Era

As discussed earlier in this report (*see* Chapter 2), the surge in cocaine use in the 1970s and 1980s was not without precedent. In the mid-1880s, cocaine was introduced into the United States

and was used widely through the early 1900s. Cocaine was promoted as a remedy for respiratory ailments, as an aphrodisiac, and as an antidote for morphine addiction and alcoholism.⁹²

By the turn of the century, the dangers of cocaine use and addiction were becoming apparent. As noted earlier, in 1891 for example, 200 deaths from cocaine intoxication were reported.⁹³ And according to one estimate, the U.S. population in 1906 – numbering only half of today's population – consumed as much cocaine as did the U.S. population in 1976.⁹⁴

As early as 1887, some states began regulating cocaine. By 1914, the year the Harrison Narcotics Act was passed on the national level, 46 states had laws regulating the use and distribution of cocaine. Leading up to the Harrison Act, in 1910 the President presented Congress with a report that found cocaine to be more dangerous than any other "habit-forming" drug used in the United States. The Harrison Act was then passed, banning non-medical use of cocaine and requiring strict accounting of medical dispensing to patients.⁹⁵

The Harrison Act was enforced by agents in the Treasury Department's Prohibition Unit of the Narcotics Division. Initial law enforcement efforts included arrests of physicians, pharmacists, and unregistered users. The Narcotics Division also aimed at closing clinics that had sprung up to treat addicts and that used maintenance regimens as part of the treatment.

Following passage of the Harrison Act, cocaine became scarce. By the 1950s, use of cocaine had declined, and the drug was no longer considered a problem.⁹⁶ Cocaine reemerged as a drug of abuse during the mid-1960s.⁹⁷

2. Other Drug Enforcement Efforts

Following the Civil War and through the rest of the 19th Century, opium was used extensively in pockets of the United States. In response to this, the first recorded drug law in the United States was passed: a municipal ordinance in San Francisco banning opium dens. A series of state laws

⁹² J. Murray, "An Overview of Cocaine Use and Abuse," 59 Psychological Reports 243-264 (1986).

⁹³ D. Allen and J. Jekel, Crack: The Broken Promise (1991).

⁹⁴ *Id.*

⁹⁵ D. Musto, "Opium, Cocaine and Marijuana in American History," Scientific American 44 (1991).

⁹⁶ Murray, *supra* note 1; R. Siegel, "New Patterns of Cocaine Use: Changing Doses and Routes," 61 National Institute on Drug Abuse Research Monograph Series 204-222 (1985).

⁹⁷ *Id.*

followed. In 1887, the federal government prohibited the importation of opium by Chinese nationals, and, in 1905, restricted opium smoking in the Philippines.⁹⁸

In the following years, the United States launched a series of international conventions designed to foster narcotics control activity, including the Shanghai Opium Convention of 1909 and the 1911 International Conference on Opium at The Hague. These conferences ultimately led to the 1914 Harrison Act, regulating cocaine and other drugs.⁹⁹

As the availability of cocaine diminished following the Harrison Act, a concurrent rise occurred in the popularity of marijuana, amphetamines, and other drugs with similar physiological and psychotropic effects. In 1922, the Narcotic Drugs Import and Export Act restricted drug imports and created the Federal Narcotics Control Board composed of the Secretaries of State, Treasury, and Commerce. The Act expanded the role of the Customs Department in interdicting illegal narcotics shipments to the United States.¹⁰⁰

In 1930, the Federal Bureau of Narcotics was created and charged with enforcing drug laws, excluding alcohol laws. In the next several years, growing public concern about marijuana prompted passage of many state laws prohibiting its use. This led to the Marijuana Tax Act of 1937, which regulated and taxed marijuana at the federal level.¹⁰¹

Following World War II, drugs again became a national concern. The Boggs Act of 1951 and the Narcotic Control Act of 1956 increased maximum criminal penalties for violations of the import/export and internal revenue laws related to drugs and also established mandatory minimum prison sentences. These penalties were later increased and broadened.¹⁰²

In 1961, the United Nations adopted the Single Convention on Narcotic Drugs, establishing regulatory schedules for psychotropic substances. In the United States in 1963, the Prettyman Commission recommended the imposition of strict federal control for certain drugs and the transfer of federal law enforcement responsibilities to the Department of Justice. In the 1960s, as a shifting pattern of drug use emerged, federal legislation continued. The 1965 Drug Abuse Control

⁹⁸ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Drugs, Crime and the Justice System, 78-80 (Dec. 1992).

⁹⁹ Musto, *supra* note 4.

¹⁰⁰ U.S. Department of Justice, *supra* note 7.

¹⁰¹ Musto, *supra* note 4.

¹⁰² U.S. Department of Justice, *supra* note 7.

Amendments began regulating the manufacture and distribution of amphetamines and barbiturates and included new criminal penalties. In 1966 and 1968, legislation provided for new treatment programs, and, in 1968, the Federal Bureau of Narcotics was transferred to the Department of Justice.¹⁰³

C. THE CONGRESSIONAL RESPONSE TO COCAINE SINCE 1970

1. The 1970s and the Repeal of Mandatory Minimum Penalties

In 1970, Congress overhauled the federal drug control laws. Included in this overhaul was a general repeal of the mandatory minimum sentences for drug offenses.¹⁰⁴ The authors of the Comprehensive Drug Abuse Prevention and Control Act of 1970 expressed a general concern that "increasingly longer sentences that had been legislated in the past had not shown the expected overall reduction in drug law violations."¹⁰⁵ Moreover, there was general concern that "severe drug laws, specifically as applied to marihuana, have helped create a serious clash between segments of the youth generation and the Government" and have "contributed to the broader problem of alienation of youth from the general society."¹⁰⁶ As a result, the 1970 Act revised the penalty structure of federal drug law. "The main thrust of the change in the penalty provisions [was] to eliminate all mandatory minimum sentences for drug law violations except for a special class of professional criminals."¹⁰⁷

The legislative history of the 1970 Act shows that Congress was concerned that mandatory minimum penalties hampered the "process of rehabilitation of offenders" and infringed "on the judicial function by not allowing the judge to use his discretion in individual cases."¹⁰⁸ Some members of Congress also argued that the mandatory minimum penalties reduced the deterrent effect of the law by reducing the consistency with which the drug laws were applied:

The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into

¹⁰³ *Id.*

¹⁰⁴ The mandatory penalty provisions of the Continuing Criminal Enterprise offenses remained intact.

¹⁰⁵ S. Rep. No. 613, 91st Cong., 1st Sess. (Dec. 16, 1969).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain.¹⁰⁹

In addition, the 1970 Act created a common standard for scheduling drugs. The Racketeer-Influenced and Corrupt Organizations and Continuing Criminal Enterprise laws, also passed in 1970, focused on the leaders of illegal drug enterprises and added forfeiture as an enforcement tool. In 1971, a Presidential Cabinet Committee for International Narcotic Control, chaired by the Secretary of State, was formed. The Foreign Assistance Act, passed in 1971, authorized assistance to countries to control drug trafficking and production. The Drug Abuse Office and Treatment Act of 1972 created the National Institute on Drug Abuse and the Special Action Office for Drug Abuse Prevention. In 1973, the Drug Enforcement Administration was created.

2. The 1980s and the Reemergence of Determinate Sentencing¹¹⁰

In the 1980s, Congress made "determinate sentencing," which had been gaining acceptance in the states, the center of federal sentencing policy. Congress questioned the legitimacy of indeterminate sentences and early parole release, particularly the ability of prison to rehabilitate offenders and of parole boards to identify offenders ready for release. At the same time an emerging consensus concluded that criminal laws would better help control crime if sentences were more certain, less disparate, and sufficiently punitive.

Through different laws, Congress enacted determinate sentencing in several forms in the 1980s. First, Congress passed the Sentencing Reform Act of 1984.¹¹¹ This law established the United States Sentencing Commission ("Commission") and directed it to promulgate a system of detailed, mandatory sentencing guidelines to assure more uniform federal court sentencing decisions. In addition, the Act abolished parole for defendants sentenced under the sentencing guidelines.

At the same time, and repeatedly since, Congress enacted mandatory minimum penalties for certain drug and firearms offenses. Mandatory minimums were enacted in 1984, 1986, 1988, and to a lesser extent in 1994, and legislative proposals currently under consideration continue to include

¹⁰⁹ H. Rep. No. 1444, 91st Cong., 2d Sess., at 11 (Sept. 10, 1970).

¹¹⁰ For further historical background on this topic, see U.S. Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining 7-14, 24-28 (Dec. 1991); U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 5-10 (Aug. 1991).

¹¹¹ Pub. L. No. 98-473, 98 Stat. 1837 (1984)

mandatory minimum penalty provisions.¹¹² These statutes represent an approach very different than that embodied by guideline sentencing.¹¹³ Both the mandatory minimums and the guidelines are mandatory determinate sentencing schemes. The statutes, however, set a minimum penalty based on only a few characteristics of the offense and offender, particularly the type and amount of drug involved in the offense. Judges can sentence below this level only when the government makes a motion that the defendant has substantially assisted in the prosecutions of other persons. The guidelines take into account many more aggravating and mitigating factors. Judges can sentence outside the guideline range if there is a unusual factor present in the case that is not taken into consideration by the guidelines.

3. The Anti-Drug Abuse Act of 1986

The Anti-Drug Abuse Act of 1986¹¹⁴ created the basic framework of mandatory minimum penalties that currently apply to federal drug trafficking offenses. The 1986 Act established two tiers of mandatory prison terms for first-time drug traffickers: a five-year and a ten-year minimum sentence. Under the statute, these prison terms are triggered exclusively by the quantity and type of drug involved in the offense. For example, the ten-year penalty is triggered if the offense involved at least one kilogram of heroin or five kilograms of powder cocaine or 50 grams of cocaine base.¹¹⁵

The 1986 Act initiated the federal criminal law distinction between "cocaine base" and other forms of cocaine. The thresholds triggering the ten-year penalty – five kilograms of powder cocaine and 50 grams of cocaine base – create the 100-to-1 quantity ratio discussed at various points in this report. The identical ratio is reflected in the five-year mandatory minimum thresholds as well: 500 grams of powder cocaine and five grams of cocaine base both trigger the five-year penalty.

a. The General Legislative History of the 1986 Act; Development of the 100-to-1 Quantity Ratio

The 1986 Act was expedited through Congress. As a result, its passage left behind a limited legislative record. While many individual members delivered floor statements about the Act, no

¹¹² See, e.g., S. 3 (Violent Crime Control and Law Enforcement Improvement Act of 1995), S. 38 (Violent Crime Control and Law Enforcement Amendments Act of 1995), and H.R. 3 (Taking Back Our Streets Act of 1995).

¹¹³ See, e.g., the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2019 (1984).

¹¹⁴ Pub. L. No. 99-570, 100 Stat. 3207 (1986).

¹¹⁵ Under the Act's approach, higher mandatory minimum penalties can apply if the offender previously had been convicted of a drug trafficking offense. See, e.g., 21 U.S.C. § 841(b)(1)(A).

committee produced a report analyzing the Act's key provisions.¹¹⁶ The sentencing provisions of the Act were initiated in August 1986, following the July 4th congressional recess during which public concern and media coverage of cocaine peaked as a result of the June 1986 death of NCAA basketball star Len Bias. Apparently because of the heightened concern, Congress dispensed with much of the typical deliberative legislative process, including committee hearings.

Of particular relevance to this report, the legislative history does not include any discussion of the 100-to-1 powder cocaine/crack cocaine quantity ratio *per se*. Congress did, however, consider a variety of powder/crack quantity ratios before adopting 100-to-1. For example, the original version of the House bill that ultimately was enacted into law (H.R. 5484)¹¹⁷ contained a quantity ratio of 50-to-1;¹¹⁸ a number of other bills introduced during this period contained ratios of 20-to-1.¹¹⁹ One of the bills containing a 20-to-1 ratio (S. 2849) was introduced on behalf of the Reagan Administration by Senate Majority Leader Dole.

The legislative history, as evidenced mainly by the statements of individual legislators, suggests four specific areas of congressional purpose.

- To the extent that Congress saw the drug problem as a national "epidemic" in 1986, it viewed crack cocaine as at the very forefront.
- The decision by Congress to differentiate crack cocaine from powder cocaine in the penalty structure was deliberate, not inadvertent.
- The legislative history, primarily in the form of member floor statements, shows (1) that Congress had concluded that crack cocaine was more dangerous than powder cocaine and (2) that this conclusion drove its decision to treat crack cocaine differently from powder cocaine.
- While Congress determined that the greater dangerousness of crack cocaine warranted "special" heightened penalties, Congress also generally intended that the quantities triggering

¹¹⁶ One committee report was issued on a legislative initiative that mirrored the penalty provisions of the 1986 Act in some ways. *See* H.R. Rep. No. 845, 99th Cong., 2d Sess., pt. 1 (1986). That report contains some general guidance on the thinking behind penalty levels and is discussed below.

¹¹⁷ H.R. 5484, as amended by S. 2878 (the Anti-Drug Abuse Act of 1986), was passed by Congress and signed into law on October 27, 1986. The Senate bill (S. 2878) contained the 100-to-1 powder cocaine/crack cocaine quantity ratio.

¹¹⁸ *See also* H.R. 5394 (Narcotics Penalties and Enforcement Act of 1986) (containing 50-to-1 ratio).

¹¹⁹ *See, e.g.*, S. 2787 (Mandatory Crack and Other Drug Penalties Act); S. 2849 (Drug Free Federal Workplace Act of 1986) (The Zero-Tolerance Act); S. 2850 (Drug Enforcement Act of 1986) (The Zero-Tolerance Act).

drug mandatory minimum penalties for crack cocaine would be consistent with the 1986 Act's overall drug mandatory minimum scheme: quantities thought to be associated with "major" traffickers were to subject a defendant to a ten-year penalty and quantities thought to be associated with "serious" traffickers were to subject a defendant to a five-year penalty.

Congress's conclusions about the dangerousness of crack cocaine relative to powder cocaine flowed from specific assumptions. First, crack cocaine was viewed as extraordinarily addictive. This addictive nature was stressed not only in comparison to powder cocaine (*i.e.*, crack cocaine is "the more addictive . . . substance"¹²⁰) but also in absolute terms. Second, the correlation between crack cocaine use and the commission of other serious crimes was considered greater than that with other drugs. Floor statements focused on psychopharmacologically driven, economically compulsive, as well as systemic crime (although members did not typically use these terms). Third, the physiological effects of crack cocaine were considered especially perilous, leading to psychosis and death.¹²¹ Fourth, members of Congress felt that young people were particularly prone to using crack cocaine. This was mentioned in debate as one of crack cocaine's most troubling features. Finally, there was a great concern that crack's "purity and potency," the cost per dose, the ease with which it is manufactured, transported, disposed of, and administered, were all leading to widespread use of crack.

Significantly, all federal circuit courts addressing the constitutionality of crack cocaine penalties have upheld the current federal cocaine sentencing scheme, including the 100-to-1 ratio. The courts have held that Congress had a "rational basis" for the penalty distinction, and that the penalty distinction was created out of the legitimate congressional objective of protecting the public against a new and highly potent, addictive narcotic that could be distributed easily and sold cheaply. (*See* Appendix C for a complete discussion of the legal challenges to crack cocaine penalties.)

b. Legislative History Surrounding Mandatory Minimum Penalties

In tying mandatory minimum penalties to the quantity of drug involved in trafficking offenses, Congress apparently intended that these penalties most typically would apply to discrete categories of traffickers – specifically, "major" traffickers (ten-year minimum) and "serious" traffickers (five-year minimum). In other words, Congress had in mind a tough penalty scheme under which, to an extent, drug quantity would serve as a proxy to identify those traffickers of greatest concern. Senator Byrd, then the Senate Minority Leader, summed up the intent during floor debate:

¹²⁰ 132 Cong. Rec. S8092 (June 6, 1986) (statement of Sen. D'Amato regarding S. 2580). *See also* 132 Cong. Rec. S14,293 (Sept. 30, 1986) (statement of Sen. Bumpers).

¹²¹ 132 Cong. Rec. 26,447 (Sept. 26, 1986) (statement of Sen. Chiles).

For the kingpins – the masterminds who are really running these operations – and they can be identified by the amount of drugs with which they are involved – we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail – a minimum of 5 years for the first offense.¹²²

Portions of the limited legislative history suggest that Congress intended, for all drug categories including crack cocaine, to link the ten-year mandatory minimum trafficking prison term to major drug dealers and to link the five-year minimum term to serious traffickers.

Perhaps of greatest import to cocaine offense sentencing, is the report issued by the House Judiciary Subcommittee on Crime following its consideration of an earlier version of the bill (H.R. 5394).¹²³ According to the report, the Subcommittee determined that the five- and ten-year mandatory sentencing scheme would create the proper incentives for the Department of Justice to direct its "most intense focus" on "major traffickers" and "serious traffickers." "One of the major goals of this bill is to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources."¹²⁴ The Subcommittee defined major and serious traffickers as follows:

- **major traffickers:** "the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities;"¹²⁵
- **serious traffickers:** "the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities."¹²⁶

¹²² 132 Cong. Rec. S. 14,300 (Sept. 30, 1986). *See also* 132 Cong. Rec. 22,993 (Oct. 11, 1986) (statement of Rep. LaFalce) ("the bill... acknowledge[s] that there are differing degrees of culpability in the drug world. Thus, separate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers"); H.R. Rep. No. 9-845, 99th Cong., 2d Sess., pt. 1 at 11-17 (1986) (construing penalty provisions of a comparable bill (H.R. 5394) similarly).

¹²³ The crack cocaine triggering amounts in H.R. 5394 were 20 grams or more (five-year minimum) and 100 grams or more (ten-year minimum). These quantities were somewhat greater than those enacted into law and reflected a 50-to-1 powder-to-crack quantity ratio.

¹²⁴ *Id.*

¹²⁵ H.R. Rep. No. 845, 99th Cong., 2d Sess. pt. 1, at 16-17 (1986).

¹²⁶ *Id.*

The Subcommittee directed staff to consult "with a number of DEA agents and prosecutors about distribution patterns of drugs which if possessed by an individual would likely be indicative of operating at such a high level."¹²⁷ After consulting with law enforcement professionals but without holding hearings, the Subcommittee set specific quantity levels for the entire range of illegal drugs, including powder and crack cocaine, that would trigger the five- and ten-year mandatory minimum penalties and that generally would be associated with major and serious traffickers. The Subcommittee report indicated that the bill's crack cocaine penalty triggers were set to fit into the major/serious trafficker scheme. In other words, the framework was to apply to crack cocaine in the same way as other drugs. At a mark-up of H.R. 5394, Congressman Hughes stated:

The quantity is based on the minimum quantity that would be controlled or directed by a trafficker in a high place in the processing and distribution chain. . . . For the major traffickers, the levels we have set [include] . . . 100 grams of cocaine freebase . . . ¹²⁸

As the 1986 Act quickly advanced through the legislative process in late summer and early fall, the Senate increased the powder cocaine-to-crack ratio to 100-to-1. Statements of individual Senators suggest that this augmentation was motivated principally by the perceived heightened harmfulness of crack and that the five- and ten-year mandatory minimum sentences ultimately were equated with those trafficked crack quantities that Congress believed would warrant at least the prescribed minimum sentence. For example, Senator Lawton Chiles, a leader in the effort to achieve stringent crack penalties, explained that:

This legislation will . . . decrease the amount for the stiffest penalties to apply. Those who possess 5 or more grams of cocaine freebase will be *treated as* serious offenders. Those apprehended with 50 or more grams of cocaine freebase will be *treated as* major offenders. Such treatment is absolutely essential because of the especially lethal characteristics of this form of cocaine. (*emphasis added*)¹²⁹

At the same time, the Act's general mandatory minimum penalty scheme continued to be explained by a number of congressional leaders (for example, by Senator Byrd, *supra*) in terms of a correlation between quantities of each of the major street drugs (including crack) and the

¹²⁷ *Id.*

¹²⁸ The Narcotics Penalties and Enforcement Act: Markup on H.R. 5394 Before the Subcomm. on Crime of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 131 (1986) (Statement of Rep. Hughes). Chairman Hughes added that the "serious trafficker" definition applied to dealers selling quantities of 20 grams of cocaine base.

¹²⁹ 132 Cong. Rec. 26,447 (Sept. 26, 1986).

relative culpability of the typical trafficker involved with those quantities in drug trafficking organizations. Taken as a whole, the abbreviated, somewhat murky legislative history simply does not provide a single, consistently cited rationale for the crack-powder cocaine penalty structure.

4. The Role of the Media and Public Opinion

As stated above, the 1986 Act was notable for the speed of its development and enactment.¹³⁰ Congressional urgency is chronicled in the legislative history. Drug abuse in general, and crack cocaine in particular, had become in public opinion and in members' minds a problem of overwhelming dimensions.

Recalling recent drug-related deaths of the Boston Celtics' first-round basketball draft pick, Len Bias, and Don Rogers of the Cleveland Browns professional football team, members of Congress repeatedly described the dimensions of the drug problem in such dramatic terms as "epidemic."¹³¹ Against this background, Senator Hawkins spoke in support of the 1986 Act, reflecting the sentiment for urgent legislation:

Drugs pose a clear and present danger to America's national security. If for no other reason we should be addressing this on an emergency basis . . . This is a bill which has far-reaching impact on the future as we know it as Americans and as we mature into the next century.¹³²

The media played a large role in creating the national sense of urgency surrounding drugs, generally and crack cocaine specifically. Whether the media simply reported an urgent situation or rather itself created an exigency has been and will continue to be debated. What is clear, however, is that the crack problem in the United States coincided with large-scale print media and network news coverage of crack.

¹³⁰ See 132 Cong. Rec. 31,329 (Oct. 15, 1986) (statement of Sen. Chiles) ("it is historical for the Congress to be able to move this quickly"); 132 Cong. Rec. 26,449 (Sept. 26, 1986) (statement of Sen. Rockefeller) ("I know it seems to some that we are moving too fast and frenetically to pass drug legislation."). Some members were critical of the speed with which the bill was considered. See, e.g., 132 Cong. Rec. 26,462 (Sept. 26, 1986) (statement of Sen. Mathias) ("Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process."); 132 Cong. Rec. 22,658 (Sept. 10, 1986) (statement of Rep. Lott) ("In our haste to patch together a drug bill – any drug bill – before we adjourn, we have run the risk of ending up with a patch-work quilt . . . that may not fit together into a comprehensible whole.").

¹³¹ E.g., 132 Cong. Rec. 26,436 (Sept. 26, 1986) (Statement of Sen. Biden); 132 Cong. Rec. 26,444 (Sept. 26, 1986) (Statement of Sen. Deconcini); 132 Cong. Rec. 8,091 (June 20, 1986) (Statement of Sen. D'Amato); 132 Cong. Rec. 8,092 (June 20, 1986) (Statement of Sen. Mattingly).

¹³² 132 Cong. Rec. 26,436 (Sept. 26, 1986).

Crack cocaine was first mentioned in the media by the Los Angeles Times on November 25, 1984, referring to a cocaine "rock" that was appearing in the barrios and ghettos of Los Angeles. The New York Times first mentioned crack in a story on November 17, 1985. The coverage increased and intensified over time. In the months leading up to the 1986 elections, more than 1,000 stories appeared on crack in the national press, including five cover stories each in Time and Newsweek. NBC news ran 400 separate reports on crack (15 hours of airtime).¹³³ Time called crack the "Issue of the Year" (September 22, 1986). Newsweek called crack the biggest news story since Vietnam and Watergate (June 16, 1986). CBS News aired a documentary entitled "48 Hours on Crack Street."

Some assertions made in these reports were not supported by data at the time and in retrospect were simply incorrect. One report in 1986, for example, labeled crack cocaine as "America's drug of choice." At the time, however, there were no prevalence statistics on the use of crack.¹³⁴ The first statistics on crack cocaine use compiled by NIDA subsequent to the report showed that snorting powder cocaine was still the preferred method of ingestion by 95 percent of cocaine users.¹³⁵

Another example is the coverage surrounding the death of Len Bias in June 1986. Bias died of cocaine intoxication the day after he was the second player drafted in the National Basketball Association's college draft in 1986. The method of cocaine ingestion that killed Bias was not known at the time of his death. Nonetheless, 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.¹³⁶

A few weeks after Bias's death, on July 15, 1986, the United States Senate's Permanent Subcommittee on Investigations held a hearing on crack cocaine. During the debate, Len Bias's

¹³³ C. Reinerman and H. Levine, "The Crack Attack: Politics and Media in America's Latest Drug Scare," in J. Best (Ed.), Images of Issues: Typifying Contemporary Social Problems 117 (1989).

¹³⁴ *Id.* at 121.

¹³⁵ *Id.*

¹³⁶ Dr. Smyth based his assertion on the fact that there were high concentration levels of cocaine in Bias's bloodstream. The previous week, however, Dr. Yale Caplan, a toxicologist in Maryland's Medical Examiner's Office said that the test of cocaine found in the vial at the scene "probably was not crack." And Maryland's Chief Medical Examiner, Dr. John E. Smialek, stated that the evidence suggests that Bias snorted cocaine due to the residue of cocaine in the nasal passages. Dr. Smyth's assertions, however, received the bulk of the coverage.

case was cited 11 times¹³⁷ in connection with crack. Eric Sterling, who for eight years served as counsel to the House Judiciary Committee and played a significant staff role in the development of many provisions of the Drug Abuse Act of 1986, testified before the United States Sentencing Commission in 1993 that the "crack cocaine overdose death of NCAA basketball star Len Bias"¹³⁸ was instrumental in the development of the federal crack cocaine laws. During July 1986 alone, there were 74 evening news segments about crack cocaine, many fueled by the belief that Bias died of a crack overdose.¹³⁹

Not until a year later, during the trial of Brian Tribble who was accused of supplying Bias with the cocaine, did Terry Long, a University of Maryland basketball player who participated in the cocaine party that led to Bias's death, testify that he, Bias, Tribble, and another player snorted powder cocaine over a four-hour period. Tribble's testimony received limited coverage.

5. The Anti-Drug Abuse Act of 1988

Congress further underscored its concern about drugs generally, and crack cocaine specifically, in the Anti-Drug Abuse Act of 1988.¹⁴⁰ The most far-reaching change of the Anti-Drug Abuse Act of 1988 applied the same mandatory minimum penalties to drug trafficking conspiracies and attempts that previously were applicable only to substantive, completed drug trafficking offenses. Furthermore, with respect to crack cocaine, the Act amended 21 U.S.C. § 844 to make crack cocaine the only drug with a mandatory minimum penalty for a first offense of simple possession. The Act made possession of more than five grams of a mixture or substance containing cocaine base punishable by at least five years in prison. The five-year mandatory minimum penalty also applies to possession of more than three grams of cocaine base if the defendant has a prior conviction for crack cocaine possession, and to possession of more than one gram of crack if the defendant has two or more prior crack possession convictions.

a. Congressional Intent Surrounding Crack Cocaine Possession Penalties

¹³⁷ See transcript of the "Crack Cocaine" hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Congress.

¹³⁸ See testimony of Eric Sterling before the United States Sentencing Commission on proposed guideline amendments, public comment, March 22, 1993.

¹³⁹ Reinerman and Levine, *supra* note 42, at 117.

¹⁴⁰ Pub. L. No. 100-690, 102 Stat. 4181 (1988).

As originally introduced, the 1988 bill did not contain mandatory minimum penalties for possession of cocaine base. Rather, the penalties were added by floor amendments in both the House and in the Senate.¹⁴¹ Relatively little debate surrounded the proposals to attach mandatory minimum penalties to cocaine base possession. Nevertheless, adoption of the proposals clearly signaled that the congressional concern over crack cocaine had continued and perhaps even increased since enactment of the 1986 Anti-Drug Abuse Act.

The 1988 Act's mandatory minimum penalties single out cocaine base possession in a manner that is much more severe than possession penalties for other serious controlled substances. Under the Act – and under today's law – simple possession penalties for cocaine base compared to any other drug are as follows:

- possession of any quantity of any other drug – whether heroin, powder cocaine, or any other controlled substance – results in a maximum penalty of one year in prison;
- cocaine base possession of between one and five grams, depending on criminal history, results in a minimum penalty of five years in prison.¹⁴²

Because there was little debate on the amendments establishing the mandatory minimum cocaine base possession penalties, statements on the floor of the House and Senate by proponents provide the clearest indication of congressional intent. It should also be noted that the Department of Justice opposed the amendments.¹⁴³ In debating the amendments, three reasons were given by proponents for singling out possession of crack cocaine for severe penalties.¹⁴⁴

First, it was argued that the supply of "cocaine"¹⁴⁵ was greater than ever. Second, it was argued that crack cocaine "causes greater physical, emotional, and psychological damage than any

¹⁴¹ See 134 Cong. Rec. H.7,704 (Sept. 16, 1988) (Statement of Rep. Shaw); 134 Cong. Rec. S17,320 (Oct. 21, 1988) (Statement of Sen. Helms).

¹⁴² The Act established an anomaly in current law whereby persons with prior convictions for crack cocaine possession under 21 U.S.C. § 844(a) who have now been caught with up to five grams of crack cocaine, have an incentive to bargain with the prosecutor for a plea to trafficking offenses (*e.g.*, a violation of 21 U.S.C. § 841) to avoid the possession mandatory minimum penalty that would otherwise apply. The anomaly results because trafficking traditionally has been considered a more serious offense than simple possession.

¹⁴³ See *e.g.*, 134 Cong. Rec. H7705 (Sept. 16, 1988) (statement of Rep. Rangel).

¹⁴⁴ 134 Cong. Rec. S17,301 (Oct. 21, 1988).

¹⁴⁵ *Id.* See also, *e.g.*, 134 Cong. Rec. H7,704 (Sept. 16, 1988) (statement of Rep. Hunter) ("There is so much crack that we . . . are creating users because the supply is so prevalent.").

other commonly abused drug.¹⁴⁶ Finally, repeating the concern expressed during consideration of the 1986 Act, it was argued that "crack [cocaine] has been linked to violent crime."¹⁴⁷ Of particular note was the connection between the crack cocaine trade and gang activity.¹⁴⁸ A strong emphasis was placed on the possession penalties as a means of aiding the enforcement community's efforts against crack cocaine traffickers by setting up a presumption that possession of five grams of crack cocaine meant the possessor was a trafficker. It was thought that possession of as little as five grams of crack cocaine was an indicator of distribution rather than personal use.¹⁴⁹

Finally, although not necessarily with reference to the cocaine base simple possession mandatory minimum penalties, members voiced notable concern during debate on the 1988 Act over a harm that was not discussed widely during consideration of the 1986 Act: the increase in cocaine-exposed infants due to crack cocaine use.¹⁵⁰ This concern led to a provision in the drug bill to establish demonstration projects to provide prevention, education, and treatment to substance-abusing pregnant women.¹⁵¹

D. FEDERAL SENTENCING GUIDELINES AND COCAINE PENALTIES

Pursuant to the Sentencing Reform Act, the United States Sentencing Commission created sentencing guidelines. The guideline system was designed to provide certainty and fairness in sentencing and to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.¹⁵² To achieve these objectives best, the Commission created a guideline system that looks, in part, at a defendant's actual conduct rather than just the offense of conviction.¹⁵³ Details of how this system applies to cocaine offenders is provided in Chapter 7.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See, e.g.*, 134 Cong. Rec. E2,701 (Aug. 10, 1988) (statement of Rep. Miller).

¹⁴⁹ Letter from Senator Jesse A. Helms to William Wilkins, Jr., Chairman, United States Sentencing Commission (May 15, 1989) (on file with the United States Sentencing Commission).

¹⁵⁰ *See, e.g.*, 134 Cong. Rec. E2,933 (Sept. 14, 1988) (statement of Rep. Vento); 134 Cong. Rec. E2,701 (Aug. 10, 1988) (statement of Rep. Miller); 134 Cong. Rec. S17,320 (Oct. 21, 1988) (statement of Sen. Helms).

¹⁵¹ 134 Cong. Rec. E2,933 (Sept. 14., 1988) (statement of Rep. Vento).

¹⁵² *See* 28, U. S.C., § 991.

¹⁵³ *See* U.S. Sentencing Commission, Guidelines Manual 1-10 (1994).

In setting the appropriate penalty levels for drug offenses, the Commission began by adopting the five- and ten-year mandatory minimum sentences set out in the 1986 Anti-Drug Abuse Act, and the quantities associated with these mandatory minimum sentences, as reference points.¹⁵⁴ Trafficking in 50 grams of crack or 5 kilograms of powder cocaine, offenses that carry a ten-year mandatory minimum term of imprisonment pursuant to statute, were assigned offense level 32, an offense level corresponding to a guideline range of 121-151 months for a defendant in Criminal History Category I. Trafficking in 5 grams of crack or 500 grams of powder, offenses that carry a five-year mandatory minimum term of imprisonment, were assigned offense level 26, an offense level corresponding to a guideline range of 63-78 months for a defendant in Criminal History Category I.

Using the above two reference points, the offense guidelines were expanded proportionately in two-level increments, upward and downward, to address trafficking in larger and smaller quantities of crack and powder cocaine. The 100-to-1 quantity ratio was maintained throughout the offense levels. Thus, powder cocaine offenses were assigned offense levels from level 12, for offenses involving 25 grams or less, to level 42, for offenses involving 1,500 kilograms or more.¹⁵⁵ Crack offenses were assigned offense levels from level 12, for offenses involving 250 milligrams or less, to offense level 42, for offenses involving 15 kilograms or more.¹⁵⁶

E. THE FEDERAL ENFORCEMENT ROLE TODAY

Within the Departments of Justice, Treasury, Transportation, Defense, and State and the U.S. Postal Service, there are numerous agencies with operational and law enforcement responsibilities for drug control. These include, for example, the Drug Enforcement Administration, the Federal Bureau of Investigation, the United States Attorneys, the Immigration and Naturalization Service, the United States Marshals Service, the United States Customs Service, the Bureau of Alcohol, Tobacco and Firearms, the United States Coast Guard, and the Federal Aviation Administration. Defining the federal role in drug enforcement among and between these agencies and the myriad of state and local law enforcement agencies is difficult at best.

The Office of National Drug Control Policy was created to set forth a strategy to coordinate the federal, state, and local efforts to achieve drug control best. The current strategy defines the

¹⁵⁴ "The Commission has used the sentences provided in, and equivalencies derived from, the statute (21 U.S.C. § 841(b)), as the primary basis for the guideline sentences." *Id.* at §2D1.1, comment. (n.10).

¹⁵⁵ *Id.* at §2D1.1(c) (Drug Quantity Table). Amendment 505, effective November 1, 1994, specified level 38 as the highest offense level corresponding to drug quantity; however, the presence of other aggravating factors (*e.g.*, possession of a dangerous weapon) may increase the offense level above level 38.

¹⁵⁶ *Id.*

federal role in law enforcement. Because federal sentencing policy significantly impacts on this strategy, the strategy is discussed below. In addition, because the Drug Enforcement Administration is the primary drug enforcement agency, its strategic approach is briefly outlined as an example of a federal agency's role. The strategic roles discussed here have been defined by these agencies with respect to the drug problem generally and not with respect to individual drugs.

a. Office of National Drug Control Policy

The Anti-Drug Abuse Act of 1988 created the Office of National Drug Control Policy ("ONDCP") in the Executive Office of the President. The Act charged the Director of ONDCP with coordinating all national drug control policy, with jurisdiction extending to both supply and demand control. The Act requires ONDCP to publish a national strategy for drug control based on quantifiable goals, to advise the National Security Council on drug control policy, to recommend management, personnel, and organizational changes necessary to implement drug control strategy, and to consult with state and local governments.

In February 1994, ONDCP published its current National Drug Control Strategy. In it ONDCP specifically defines the federal enforcement role in overall drug law enforcement. The National Drug Strategy also outlines the federal anti-drug role in areas other than enforcement. These other areas include providing financial and technical support for drug prevention, drug treatment, and alternative sentencing programs like boot camps, providing money for additional state and local police, and regulating firearms purchases.¹⁵⁷

The National Drug Control strategy outlines the federal enforcement role as follows:

The Federal role in drug law enforcement includes (1) aggressively pursuing those enforcement efforts that target the major international and inter-State drug enterprises; (2) providing leadership, training, technical assistance, and research; (3) fostering cooperation among Federal, State, and local agencies; and (4) facilitating State and Local enforcement and criminal justice efforts and/or innovative drug control approaches.¹⁵⁸

According to the ONDCP strategy, "[t]argeting the major trafficking organizations will continue to be the top priority of Federal drug law enforcement authorities." As the top priority, the Attorney General and the Secretary of the Treasury are developing a comprehensive investigative plan to ensure integration of efforts by all relevant agencies. Part of the investigative policy outlined by

¹⁵⁷ The White House, Office of National Drug Control Policy, National Drug Control Strategy 36-46 (Feb. 1994).

¹⁵⁸ *Id.*

ONDCP includes "the kingpin and enterprise strategies" that are designed to ensure that federal enforcement efforts are focused on major drug trafficking organizations. These strategies target criminal organizations that transport and distribute drugs across state lines as well as those that transport drugs into the United States.¹⁵⁹

In addition, federal law enforcement agencies are permitted to assist states and localities through participation in joint task forces such as the Organized Crime Drug Enforcement Task Forces "when the needs of the community, the state, or the region are best served by such efforts." These task forces are meant to "support States and localities as they define and improve their criminal justice system." The task forces, and federal enforcement efforts generally, target gangs and other organizations that cause violence in communities regardless of the quantity of drugs distributed by the organizations.

Although such gangs may deal in a volume of drugs lower than that typically seen in Federal drug cases, several factors make Federal participation in State and local investigations and prosecution appropriate and necessary. These include the multi-State nature of gang operations, the potential violation of immigration laws by many of these groups, their involvement in violations of Federal firearms laws, and the threat their violence poses to local communities. Thus, efforts to control the gang problem will be a focus of our national antidrug efforts.¹⁶⁰

The National Drug Strategy also calls for continued federal involvement in border interdiction and in capturing those involved in money laundering and drug-related financial crimes.

b. Drug Enforcement Administration

In November 1993, the Drug Enforcement Administration (DEA) issued a Strategic Management System, outlining the agency's policies and priorities for the upcoming year. Consistent with the National Drug Control Strategy, DEA's Strategic Management System lays out the following priorities: (1) incapacitating leaders and important players in major international and interstate drug trafficking organizations; (2) disrupting the production of illegal drugs; (3) preventing the diversion of controlled substances; (4) controlling the chemicals used to manufacture illegal drugs; (5) supporting interdiction efforts; and (6) seizing and forfeiting assets derived from drug trafficking.¹⁶¹

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ U.S. Department of Justice, Drug Enforcement Administration, Strategic Management System: FY 1994 (Nov. 1993).

To achieve these goals, the Strategic Management System delineates three specific responsibilities for DEA. First, DEA is to lead federal drug law enforcement by conducting managing, and coordinating major investigations and international operations. As part of this responsibility, DEA has implemented the Kingpin Strategy, "DEA's primary enforcement effort focusing on the identification and targeting of drug Kingpins and their supporting infrastructure." Second, DEA is to coordinate and disseminate drug intelligence. For example, DEA manages the National Narcotics Intelligence System, collecting, analyzing, and disseminating drug-related intelligence. Finally, it is DEA's responsibility to share its experience and to provide investigative support to state and local enforcement agencies. DEA's State and Local Task Force Program is the primary vehicle by which DEA provides a federal presence at the state and local law enforcement levels.¹⁶²

F. STATE LEGISLATIVE ACTION

To place federal legislative actions in context, the Sentencing Commission surveyed the laws of the 50 states, the District of Columbia, the Virgin Islands, and Puerto Rico¹⁶³ to determine whether and to what extent the states¹⁶⁴ distinguish between crack cocaine and powder cocaine.¹⁶⁵

In addition to collecting information on cocaine penalties, the Commission sought information regarding the following:

- whether the state uses sentencing guidelines (either advisory or mandatory);
- whether state guidelines distinguish between crack cocaine and powder cocaine;
- whether state sentences are determinate or whether early release through parole is available;

¹⁶² *Id.*

¹⁶³ The Commission also surveyed research literature and drug policy experts to determine if the crack cocaine problem is international in scope and whether other countries distinguish crack cocaine from powder cocaine in their criminal laws. Both the literature and the experts suggested that there is no comparable crack cocaine problem outside the United States, although Canada has a significant crack problem. Further, neither the literature nor the experts cite a foreign country that differentiates crack and powder cocaine in its criminal laws.

¹⁶⁴ Unless otherwise indicated, this chapter's use of the term "state" hereafter signifies the states and territories contacted for the survey.

¹⁶⁵ The Commission reviewed relevant state statutes and guideline provisions. In addition, the Commission contacted each state sentencing commission or its counterpart if the state had such an agency. Otherwise, the Commission surveyed the state agency responsible for collecting criminal justice data (*e.g.*, statistical analysis centers).

- whether the state has enacted mandatory minimum drug statutes; and
- whether the state compiles data on crack cocaine's impact on the prison population, on crack cocaine use and violence, or on crack cocaine's relative impact on prosecutorial caseloads.¹⁶⁶

1. Statutory Distinctions Between Crack Cocaine and Powder Cocaine

Because a primary focus of this report is the significant distinction made in federal statutes between powder cocaine and crack cocaine, the Commission researched whether state statutes distinguish between powder cocaine and crack cocaine. As of the date of this report, 14 states have some form of distinction between crack and powder cocaine in their statutory schemes. Following is a summary of the manner in which each of these states distinguishes between the two forms of cocaine.

It must be noted that depending on the state, the sentence actually served by an offender may be a small fraction of the sentence meted out by the state court. This is true for many reasons, most notably, prison capacity and whether parole is a feature of the state's law. The data on actual time served for defendants were not available to the Commission at the time of this report.

a. Alabama

Although Alabama does not provide different penalties for crack and powder cocaine crimes, it uses a 10-to-1 quantity ratio for determining eligibility for its diversion program. Penalties for cocaine crimes are determined by the quantity of cocaine involved. There is no separate mention of cocaine base or crack cocaine in these provisions.¹⁶⁷ However, the statutory provisions outlining eligibility for the diversion of offenders to drug treatment rather than prosecution provide different quantity levels for powder cocaine and crack cocaine offenders. If the substance involved in the offense was powder cocaine, the quantity cannot exceed five grams for eligibility for diversion. If the substance was crack cocaine, the quantity cannot exceed 500 milligrams (one-half gram).

b. California

In California, individuals convicted of possession or possession with intent to sell crack cocaine and powder cocaine are sentenced to different terms. Crack cocaine defendants are sentenced to a three-, four-, or five-year term of imprisonment, while powder cocaine defendants are

¹⁶⁶ Information related to data collection was not available for all states.

¹⁶⁷ Alabama Code § 13A-12-231(2) (1993).

sentenced to a lesser two-, three-, or four-year term.¹⁶⁸ California statutes provide enhancements if large quantities of drugs are involved in the offense. However, when calculating the quantity levels necessary to trigger these enhancements, California does not distinguish between crack cocaine and powder cocaine.

c. Connecticut

Connecticut differentiates between the two forms of cocaine. The Connecticut statutes set a penalty of 5-20 years to life for trafficking in one ounce or more of cocaine powder. The same penalty applies for trafficking in .5 gram or more of cocaine base. The powder/crack quantity ratio is thus 56.7-to-1.¹⁶⁹

d. District of Columbia

The District of Columbia criminal code differentiates between cocaine base and cocaine powder. It provides a five-year term for a first offense and a ten-year term for a second offense involving trafficking in various amounts of controlled substances. The threshold amount of cocaine powder for these terms is 500 grams.¹⁷⁰ The threshold amount for offenses involving cocaine base is 50 grams (a 10-to-1 ratio). However, another code section that establishes specific mandatory minimum penalties for cocaine offenses¹⁷¹ provides that if these threshold amounts are met, the minimum terms are four, seven, and ten years, respectively, for a first, second, third, or subsequent offense involving cocaine base. The minimum terms are higher, at five, eight, and ten years respectively, for a first, second, third, or subsequent offense involving cocaine powder.

e. Iowa

Iowa employs a 100-to-1 ratio in distinguishing between powder cocaine and crack cocaine. Unlike the federal statutes, however, this ratio is not reflected in the threshold amounts that trigger the mandatory minimum penalties. Rather, the 100-to-1 quantity ratio is reflected in the threshold

¹⁶⁸ In California, prison sentencing ranges comprise three possible terms: normal, aggravating, and mitigating. For example, the "normal" defendant convicted of crack cocaine possession receives a four-year term. If aggravating circumstances exist, the defendant receives a five-year term. And if mitigating circumstances exist, he/she receives a three-year term. *See* California Health and Safety Code §11350, *et seq.*

¹⁶⁹ Connecticut General Statutes Annotated § 21a-278(a) (West Supp. 1993).

¹⁷⁰ District of Columbia Code Annotated § 33-541(c)(1)(A) *et seq.*

¹⁷¹ The District of Columbia provides penalties for cocaine powder and cocaine base in two statutory provisions.

amounts that determine the maximum statutory penalty. In other words, a defendant must have 100 times more powder cocaine than another defendant trafficking in crack cocaine in order to trigger the same statutory maximum penalty.

f. Louisiana

Louisiana differentiates between powder cocaine and cocaine base but not through a quantity ratio. The Louisiana statutes provide a sentencing range of 5-30 years for trafficking in any amount of a narcotic drug (which includes cocaine powder) and a sentencing range of 20-50 years for trafficking in any amount of cocaine base.¹⁷²

g. Maryland

The Maryland criminal code provides for a five-year mandatory minimum penalty for trafficking in controlled substances. The mandatory minimum is triggered in cases involving 48 grams of cocaine powder or 50 grams of cocaine base.¹⁷³ Maryland does not differentiate punishment ratios for offenses involving bringing a narcotic into the state. In addition, Maryland has a "drug kingpin" statute providing more severe penalties for an offender who meets the statutory definition. Generally, a person is considered a drug kingpin if the offense involved specified quantities of controlled substances. The statute provides different amounts for offenses involving various controlled substances including cocaine, but provides no separate penalties for cocaine base offenses.

h. Missouri

The Missouri statutes provide that offenses involving more than 150 grams but less than 450 grams of cocaine powder are Class A felonies. An offense involving 450 grams or more is a Class A felony for which the offender may not receive probation or parole. The quantities that trigger these same sentences for offenses involving cocaine base are more than two but less than six grams, and six or more grams, respectively.¹⁷⁴

i. Nebraska

Nebraska sets penalties generally based on the schedule of controlled substance involved in the offense. An offender is subject to punishment for a Class IC felony when seven or more ounces

¹⁷² Louisiana Revised Statutes Annotated § 40:967(B)(1) *et seq.*

¹⁷³ Maryland Annotated Code art. 27, § 286(f)(1) *et seq.*

¹⁷⁴ Missouri Annotated Statutes § 195.222(2.).

of powder cocaine are involved in the offense or 28 grams of cocaine base. The quantity ratio is thus 7.1-to-1.¹⁷⁵

j. North Dakota

Following the federal regime, North Dakota uses a 100-to-1 quantity ratio. The criminal code provides for increased penalties in offenses involving 500 grams of cocaine powder or 5 grams of cocaine base.¹⁷⁶ Unlike the federal system, however, below these threshold quantities, all controlled substances listed in the same schedules are treated alike.

k. Oklahoma

Oklahoma also differentiates between the two forms of cocaine, using roughly a 6-to-1 ratio. The Oklahoma statutes provide ten-year mandatory minimum penalties for offenses involving 28 grams of cocaine powder or 5 grams of cocaine base.¹⁷⁷ The statutes also provide a 20-year mandatory minimum for offenses involving 300 or more grams of cocaine powder or 50 grams or more of cocaine base.

l. South Carolina

South Carolina's statutory scheme for cocaine penalties is complex.¹⁷⁸ There are separate offenses for possession, distribution, and trafficking of cocaine base and powder cocaine with different minimum and maximum penalties. The penalties for distribution of cocaine powder are more stringent than those for crack: 5-30 years for a first offense involving the distribution of cocaine powder and 15-30 years for a second offense as compared to 0-25 years for a first offense involving the distribution of cocaine base and 0-30 years for a second offense.¹⁷⁹ However, there is also a separate statute that directs sentences for particular quantities of cocaine involved in the case within the larger minimum and maximums. These sentencing ranges are based on the same quantities for cases involving both crack and powder cases. There are also different maximum penalties for offenses involving possession, with those for cocaine base being somewhat higher than those for

¹⁷⁵ Nebraska Revised Statutes § 28-405.

¹⁷⁶ Sections 19-03.1-23.1(c)(2) and (3).

¹⁷⁷ Oklahoma Statutes Annotated Tit. 63, § 2-415(C)(2).

¹⁷⁸ South Carolina Code Annotated §§ 44.53-370, 44.53-375 (1992 Supp.).

¹⁷⁹ South Carolina's statutory scheme formerly provided several punishments for offenses involving cocaine base that were significantly lower than those for offenses involving cocaine powder. The current statutory scheme is a result of deliberate attempts to equalize penalties for offenses involving these two forms of cocaine.

cocaine powder: for example, for a first offense, crack cocaine possession has a statutory maximum of five years, while powder cocaine possession has a two-year maximum.

m. Virginia

In Virginia, there is no statutory distinction between powder cocaine and cocaine base generally. The penalties are determined by the schedule of the controlled substance involved in the offense, and all cocaine forms and derivatives are placed in schedule II.¹⁸⁰ However, Virginia recently enacted a "drug kingpin" statute that provides a 20-year mandatory minimum (with a maximum of life) for offenders who qualify as "drug kingpins" by trafficking in specified quantities of various substances. The "kingpin" level for trafficking in powder cocaine is 500 kilograms, and the level for cocaine base is 1.5 kilograms. This results in a 333-to-1 quantity ratio for those offenders prosecuted as drug kingpins.

n. Wisconsin

In Wisconsin, drug weight ratios of crack cocaine to powder cocaine vary depending on the quantity of drugs. For example, three grams or less of crack cocaine triggers a one-year mandatory minimum sentence, while 25 to 100 grams of powder cocaine trigger the same penalty. A three-year mandatory minimum penalty is mandated in offenses involving 3 to 10 grams of crack cocaine compared to 100 to 400 grams of powder cocaine. The five-year mandatory penalty is implicated by 10 to 40 grams of crack and 400 to 800 grams of powder cocaine. Finally, more than 40 grams of crack cocaine triggers the ten-year mandatory minimum penalty compared to more than 800 grams of powder cocaine.

o. The Remaining States

The remaining states do not distinguish statutorily between crack cocaine and powder cocaine.

2. Sentencing Guidelines

State criminal penalties are best understood with an awareness of a state's sentencing structure. As part of its survey, the Commission asked whether states had sentencing guideline systems and whether imposed sentences were determinate (*i.e.*, sentence imposed is the sentence served) or indeterminate (*i.e.*, sentence or sentence range imposed with release into the community after service of less than the full sentence). The results of this survey are presented in Table 4.

¹⁸⁰ Virginia Code Annotated § 18.2-248 (1993 Supp.).

Twenty-one states employ some form of sentencing guidelines. Some state guidelines are advisory/voluntary, while others are "mandatory." Twenty states have determinate sentencing structures, some in combination with guidelines, some not. At the current time, four states with existing guideline systems, Wisconsin, Maryland, Louisiana, and Virginia, distinguish between cocaine powder and cocaine base in their guidelines. Ohio's proposed guidelines, which have passed the state house and are expected to pass the state senate sometime in 1995, would distinguish between powder cocaine and crack cocaine at a ratio that varies from 2-to-1 to as high as 10-to-1.¹⁸¹ There is considerable variation in statewide sentencing schemes. For example, only two of the states with statutes that distinguish between cocaine powder and cocaine base have determinate sentencing. One of these, Louisiana, employs some form of guidelines system; the other, Connecticut, does not. Consequently, little can be said about how varied sentencing structures affect the presence or absence of a distinction between crack cocaine and powder cocaine in the actual sentence served by the offender.

3. Mandatory Minimum Sentences

The Commission surveyed the states on the prevalence of mandatory minimum drug penalties in order to examine the relationship between such penalties and sentencing distinctions made between crack cocaine and powder cocaine. If states did not distinguish between crack cocaine and powder cocaine, the Commission sought to determine whether, nevertheless, they had enacted mandatory minimum penalties for drug offenses.

Table 4 shows that 32 states have mandatory minimum penalties for one or more types of drug offenses (*e.g.*, trafficking, repeat trafficking, repeat possession, and sale of drugs within a certain distance of a protected area such as a school or playground). Most of these states base their minimum penalties on the quantity of drugs for which the defendant is held accountable. All of the states that distinguish between powder cocaine and crack cocaine also have mandatory minimum penalties, except Nebraska.

4. Referral Policies

In addition to determining the ways in which states distinguished between crack cocaine and powder cocaine, the survey sought information about whether the federal statutes' harsher penalties for crack cocaine affected a state's decision to refer crack cases to the federal system for prosecution. States cited three primary reasons for referring a crack cocaine case to federal prosecutors:

¹⁸¹ In Ohio, the legislature thus far has chosen not to distinguish between cocaine powder and cocaine base in the statutory scheme.

- involvement of a large amount of drugs (18 states);
- involvement of federal authorities in the investigation (15 states); and
- opportunity for asset forfeiture where the state had no power to seek such forfeiture (6 states).

The federal system's 100-to-1 quantity ratio was not specifically cited as a reason to refer cases to federal prosecutors. However, several respondents stated that if the drug amounts were above the thresholds for federal mandatory minimum penalties, the state would refer the case to federal prosecutors.

5. Impact of Crack Cocaine on State Criminal Justice Systems

As part of the survey, states were asked if they collected empirical data on the number of crack cocaine cases in their state's criminal justice system. The Commission was interested in learning whether the distribution of drug cases at the state level is similar to that of the federal system, and whether states could provide data on crime associated with drug offenses.

Only three states were able to provide statistics on the number of crack cocaine cases and their impact on prosecutorial caseloads. Responses varied widely. For example, 50 percent of South Carolina's drug cases involve crack cocaine. In Minnesota, 17.3 percent of the drug cases involve crack. In Virginia, 18.3 percent of the state's drug convictions were for crack cocaine, compared to 52.8 percent for powder cocaine.

None of the states could provide specific data or any correlation between crack cocaine use and violence. Many respondents provided anecdotes that revealed particular views on these issues, but no quantifiable data. This lack of data may be due to the fact that the majority of states do not distinguish between crack cocaine and powder cocaine for penalty or recordkeeping purposes.

G. THE IMPACT OF PROSECUTORIAL AND INVESTIGATORY DISCRETION ON COCAINE OFFENDERS AND SENTENCES

Discretion exercised by prosecutors and investigators working on cocaine cases can have a significant impact on sentences for any individual cocaine offender. While the exercise of discretion by prosecutors and investigators has an impact on sentences in almost all cases to some extent because of the 100-to-1 quantity ratio and federal mandatory minimum penalties, discretionary decisions in cocaine cases often have dramatic effects.

1. Prosecutorial Discretion

Federal law enforcement and judicial resources are limited. The federal criminal justice system cannot process all the cases involving violations of federal law. The FBI's Uniform Crime Reports estimate that state and local law enforcement agencies made almost 1.1 million arrests for drug abuse violations in 1990. During the same period, DEA made 21,799 arrests. Nearly all of these arrests, both state and federal, involve violations of both state and federal law. Some of these arrests make their way to the federal system, others to the state (and some were prosecuted in both systems).

Table 5 shows the number and percentage of drug trafficking cases sentenced in the various federal districts and circuits. There are some surprising variations in prosecution practices. The largely rural district of Central Illinois sentenced a considerably higher proportion of crack cocaine cases than the Chicago-driven district of Northern Illinois. Brooklyn, New York, reports a much lower proportion of federal crack sentencings than Northern and Southern West Virginia, though New York City Police Department data show that 45.8 percent of all drug arrests in 1989 were crack cocaine-related.¹⁸² In 1993 the state of South Carolina had more crack cocaine cases (118) than the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming combined (113).

Specific examples further illuminate the impact of prosecutorial discretion. In the Central District of California, which includes Los Angeles, the United States Attorney's Office has stated in court documents that it generally does not prosecute crack cases involving less than 50 grams of crack.¹⁸³ This is borne out by Sentencing Commission data that show only four sentencings for drug trafficking in 1993 for quantities of crack below 50 grams in this district. The result of this policy is that those defendants involved in quantities below the 50-gram threshold are prosecuted in state court and are subject to less severe sentences.¹⁸⁴

By contrast, U.S. Attorney's Offices that do not have this policy frequently prosecute defendants who fall below the 50-gram threshold. For example, in the District of Columbia in 1993, 111 defendants were sentenced for trafficking less than 50 grams of crack cocaine.¹⁸⁵ Similarly, in the Southern District of West Virginia, 97 defendants were sentenced for trafficking less than 50 grams of crack. Because the sentencing guidelines at these levels are tied proportionately to the

¹⁸² Steven R. Belenko, *Crack and the Evolution of Anti-Drug Policy* (1993), at 118.

¹⁸³ United States v. Washington, et al., CR 91-632-TJH (C.D. Ca. 1993), Declaration of Assistant United States Attorney David C. Scheper attached to Government's Opposition to Defendant's Motion To Dismiss Re: Selective Prosecution.

¹⁸⁴ R. Berk, "Preliminary Data on Race and Crack Charging Practices in Los Angeles," 6 Federal Sentencing Reporter 36-38 (1993).

¹⁸⁵ The United States Attorney's Office in the District of Columbia has recently changed its policy so that crack cases involving less than 50 grams generally are not prosecuted in federal court.

federal mandatory minimum penalties, these defendants are punished more severely than their counterparts in Los Angeles.

Certainly, resource limitations or differing state/federal priorities may restrict the prosecution of crack cases in larger federal districts and help to explain why some of the smaller, more rural federal districts have experienced larger numbers of crack prosecutions. The Commission does not mean to suggest that any apparent disparities are unwarranted. We have not analyzed various factors that might explain these differences, including the strength of the state and local law enforcement efforts directed at the crack cocaine trade, the relative punishment available through state statutes, or the differing needs and problems facing each district.

Most important from the Commission's perspective, the discretion exercised in determining which arrests end up in which system can have a dramatic effect on the ultimate sentence for a particular defendant. Federal courts in 1990 sentenced drug traffickers to an average of 84 months in prison. Under federal law, the vast majority of these sentences are actually served.¹⁸⁶ By contrast, according to the Department of Justice, state courts in 1988 sentenced drug traffickers to an average maximum sentence of 66 months in prison.¹⁸⁷ Of the maximum 66 months, the Department of Justice's Bureau of Justice Statistics estimated that, on average, 20 months, or roughly 30 percent, were actually served.

2. Investigatory Discretion

As discussed earlier in this report and documented in the next chapter, generally only retail and small wholesale distributors traffic in crack, while those higher in the distribution chain are involved with the powder form. Obviously, somewhere within this chain someone converts the powder to crack. When an offender is discovered above the conversion level, whether the investigator ties the offender to those lower in the distribution chain can have a dramatic impact on the sentence.

For example, if a DEA agent uncovers a person with no criminal history distributing one kilogram of powder cocaine and makes an arrest, that person is subject to roughly a five-year

¹⁸⁶ U.S. Department of Justice, *supra* note 7. A convict's sentence may be significantly reduced on motion of the government if the convict substantially assists the government in the investigation or prosecution of another person who has committed an offense.

¹⁸⁷ *Id.*

sentence based on the quantity of controlled substance. If the distributor converts that same quantity of cocaine to crack, (perhaps at the agent's suggestion)¹⁸⁸ the resulting sentence is roughly 15 years.

¹⁸⁸ At least one district court has found this practice unconstitutional. See United States v. Shepherd, 857 F.Supp. 105 (D.D.C. 1994).

Chapter 7

SENTENCING OF COCAINE OFFENDERS

A. INTRODUCTION

At the heart of the debate surrounding cocaine sentencing lies the 100-to-1 quantity ratio between powder and crack cocaine. This *quantity* ratio leads to a *penalty* ratio for offenders involved with equivalent amounts of either form of crack cocaine. Depending on the exact quantity, the mandatory minimum penalties and sentencing guidelines prescribe prison terms for crack defendants that generally range from three to almost eight times longer than for defendants with equivalent amounts of powder cocaine.

Previous chapters have examined various aspects of the cocaine problem, focusing particularly on similarities and differences between the forms of the drug. Chapter 6 reviewed the legislative and law enforcement response. In this chapter, we focus on the end result of law enforcement – the sentencing of cocaine offenders – with special attention to the differences in penalties associated with crack and powder cocaine. How are penalties in the federal courts determined? What are the typical sentences for crack versus powder cocaine defendants? What is the impact of the 100-to-1 quantity ratio on cocaine sentences? Who are the defendants receiving these sentences? How effective are current policies at identifying for increased punishment the most dangerous and culpable offenders?

B. HOW COCAINE TRAFFICKERS ARE SENTENCED UNDER THE GUIDELINES AND MANDATORY MINIMUM STATUTES

Federal sentences for drug trafficking are determined through the interaction of mandatory minimum statutes and the sentencing guidelines. Section 841 of title 21, U.S.C., identifies seven drugs (including powder and crack cocaine) and assigns each differing quantity levels that trigger five- and ten-year mandatory minimum penalties. The Sentencing Commission incorporated these "triggering amounts" when it created the drug guidelines.

As a general matter, the guidelines assign a base offense level (a number) that serves as a starting point in assessing the seriousness of an offense. This base offense level can increase or

decrease based on the circumstances of the particular case. The factors that modify the base offense level ("specific offense characteristics") are enumerated in the guidelines. A base offense level, modified by specific offense characteristics and general adjustments, forms one axis of the table used to determine sentencing ranges. The sentencing table's offense axis extends from level 1 (least serious) to level 43 (most serious).

The other axis reflects the defendant's criminal history category as expressed in one of six categories (Category I-Category VI). The point at which the offense level and criminal history category intersect on the sentencing table determines an offender's guideline range.

In drug cases, the guidelines take account of a large number of relevant factors when determining the offense level and criminal history category:

- **Base offense level:** The most important elements in setting the base offense level are the type and quantity of drugs involved. As discussed above, the guidelines incorporate the penalty levels established in the mandatory minimum statutes and then extrapolate from these across the range of possible drug quantities to achieve a smooth, proportionate increase in sentence length as drug amount increases.¹⁸⁹
- **Specific Offense Characteristics:** The base offense level is adjusted upward by a predetermined amount for drug offenses that involve
 - death or serious bodily injury resulting from the use of the substance;¹⁹⁰
 - possession of a dangerous weapon;¹⁹¹
 - use of an aircraft-related skill in importing the substance,¹⁹² or
 - killing of a victim.¹⁹³

¹⁸⁹ For example, an offense level of 26 (equivalent to the five-year mandatory minimum penalty prescribed by 21 U.S.C. § 841(b)(1)(B)) is applied when crack cocaine weight is 5 grams to 20 grams or powder cocaine weight is 500 grams to 2 kilograms. For detailed instructions on how the guidelines sanction drug offenders, *see* U.S. Sentencing Commission, Guidelines Manual (hereinafter "USSG") Chapter Two, Part D, "Offenses Involving Drugs."

¹⁹⁰ USSG §2D1.1(a)(1) or (2).

¹⁹¹ USSG §2D1.1(b)(1).

¹⁹² USSG §2D1.1(b)(2).

¹⁹³ USSG §2D1.1(d)(1).

- **Other general offense level adjustments:** The base offense level can be adjusted for additional aggravating or mitigating factors
 - if a vulnerable or official victim was involved or a victim was restrained;¹⁹⁴
 - for a defendant's role in the offense (*e.g.*, acting as leader or organizer of a group), for abuse of a position of trust, or use of a special skill;¹⁹⁵
 - for obstruction of justice;¹⁹⁶
 - for multiple counts of conviction;¹⁹⁷ and
 - for a defendant's acceptance of responsibility for the crime.¹⁹⁸

- **Prior criminal involvement:** The criminal history category is increased if a defendant
 - has a prior record, based on the number, seriousness, and recency of sentences for prior convictions;¹⁹⁹
 - committed the new offenses while under another criminal justice sentence;²⁰⁰
 - committed a crime of violence related to another offense;²⁰¹ and

¹⁹⁴ USSG, Chapter Three, Part A ("Victim-Related Adjustments").

¹⁹⁵ USSG, Chapter Three, Part B ("Role in the Offense").

¹⁹⁶ USSG, Chapter Three, Part C ("Obstruction").

¹⁹⁷ USSG, Chapter Three, Part D ("Multiple Counts").

¹⁹⁸ USSG, Chapter Three, Part E ("Acceptance of Responsibility").

¹⁹⁹ USSG, Chapter Four, Part A ("Criminal History"), §4A1.1 (a)-(c).

²⁰⁰ USSG, Chapter Four, Part A ("Criminal History"), §4A1.1(d).

²⁰¹ USSG, Chapter Four, Part A (Criminal History"), §4A1.1(f).

- receives a career offender enhancement that provides penalties at or near the statutory maximum for drug traffickers with two or more prior convictions (state or federal) for drug trafficking or crimes of violence.²⁰²

The judge must choose a sentence from within the guideline range unless the court identifies an aggravating or mitigating circumstance that was not adequately considered by the Sentencing Commission (a "departure").²⁰³ In mandatory minimum drug cases, judges can depart only upon motion from the government stating that a defendant has provided substantial assistance in the investigation or prosecution of another person.²⁰⁴ (The numbers of persons receiving these departures are reported below.)

Because guideline base offense levels are pegged to the statutory mandatory minimum drug quantities, all guideline drug sentences are indirectly affected by the mandatory minimums. The base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities. Most of the specific offense characteristics and general adjustments increase the sentence length, as do all of the adjustments for criminal history. The result is that most drug defendants in federal court receive guideline sentences higher than the applicable statutory mandatory minimum penalty. In 79 percent of the 1993 crack cases and 71 percent of the powder cases, the minimum of the guideline range was higher than the applicable statutory mandatory minimum. For cases in which the mandatory minimum level is higher than the guidelines, the statutes "trump" the guidelines and the defendants receive the mandatory minimum penalty.

An exception to the mandatory minimum drug penalties was created by Congress in 1994 for certain first-time, non-violent, low-level drug offenders. This so-called "safety valve" allows qualified defendants to receive the full benefit of any mitigating guideline adjustments that they would otherwise be precluded from due to the mandatory minimum penalties.²⁰⁵ Only defendants whose guideline sentence is lower than the mandatory minimum level or who qualify for a downward departure actually benefit from the "safety valve" provision. In the first two months of its implementation, 27 powder cocaine and 13 crack defendants benefitted from the "safety valve."²⁰⁶

²⁰² 28 U.S.C. § 994(h) and USSG, Chapter Four ("Criminal History and Criminal Livelihood").

²⁰³ 18 U.S.C. § 3553(b) and USSG §5K2.0.

²⁰⁴ 18 U.S.C. § 3553(e) and USSG §5K1.1.

²⁰⁵ 18 U.S.C. § 3553(f), and USSG §5C1.2.

²⁰⁶ The "safety valve" became effective September 23, 1994. As of February 3, 1995, the Sentencing Commission had received and entered into its database 96 cases in which the provision had clearly been applied. (In 28 cases a qualifying defendant received a sentence below the mandatory minimum but court records do not indicate the reason or legal basis.)

C. SENTENCES IMPOSED FOR CRACK AND POWDER COCAINE

1. Sentencing Commission Data

The findings in the following sections were obtained from the U.S. Sentencing Commission's monitoring database for federal offenders.²⁰⁷ The Sentencing Commission receives information on all cases sentenced under the federal guidelines and maintains an automated database with more than 260 variables for each case.²⁰⁸ The data include only cases convicted at the federal level. Consequently, they cannot be said to present a representative sample of all drug importation, trafficking, and distribution offenses in the United States, nor of the demographics of all drug defendants.

Information in the monitoring database is derived from various documents sent to the Commission from federal district courts (*i.e.*, Judgment of Conviction Order, Presentence Report, Plea Agreement, Report on the Sentencing Hearing, and Guideline Worksheets). In a limited number of cases, documentation is incomplete.²⁰⁹ To ensure that the analysis is founded on the best available data, only those cases in which complete court information was received were used.²¹⁰ Finally, the analysis below is based on the primary type of drug involved in the offense. "Primary drug type" does not mean the only drug involved in the offense, but rather the drug that was most important in determining the defendant's sentence.²¹¹

2. Sentences of Drug Traffickers

There is generally a two-month lag between a defendant's sentencing and his/her case file being received by the Commission.

²⁰⁷ The Sentencing Commission's data system began distinguishing between crack cocaine and powder cocaine defendants in FY 1992. Information in this chapter reflects FY 1993 data, the most complete and recent information publically available. (The analyses presented here were replicated with 1992 data and with 1994 data recently entered at the Commission. No changes in the major findings discussed here were found; 1993 is a representative year.)

²⁰⁸ Case, when referred to in this chapter, is defined in the Commission's data collection system as a single sentencing event for a single defendant. Multiple defendants in a single sentencing event are treated as separate cases. If an individual defendant is sentenced more than once during a reporting year, each sentencing event is identified as a separate case.

²⁰⁹ The Sentencing Commission depends upon the district courts to submit data. Defendants sentenced under the guidelines whose files were not forwarded to the Commission are not included in these analyses.

²¹⁰ Selecting cases using this criterion reduces the number of drug cases for analysis by 3,283 cases.

²¹¹ Many drug dealers simultaneously deal more than one illicit drug (*e.g.*, as discussed in Chapter 4, many crack cocaine dealers also deal in powder cocaine). Because of the current sentencing scheme and the 100-to-1 quantity ratio, crack will usually drive the ultimate sentence in the case of a dealer in both crack and powder cocaine, and thus will be considered the primary drug type. It is possible that such a defendant was involved with a greater quantity of powder cocaine, but the lesser quantity of crack controlled the sentence.

Of the 42,107 defendants sentenced in federal court in fiscal year 1993, more than 46 percent were convicted of drug offenses. During FY 1993, the number of drug defendants increased by ten percent over the previous year.²¹² Figure 9 presents the distribution of FY 1993 drug cases by type of drug. Powder cocaine was the most frequently reported primary drug, representing 34.5 percent of federally sentenced drug cases. The remaining 65 percent, in order of prevalence include marijuana (26.7%), crack cocaine (19.4%), heroin (10.0%), methamphetamine (4.9%), and other drugs (4.5%). Combining crack and powder cases, we see that cocaine was the primary drug for 53.9 percent of all federal drug cases sentenced under the guidelines, or a total of 9,925 sentenced offenders.

As outlined above, cocaine sentences are the product of a complex interaction of statutes and guidelines. The result of this interaction has been that crack cocaine defendants are more likely to be sentenced to prison and, on average, receive much longer sentences than powder cocaine offenders. Table 6 shows that approximately 94 percent of all drug trafficking cases receive prison sentences. Crack defendants are even more likely to receive a sentence of imprisonment (97.6% prison), as well as the longest average period of incarceration (median 97 months, mean 1266 months).²¹³ Methamphetamine cases resulted in the second longest average period of incarceration (median 78 months, mean 106.7 months), followed by powder cocaine cases (median 63 months, mean 96.0 months), heroin cases (median 60 months, mean 71.6 months), and marijuana cases (median 35 months, mean 49.3 months).

Courts have discretion to select a sentence within the guideline range or, in appropriate cases, to depart. Table 7 presents information on sentence departures. Most defendants are sentenced within the guideline range (varying from 53.9% of methamphetamine cases to 69.6% of heroin cases). When departures occur, they are most often the result of a motion from the government that the defendant provided substantial assistance in the investigation or prosecution of another person (ranging between 22.5% of heroin cases and 39.9% of methamphetamine cases).²¹⁴ Close to 33 percent of powder cocaine defendants receive a departure for substantial assistance compared to 28 percent of crack cases. Both types of offenders receive similar percentages of other downward departures, 4.7 and 5.5 percent for powder and crack respectively, and virtually identical numbers of upward departures.

²¹² United States Sentencing Commission, Annual Report (1993).

²¹³ The mean and the median are the two most common measures of "central tendency" or typicality of a group of cases. The median is the point at which half the cases fall above and half fall below. The mean is the mathematical average obtained by adding all sentence lengths together and dividing by the number of cases; means, therefore, are affected more by a particularly high or low sentence.

²¹⁴ The percentage of cases receiving a motion for substantial assistance is the factor that has changed the most over the past three years. In 1992, 20.8 percent of crack cases and 27.2 percent of powder cases received such a motion. This rate has increased every year, with 32.6 percent and 35.7 percent of crack and powder cases, respectively, getting such an adjustment in 1994.

The 100-to-1 quantity ratio is a major factor contributing to the differences between powder and crack cocaine sentences. If we compare the average sentence of offenders involved with the same amount of powder and crack cocaine,²¹⁵ the impact of the quantity ratio can be clearly seen. For defendants involved with 50 to 150 grams of cocaine, crack defendants have median sentences of 120 months, while powder defendants have median sentences of 18 months.

3. Sentences for Offenders Convicted of Simple Possession

Drug possession is treated differently than trafficking under the guidelines. For all drugs other than crack, only the type and not the amount possessed affects the base offense level. Guideline 2D2.1 lists three offense levels: heroin or other opiates and crack are assigned base offense level 8; cocaine, LSD, and PCP base offense level 6; and other controlled substances level 4. These base offense levels correspond to a prison range of 0-6 months for first offenders. This allows them to qualify for alternatives to imprisonment, such as confinement in a residential treatment facility.

A special provision of §2D2.1 accommodates the mandatory minimum penalty for possession of more than five grams of crack. Keeping with the congressional presumption that possession of this amount represents trafficking instead of personal use, the guidelines refer defendants with more than five grams of crack to the drug trafficking guideline. Consequently they are sentenced like drug traffickers, with base offense levels beginning at 26 (corresponding to prison terms of 63 to 78 months for first offenders).

Table 8 shows the average sentences for defendants convicted of possession of various drugs, including crack and powder cocaine. Ninety-eight defendants were sentenced for possession of crack in 1993; 122 were sentenced for possession of powder. The mean sentence for crack was 306 months, the mean sentence for powder was 3.2 months; the median for crack was 9.5 months, for powder it was zero. The median of zero for powder indicates that most powder possession cases (73.8%) received probation with no prison term, compared to 32 percent of crack possession cases receiving probation.

Table 8

²¹⁵ Drug amount is determined in the database according to the defendant's base offense level. For this analysis, we compare powder defendants at base offense levels 16 and 18 (corresponding to 50 to 200 grams) to crack defendants at level 32 (corresponding to 50 to 150 grams). Thus, the powder cocaine defendants in the sample may have actually had slightly larger amounts of drugs. These amounts were chosen because they are the levels at which a substantial number of defendants can be found for both forms of the drug.

D. DEMOGRAPHIC PROFILE OF FEDERAL COCAINE OFFENDERS

Who are federal cocaine offenders, and how do powder and crack cocaine offenders compare with each other and with other drug offenders? In particular, are there important offender characteristics that distinguish crack offenders from powder offenders?

1. Citizenship

Table 9 shows the citizenship of federal drug defendants. Among crack cocaine cases, only 8.1 percent were non-U.S. citizens. This contrasts with the higher proportion of aliens for other drugs (powder cocaine 29.7%, heroin 63.0%, marijuana 31.8%, and methamphetamine 9.9%). Within a drug organization, alien status may be associated with the role of mule or courier and the crossing of a U.S. border. As discussed in Chapter 4, crack cocaine cases very infrequently involve crossing the U.S. border.

2. Gender, Age, and Education

Most federal drug defendants are male (89.2% of traffickers, 81.4% of possessors), regardless of the type of drug involved (*see* Table 10). Most (75.2% of traffickers) are 26 years of age or older (*see* Table 11). However, crack cocaine trafficking defendants are generally younger, with nearly half (46.9%) less than 26 years old. Crack cocaine defendants are the only drug group with an average age less than 30 years. As Table 12 shows approximately half (47.9%) of all drug defendants have not graduated from high school. The percentage of defendants not completing high school is highest among marijuana defendants (53.0%). Crack cocaine trafficking defendants have the lowest rates of college attendance or graduation.

3. Race and Ethnicity

Table 13 presents the distribution of drug trafficking cases by defendant's race. In 1993, Whites account for 30.8 percent of all convicted federal drug offenders, Blacks 33.9 percent, and Hispanics 33.8 percent. Sentencing patterns for some drugs show high concentrations of a particular racial or ethnic group. Most strikingly, crack cocaine offenders are 88.3 percent Black. Conversely, methamphetamine offenders are 84.2 percent White. Powder cocaine cases involve sizeable proportions of Whites (32.0%), Blacks (27.4%), and Hispanics (39.3%).

Among defendants convicted of simple possession, 58 percent of powder defendants were White, 26.7 percent were Black, and 15 percent were Hispanic. Among crack defendants, 103 percent were White, 84.5 percent were Black, and 5.2 percent were Hispanic.

4. The Effect of the 100-to-1 Quantity Ratio on Differences in Average Sentences Imposed on Various Racial Groups

Findings in a recent Bureau of Justice Statistics study, conducted by Douglas McDonald and Kenneth Carlson, suggest that between 1986 and 1990 both the rate and the average length of imprisonment for federal offenders increased for Blacks in comparison to Whites.²¹⁶ The researchers concluded that this increase, based on legally relevant offense characteristics, was caused largely by the mandatory minimum penalties for drug offenses and more specifically by the 100-to-1 quantity ratio of powder cocaine to crack cocaine. The study states that with the implementation of sentencing guidelines and mandatory minimum penalties,

[t]he main reason that Blacks' sentences were longer than Whites' during the period from January 1989 to June 1990 was that 83% of all Federal offenders convicted of trafficking in crack cocaine in guideline cases were Black, and the average sentence imposed for crack trafficking was twice as long as for trafficking in powdered cocaine.²¹⁷

McDonald and Carlson examined a number of offense- and offender-related characteristics and found that White, Black, and Hispanic crack cocaine traffickers differed in drug amounts, prior record, weapon involvement, trial rates, and charge reductions resulting from pleas. They conclude that within the category of crack cocaine trafficking, "these differences accounted for all the observed variation in imprisonment sentences."²¹⁸

Interpreting their findings, McDonald and Carlson suggest that "[m]odification of specific laws and/or guidelines would essentially eliminate the racial/ethnic differences..."²¹⁹ More specifically, they single out the 100-to-1 quantity ratio and argue that

[i]f legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study's

²¹⁶ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Sentencing in the Federal Courts: Does Race Matter? (Nov. 1993).

²¹⁷ *Id.* at 1.

²¹⁸ *Id.* at 2.

²¹⁹ *Id.* at 1.

analysis suggests that the Black/White difference in sentences for cocaine trafficking would not only evaporate but would slightly reverse.²²⁰

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.

E. IDENTIFYING THE MORE DANGEROUS DEFENDANTS

1. Prior Record

Research has shown that the best way to identify offenders who are most likely to commit new offenses is to focus on their prior criminal record. The sentencing guidelines increase a defendant's sentence based on the seriousness of his/her criminal history to ensure that persons who are a continuing threat to the community are sufficiently punished. The Commission's criminal history categories have been shown to be valid predictors of recidivism and dangerousness for drug offenders.²²¹

Table 14 presents data on the criminal history categories of federal drug trafficking defendants. In general, federal defendants do not have serious prior criminal records: 62.0 percent fall in Category I, that is, they have either no prior record, a single minor offense, or very old convictions. Examination by specific drug type, however, indicates that crack cocaine defendants as a group have more serious records of prior convictions than defendants convicted of other drug offenses. Crack defendants are least likely to have the lowest criminal history score (44.8%) and most likely to score in the career offender range (6.3%).

Table 15 shows that crack cocaine defendants also are more likely to have a recent criminal record, with 33.7 percent under a pre-existing criminal justice sentence at the time of their most recent federal offense. Additionally, crack cocaine defendants are most likely (4.2% compared to 1.7% for powder cocaine defendants) to have committed the instant offense within two years of release from imprisonment for a prior offense. Finally, 14.5 percent of crack cocaine defendants (compared to 6.6% of the powder cocaine defendants) are *both* under a pre-existing sentence when

²²⁰ *Id.* at 2.

²²¹ See U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (Feb. 1994), Table 26 Part I (reporting results of follow-up study of a cohort of drug offenders with a range of criminal histories. Offenders with zero criminal history points were still successful three years after release 92% of the time. Those with over ten points succeeded only 23% of the time. Among Category I offenders, half the failures were for drug sale or possession, 14% were for property crimes, 12% were for driving while intoxicated, and 6% were for simple assault. The remainder were for technical violations or other offenses.)

they commit their offense and commit the new offense within two years of a release for a prior sentence.

2. Weapons

Another element of dangerousness includes the involvement of weapons in drug trafficking offenses. Under the guidelines, drug trafficking defendants receive a sentence enhancement if they or someone with them possess a weapon in connection with the offense. The weapon need not be present during the commission of the crime so long as it is in reasonable proximity to the place and time that conduct relevant to the drug trafficking occurred.²²² Some defendants are convicted under 18 U.S.C. § 924(c) which mandates a five-year mandatory consecutive sentence for use of a weapon in relation to a drug offense.

Table 16 examines the application of these sentence enhancements for weapons by the type of drug involved in the offense. Most drug defendants (83.5%) do not receive a weapon adjustment. However, this percentage decreases when the primary drug involved is either crack cocaine or methamphetamine. The guideline weapon enhancement is applied to 13.9 percent of crack defendants, 13.1 percent of methamphetamine defendants, and 8.8 percent of powder offenders. The charge for possession of a weapon under section 924(c) is applied to 14.0 percent of crack cases, 9.9 percent of methamphetamine cases, and 6.3 percent of powder defendants.

3. The Effectiveness of Current Policy in Targeting Dangerous Offenders

When Congress established the 100-to-1 quantity ratio, the sentencing guideline system was not yet in place. Both Congress in passing mandatory minimums penalty statutes and the Commission in its guidelines have targeted dangerous offenders for lengthier terms of imprisonment. The result of these dual efforts, however, is a complicated system of overlapping statutes and guidelines. The two systems use different criteria to target the most dangerous defendants.

The data show that the form of cocaine involved in an offense is not as accurate an index of a defendant's dangerousness (*e.g.*, criminal record, weapon possession) as are the guideline enhancements designed explicitly to capture these characteristics. Hence, while more crack offenders have prior records than do other drug offenders, 44 percent have either minor records or none at all. Furthermore, while more crack offenders possess a weapon in connection with their offense than other drug offenders, 72 percent do not. All defendants who receive enhanced sentences for dangerousness under the guidelines actually have more serious prior records or show other evidence of greater risk; this is not the case for defendants punished by the 100-to-1 quantity ratio.

²²² USSG §2D1.1(b)(1) and Comment. (N.3).

The application of lengthy penalties to all persons based solely on whether they fit the statute-defined criteria (drug type and amount) results in a problem that is common to all mandatory minimum statutes – unwarranted uniformity.²²³ Offenders who differ in terms of danger to the community, culpability, or 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 were obscured by the single, flat approach. Sentencing guidelines were intended to permit more sophisticated, calibrated gradations among offenses and offenders than are possible in a broad statutory system.²²⁴

F. IDENTIFYING THE MORE CULPABLE DEFENDANTS

As reviewed in Chapter 6, Congress was particularly concerned when it enacted the cocaine penalties to single out the most culpable defendants for lengthy terms of imprisonment. In general, the higher-level drug dealers were to get at least ten years in prison, the middle-level dealers at least five. At the same time, Congress mandated that crack defendants receive relatively harsher penalties because of the perceived heightened harmfulness of crack. Thus, both quantity and type of drug involved in the offense were used in the statute as proxies for different levels of culpability.

The culpability of a defendant is an important consideration at sentencing for a number of reasons. The seriousness of an offender's crime depends in part on how responsible that particular person is for the harms that flow from the crime. For example, defendants trafficking in particularly harmful drugs are considered more culpable than those trafficking in drugs that are relatively less dangerous. Likewise, major dealers in drug trafficking operations – those who mastermind the crime, direct the activities of others, and stand to reap the profits – are considered more blameworthy than the underlings who know less, control fewer of the operations, and make much less money. Leaders are less easily replaced than workers, and imprisoning them for longer periods is more disruptive to the criminal organization. Finally, leaders are more likely to weigh the costs of a crime against its benefits, and thus to be deterred by lengthy terms of imprisonment. For all these reasons, targeting the most culpable defendants for more severe punishment is an important purpose of sentencing.

As described in Chapter 4, drug trafficking activities include many steps (*e.g.*, growing, processing, importing, refining, packaging, and selling, from wholesale amounts to retail street deals). Drug distribution usually involves many persons, each performing one or more tasks. In some circumstances, the different roles are well defined and exist within an organizational structure. In

²²³ See Stephen J. Schulhofer, "Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity," 29 *American Crim. Law Rev.* 833 (1992).

²²⁴ For a full discussion of the "tariff" effect of mandatory minimum penalty statutes, see U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Criminal Justice System* (Aug. 1991).

other cases, a small number of persons may perform a number of activities as independent entrepreneurs, linked temporarily into a quasi-organization for the purpose of furthering their mutual goal – profit.

1. The Guideline Role Adjustment

The sentencing guidelines adjust for a defendant's role in the offense, increasing the sentence for organizers, leaders, managers, or supervisors and decreasing it for those with minor roles. Most drug trafficking defendants (73.5%) receive no aggravating or mitigating role adjustment at sentencing. The mitigating role adjustment is granted least often for crack cocaine defendants (8.7%), while approximately ten percent of defendants receive an aggravating role adjustment regardless of the drug type.

The guideline role adjustment is not intended to measure a defendant's function within a drug trafficking organization or a defendant's culpability relative to the entire drug distribution system. This is because the adjustment is made relative to the scope of trafficking that the defendant is held accountable for under the relevant conduct guideline. For example, a retail street dealer at the bottom of a multi-state trafficking organization would not necessarily be granted an adjustment for minor role if he/she was indicted alone and was held accountable only for the drugs he/she personally sold. For this particular offense, the defendant was not a minimal or minor participant.

2. Analyzing Defendants' Functions Within Drug Organizations

The Commission conducted a special study in 1993 to more completely assess defendants' functions within drug organizations. Defendants were classified by their drug distribution activities in two dimensions: 1) geographic range, *e.g.*, international, interstate, intrastate (and local); and 2) function, *e.g.*, courier, mule, street-level, mid-level, and upper-level.²²⁵

a. Geographic Range of Activity

As shown in Table 17, the geographic scope of activity for crack cocaine cases is largely limited on the local level (76.8%), at a rate nearly twice that of powder cocaine, the drug with the next highest rate (39.0%). This confirms what the literature reviewed in Chapter 5 concluded cocaine is generally distributed in powder form until it is close to the point of retail sale. Interstate

²²⁵ The four-level classification scheme was constructed from codes that identified each defendant in terms of the role he/she played in the distribution organization. Upper-level includes: high-level dealers/importers, financiers, growers/manufacturers, and pilots. Mid-level includes: mid-level dealers or broker, steerers, or go-betweens. Street-level includes only street-level dealers or bodyguards. The final category includes couriers and mules. Not included in this analysis are defendants described as gofer/off-loaders, renters, enablers, or users. This information was coded from a five-percent stratified random sample of drug cases sentenced during FY 1992.

activity by crack cocaine defendants was uncommon (14.6%) and international activity was extremely rare (1.3%). For other drugs, approximately 50 percent or more of defendants were involved in interstate or international drug trafficking activities (powder cocaine 49.4%, heroin 62.8%, marijuana 64.7%). Methamphetamine defendants in the sample were not active in international trafficking however, 35.4 percent were involved in interstate trafficking activities.

b. Defendant Function

Table 18 shows for five drug types the number and percent of defendants with various functions in the drug distribution organization. Among cocaine offenders generally, relatively few are classified as high level (9.2% and 5.5% for powder and crack, respectively.) Reflecting international and interstate trafficking patterns, 21.6 percent of the powder cocaine cases involve mules and couriers. The highest percentage of powder cocaine defendants are mid-level (38.2%), followed by street-level (31.2%). The majority of crack defendants, however, are street-level (59.6%).

c. Profits to be Reaped

Drug quantities specified in the mandatory minimum statutes are incorporated into the system of guidelines offense levels, which are in turn linked to months of imprisonment. Table 19 shows the street value, as determined by the Drug Enforcement Administration, of the quantity of various drugs associated with particular offense levels. First offenders at level 14 are subject to 15-21 months of imprisonment based solely on drug quantity (other guideline adjustments may increase or decrease the sentence). A marijuana defendant with an offense level of 14 would have been dealing drugs worth \$42,000. A powder cocaine defendant at the same offense level would have been dealing cocaine worth about \$2,675. A crack dealer would have been dealing \$29 worth of crack. At guideline level 32, first offenders receive more than ten years of imprisonment. Dealers of drugs other than crack would be involved with between \$500,000 and \$8 million worth of drugs at level 32. Crack offenders would be involved with around \$5,750 of crack at the same ten-year level.

3. Assessing the Real Offense in Crack Cocaine Possession Cases

Under the mandatory minimums and the guidelines, crack possessors are treated the same as crack distributors if they have amounts above the statutory threshold (five grams for first offenders; as little as one gram for repeat offenders.) Congress believed that persons with these amounts were likely to be engaged in distribution and deserved to be sentenced as such.

To discover if these crack defendants are in fact engaged in distribution, the Commission examined all 1993 crack possession cases with a base offense level indicating possession of more than the statutory minimum amount. Of the 32 defendants who fit this criteria, 24 were originally indicted for distribution, and pleaded to (or, in some cases, were found by a jury guilty of) only simple

possession. This finding suggests that most of these offenders are engaged in distribution. Given that 25 of these offenders were identified as having a substance abuse problem or addiction, they may fit the typical pattern of a user/dealer, described in Chapter 4.

For comparison, the Commission examined a random sample of 34 powder cocaine simple possession cases. In 18 of these cases, the defendant had originally been indicted for distribution. As described above, crack possessors have a mean sentence of 30.6 months and a median of 95 months. Most powder defendants are sentenced to probation, in some cases with drug treatment and testing as a condition of supervision.

4. Flattening and Inversion of Penalties

Crack's unique distribution pattern, in combination with the 100-to-1 quantity ratio, can lead to anomalous results in which retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced. The following example from a recent federal case illustrates this sentencing anomaly:

Two defendants purchased approximately 255 grams of powder cocaine from their supplier, returned home, and "cooked" the powder cocaine, producing approximately 88 grams of crack cocaine. Unhappy with the amount of crack produced (typically the yield would be about 200 grams), the defendants called their supplier and complained. The supplier agreed to replace the 255 grams of powder cocaine at no additional cost. The defendants returned to their supplier with the 88 grams of crack in their possession and were arrested prior to completing the transaction.

At sentencing, the supplier's guideline sentencing range (a first-time offender) for selling the 255 grams of powder is 33 to 41 months' imprisonment; the range for the defendants (also first-time offenders) who bought a portion of the supplier's powder and cooked it is 121 to 151 months. In addition, the two crack defendants are subject to a mandatory minimum penalty of ten years, while the supplier who sold them the powder cocaine is subject to no statutory minimum penalty.²²⁶

This case, while extreme in its details, is not atypical of the inversion of penalties between high- and low-level distributors caused by the 100-to-1 quantity ratio.

In more general terms, in order to receive a five-year mandatory minimum sentence, a crack dealer must traffic only in five grams of crack. Five grams of crack represents 10-50 doses of crack,

²²⁶ U.S. Sentencing Commission, Hotline Database, (Nov. 1994).

with an average retail price of \$225-\$750 for the total five grams. In contrast, a powder cocaine dealer must traffic in 500 grams of powder cocaine in order to receive the same five-year sentence. The 500 grams of powder cocaine represent 2,500-5,000 doses, with an average retail price of \$32,500-\$50,000 for the 500 grams.

Viewed another way, the 500-gram quantity of powder cocaine that can send one powder cocaine distributor to prison for five years can be distributed to up to 89 different street dealers who, if they chose to turn it into crack cocaine, could make enough crack to trigger the five-year penalty for each defendant.

Using the sample of cocaine cases described above, we determined the average sentence presently imposed on offenders by function and range of activity. Figure 10 shows that local-level crack dealers get average sentences quite similar to intrastate and interstate powder cocaine dealers. Both intra- and interstate crack dealers get average sentences *longer* than international powder cocaine traffickers. (There are too few international crack traffickers to include in these estimates.) Figure 11 shows that crack dealers at the street- and mid-levels receive longer sentences than their powder counterparts, and crack street dealers get average sentences almost as long as the mid-level powder brokers and suppliers from whom they get their drugs.

Chapter 8

FINDINGS, DISCUSSION, AND RECOMMENDATIONS

A. INTRODUCTION

In 1986, prior to implementation of the federal sentencing guidelines, Congress enacted the Anti-Drug Abuse Act, establishing a 100-to-1 quantity ratio between powder cocaine and crack cocaine that lies at the heart of the debate surrounding cocaine and federal sentencing policy. In addition, Congress set forth in the Anti-Drug Abuse Act of 1988 a mandatory minimum penalty for simple possession of crack cocaine that distinguished it from simple possession of all other controlled substances. In light of research and information drawn from preceding chapters, this chapter discusses the factors that led Congress to distinguish between powder cocaine and crack cocaine. Further, this chapter discusses the part federal sentencing guidelines play in setting cocaine sentencing policy. Finally, the chapter concludes with recommendations to the Congress concerning possible changes to current cocaine sentencing policy.

In summarizing the perceived distinctions between powder cocaine and crack cocaine, certain caveats are important. Specifically, the Commission acknowledges the limited research concerning those factors most frequently cited as distinguishing powder cocaine from crack cocaine. For example, it generally is believed that smoking crack cocaine tends to create more dependency on the drug (that is, is more psychologically "addictive") than snorting powder cocaine, but the research does not quantify how much more "addictive" smoking crack is than snorting powder. Obviously, such a figure could assist the informed determination of an appropriate ratio. Similarly, while there is some research confirming in part and rebutting in part the perception that distribution and use of crack cocaine has resulted in increased criminal activity, the data are not definitive concerning the impact of crack cocaine use and sales on crime. The empirical evidence also is inadequate to permit firm conclusions about whether crack has resulted in the birth of more babies exposed to drugs or in greater neglect of children by mothers addicted to the drug.

The absence of firm answers does not mean that the perceptions are necessarily wrong. However, gaps in the data make it difficult to draw precise conclusions about the merits of existing congressional distinctions in cocaine sentencing policy. Further, to the extent that Congress has

created a sentencing system that so disparately and substantially punishes crack cocaine over other forms of the same drug, the absence of comprehensive data substantiating this legislative policy is troublesome.

B. FINDINGS

In the early to mid-1980s, a national sense of urgency surrounded the drug problem generally, and crack cocaine specifically (*see* Chapter 6). Whether the media simply reported an urgent situation or helped create a sense of emergency has been and will continue to be debated. What is clear however, is that the crack cocaine problem in the United States received unprecedented coverage in newspapers, news magazines, and on network television during this period.

Evoking the then-recent drug-related deaths of two nationally known sports figures, Len Bias and Don Rogers, members of Congress repeatedly described the dimensions of the crack problem in such dramatic terms as "epidemic." Because of this heightened public concern and media emphasis, Congress acted quickly to pass the Anti-Drug Abuse Act of 1986, which established mandatory minimum penalties for drug trafficking offenses in general and the powder cocaine and crack cocaine quantity differential in particular.

1. Congressional Concerns Leading to the Powder Cocaine/Crack Cocaine Differential

The Commission's review of the legislative history suggests the following with regard to Congress's action on the 1986 Act: 1) Congress determined that substantial involvement in drug trafficking, measured in terms of specified threshold quantities of each of the more common street drugs, warranted a mandatory minimum sentence (ten years for major traffickers involved with larger quantities, five years for serious traffickers involved with somewhat lesser quantities); 2) to the extent Congress saw the drug problem as a national epidemic, it viewed crack cocaine to be at the forefront of that epidemic; 3) the decision by Congress to differentiate between powder and crack cocaine in the penalty structure was deliberate, not inadvertent; and 4) the congressional decision to treat powder and crack cocaine differently arose primarily from members' beliefs that crack cocaine was significantly more dangerous than powder cocaine (*see* Chapter 6).

As noted in Chapter 6, Congress considered crack more dangerous than powder for several reasons. First, members viewed crack cocaine as extraordinarily addictive, characterizing it in such terms as "intensely addictive" and "quite possibly the most addictive drug on Earth." Second, members perceived crack cocaine to be "caus[ing] crime to go up at a tremendously increased rate," emphasizing what they believed was a higher correlation between crack cocaine use and the commission of other serious crime. Members believed that crack users stole money to support their habits, that crack addicts committed especially brutal acts due to the drug's influence, and that sellers

traded drugs for stolen property thereby encouraging a market in stolen goods. Third, Congress considered the physiological effects of crack cocaine to be especially perilous, leading to higher rates of psychosis and death. Fourth, and of particular concern, members felt that young people were especially prone to crack cocaine use because the drug could be obtained relatively easily. Finally, Congress believed that crack cocaine's purity and potency, relatively low cost, ease of manufacture, transportation, disposal, and consumption were leading to widespread use.

Congress demonstrated its continued concern about the increased dangers of crack cocaine in 1988 when it established a different penalty structure for crack offenses charged under the simple possession statute than for other drug offenses so charged (*see* Chapter 6). The clearest indication of congressional intent comes from floor statements by the amendments' chief sponsors. These statements suggest that 1) the apparently increasing supply of cocaine (particularly crack cocaine) threatened to create new users due to the drug's easy availability; 2) crack cocaine "cause[d] greater physical, emotional, and psychological damage than any other commonly abused drug"; 3) crack cocaine was considered "linked to violent crime," especially with gang activity; and 4) because the stiff penalties set forth in the 1986 Act presumptively discouraged dealers from carrying quantities above five grams, Congress assumed that "possession of as little as five grams means individuals [carrying such amounts] in most instances are dealers, not users."

The Commission's research shows that the use and marketing of crack cocaine were still in their infancy in the mid-1980s when Congress established the powder/cocaine quantity ratio and enhanced penalties for crack possession. This chapter reassesses the quantity ratio and enhanced penalties for crack possession in light of empirical information not available when Congress adopted these laws. The factors set forth below are those considered by Congress in establishing the present 100-to-1 quantity ratio.

a. Cocaine and Addiction

Neither powder cocaine nor crack cocaine are physiologically addictive; however, both are psychologically addictive (*see* Chapter 2). Moreover, psychological dependence usually is as devastating as physiological addiction. A comparison of the relative addictive qualities of the two forms of cocaine indicates that there is a greater likelihood of addiction resulting from the casual use of crack cocaine than from the casual use of powder cocaine. That this is so, however, is not due to the difference in the chemical makeup of the two substances, but instead results from the method of administration associated with each.

In particular, the three primary methods of administering cocaine are snorting, smoking, and injection (*see* Chapter 2). One can snort or inject powder cocaine or easily convert it to a smokable

form; however, for the most part, those who smoke cocaine use crack cocaine.²²⁷ No matter the route of administration, use of cocaine produces the same type of physiological and psychotropic effects. The intensity and duration of these effects, however, differ significantly based on the method of administration; and it is the intensity and duration of the physiological and psychotropic effects that determine the likelihood of dependency and abuse. Specifically, the greater the amount of cocaine absorbed and the faster it is absorbed, the greater the intensity and the shorter the duration of the psychotropic effects. The greater the intensity of these effects and the shorter their duration, the greater the likelihood cocaine use will lead to dependence and abuse.

As a result, for a given quantity of cocaine, smoking crack cocaine or injecting powder cocaine produces the most intense physiological and psychotropic effects.²²⁸ Snorting powder cocaine produces less intense effects and does so at a much slower rate. For those who either smoke crack cocaine or inject powder, the effects begin rapidly (1-4 minutes), are intense, and dissipate quickly (30 minutes); for those who snort powder, the effects begin in 20 to 40 minutes and last about one hour. Accordingly, compared to those who snort cocaine, smokers and injectors are more likely to use cocaine frequently and are more likely to become cocaine dependant. Moreover, crack smokers are more likely to engage in binging.

The route of administration, therefore, can be an important factor in the creation of psychological dependence and abuse. Accordingly, the form of cocaine is significant to the extent that it acts as a proxy for a given route of administration. However, the form of cocaine operates only as a limited proxy for a method of administration. That is, crack cocaine can only be smoked, which means that crack is always in a form that makes its user most vulnerable to dependency. Powder cocaine, however, can be snorted, which renders it less addictive, or injected, which renders it more addictive. Accordingly, while crack always represents the most addictive form of cocaine, powder can represent either a less addictive or equally addictive form of the drug, depending on the method by which it is administered. Therefore, the form of cocaine can be an adequate proxy for addictiveness when the cocaine is in crack form, but an inadequate proxy when the cocaine is in powder form. Determining the appropriate degree of enhancement in penalty based solely on the form of cocaine, therefore, is difficult.

Compounding this difficulty is the existence of incomplete data on the percentage of people who inject cocaine versus those who smoke it. For example, if one knew that half of all cocaine users

²²⁷Although one can smoke "freebase" powder cocaine, the dangers inherent in such an activity, as a result of the substance's great flammability, and the availability of a "safe" smokable alternative, in crack, have rendered freebasing to be an unpopular and impractical method of administration. Moreover, the availability of a smokable alternative in crack has made an "intense" form of cocaine more accessible to juveniles.

²²⁸The effects of smoking and injection are comparable. Although crack cocaine produces somewhat less intense effects, it does so at a slightly more rapid rate (*see* Chapter 2).

smoked crack cocaine and half injected powder cocaine, there would be no rational basis for distinguishing, on addictive grounds, the penalty for the two forms, as they would be equally addictive. The limited available data,²²⁹ however, suggest that substantially more people smoke cocaine than inject it. Indeed, the ease of smoking, compared to the greater difficulty and unpleasantness involved in injecting any substance, suggests that smoking will be inherently more tempting for the first time user and more appealing for the repeat user than will injection. Moreover, to the extent that both smoking and injecting lend themselves to binge use, a user can smoke for a longer period of time than he/she can inject, due to the limit on the number of times one can inject something into one's body during a short period of time.

Ideally, to determine a precise ratio based solely on addictiveness, one would have to devise a formula that considered the relative increase in likelihood of addiction based on smoking or injecting versus snorting, as well as the relative proportion of users who smoked crack versus those who injected powder. Alternatively, one could conclude that calculating a ratio based on the form of the drug is too problematic, suggesting that one should not increase the ratio based on this factor alone.

In summary, the higher addictive qualities associated with crack combined with its inherent ease of use can support a higher ratio for crack over powder. However, determining the precise magnitude of that ratio based on the available evidence is difficult.

b. Psychosis and Death

The absence of studies focusing on cocaine and psychosis makes it difficult to support or refute congressional concern that more psychosis results from crack cocaine use than from powder cocaine or other drug use. As discussed below and in Chapter 5, much of the crime associated with crack cocaine use appears to be systemic (*i.e.*, associated with the drug trade) as opposed to psychopharmacological (*i.e.*, drug-induced criminal activity). Although the lack of cocaine-associated psychopharmacological crime should not be construed to mean that crack cocaine and powder cocaine use do not lead to psychosis, it provides a positive indication that cocaine use in both forms does not produce individuals psychotically driven to commit crime.

Research also is relatively scant with respect to drug use and death. The Drug Abuse Warning Network (DAWN) gathers data on drug-related emergency room visits and medical examiner cases as reported from selected hospitals and medical examiners in specified metropolitan

²²⁹Data on method of cocaine use during the past year from the National Household Survey on Drug Abuse show that 10 percent of cocaine users inject the drug, 28 percent smoke it, and 75 percent snort it. While there is little reliable data on the total consumption of powder versus crack or on the amount of powder snorted versus injected, the data suggest that considerably more powder is snorted than is injected. These data must be considered in light of the limitations inherent in the National Household Survey which potentially underrepresents lower-income populations and overrepresents middle or upper-income populations or those who reside in households (*see* Chapter 3).

areas (*see* Chapter 3). However, because neither data collection effort distinguishes between powder and crack cocaine, it is difficult to draw firm inferences about the possible different effects of powder and crack cocaine. Both data collection efforts provide information on route of administration which can be used, to a limited extent, as a proxy for the form of cocaine. For cases reporting information on the route of administration in 1991 (the most recent complete data available), DAWN reported that 38.2 percent of cocaine-related emergency room admissions involved smoking cocaine; 17.5 percent involved injection; and 11.3 percent involved snorting (*see* Chapter 3).²³⁰ These data indicate that most cocaine-related hospital emergencies involve the two most rapid routes of administration (smoking and injection) with smoking crack accounting for twice as many admissions as injecting powder.

The medical examiner data suggest that the vast majority of drug-related deaths, 74.5 percent, involve polydrug use (*see* Chapter 3). Cocaine, either alone or in combination with another drug accounts for 45.8 percent of the drug-related deaths. Among cocaine-related deaths, concurrent use with alcohol is the most deadly combination. Moreover, the number of drug-related deaths involving cocaine increased 20 percent between 1990 and 1991.

In contrast to the emergency room data, the DAWN medical examiner data indicate that injecting powder accounts for three times as many deaths as smoking crack. Specifically, the most frequent route of administration for cocaine-related deaths was injection (12.7%), compared to 4.3 percent for inhalation.²³¹ Therefore, while most cocaine-related emergency room admissions result from smoking crack, most cocaine-related deaths result from injection of powder (*see* Chapter 3).

c. Correlation between Crack Cocaine and Other Serious Crime

As discussed in Chapter 5, both Congress and the public view violence as one of the greatest concerns associated with drug use and distribution. A secondary concern is the relationship between drug use and distribution and an increase in non-violent crime, as well as the relationship between drugs and a general breakdown in the social order in neighborhoods where drug use and distribution is most prevalent.

The Commission has heard frequently from certain observers that the advent of crack cocaine has devastated the innercities of America in a way uncharacteristic of any other drug. Nevertheless, identifying the extent to which a particular drug, alone or in combination with other factors, may have contributed to certain negative social phenomena is problematic. The prevalence of cocaine-exposed babies, children neglected or abandoned by mothers addicted to drugs, an increase in illegitimate

²³⁰In approximately 30 percent of the cases, the route of administration was unavailable.

²³¹Because in 70 percent of the medical examiner cases the route of drug administration was unavailable, these findings should be viewed with caution.

births, or an increase in gratuitous violence (e.g., drive-by shootings) are complex issues not attributable to any single cause.

Drawing empirically sound conclusions about the use or distribution of any drug and its causal relationship to the commission of crime is difficult, because demonstrating such a relationship requires one to isolate the drug activity from other factors influencing criminal behavior. Drawing such conclusions about crack cocaine, a relatively new drug, is particularly difficult, given the very limited available research and law enforcement data. Moreover, there is even less reliable research comparing crack cocaine and powder cocaine in their relation to criminal activity. In particular, the Commission has had only three somewhat limited studies on which to rely in drawing inferences on this question. More studies in this area would be useful and, to the extent that Congress desires precise empirical conclusions, are necessary. Beyond the limitations in the research, arrest data generally are unhelpful in this area because urinalysis tests cannot distinguish between the presence of powder cocaine and crack cocaine in a subject's system. The administration of such tests at the time of arrest or during pretrial supervision cannot reveal which of the two forms of the drug may have been used at that time or, more importantly, at the time the offense was committed.

Notwithstanding these limitations, the available research suggests that crack cocaine is significantly associated with systemic crime (that is, crime related to its marketing and distribution. At a Sentencing Commission hearing on crack cocaine, a panel of noted researchers agreed that crack's violence is associated with the emergence of an illicit market for a new drug and the attempts by competing factions to consolidate distribution (see Chapter 5). As a result, individuals operating on street corners and in open-air markets and crack houses are prone to be involved in, as well as victimized by, increased levels of violence. Consistent with its distribution forums, crack offenders are more likely to carry weapons than individuals trafficking in other drugs, a finding borne out in the Commission's data in which 27.9 percent of crack offenders sentenced in the federal courts in 1993 were found to possess dangerous weapons, compared to 15.1 percent of powder cocaine offenders.

Two popular forums for distributing powder and crack cocaine, street-corner or open-air markets and crack houses or shooting galleries, lend themselves to increased violence. The security of these forums often is maintained by lookouts or enforcers who carry firearms to protect street retailers or customers from law enforcement, rivals, and other customers. Further, crack houses and shooting galleries facilitate sex-for-drugs and the use of stolen property, firearms, and food stamps as mediums of exchange for drugs (see Chapter 4). The intimate nature of drug transfer in crack houses and shooting galleries as well as the "open" aspect of street-corner transactions make customers and retailers particularly vulnerable to violence.

No significant conclusions can be drawn from the available research regarding an association between crack cocaine and non-systemic crime (see Chapter 5). The limited research to date suggests that there is little distinction between crack cocaine and powder cocaine use in terms of psychopharmacological crime (i.e., crime resulting from the behavioral effects of the drug). Given

the fact that crack and powder contain the same active ingredients, the only potential psychopharmacological difference likely would involve different effects resulting from the frequency of use, with inhalation of crack tending to produce more binge users than snorting of powder.

The Commission found virtually no research that compared the respective association of crack and powder cocaine with economically driven crime. Available research, although limited, suggests that there is some association between crack cocaine and economically driven crime. For example, Inciardi reports that 48 percent of men and 62 percent of women who used crack engaged in petty property crime, and that a significant minority of the men committed fairly high numbers of violent or potentially violent offenses (*see* Chapter 5). His study also reports that 69 percent of women crack users engage in prostitution (other studies reported in Chapter 3 indicate that women who use powder cocaine also engage in prostitution). Finally, Inciardi notes that the main criminal activity of participants in his study involved retail drug distribution. Other studies show a similar association between crack cocaine and economically driven crime, but none of the studies the Commission uncovered contrast this association to that for powder cocaine. Accordingly, the Commission lacks a basis for comparing the effects of crack and powder cocaine on economically driven crime.

The limited available research suggests that there appears to be more criminal activity associated with crack cocaine use and distribution than with powder cocaine use and distribution. However, nothing in this research permits a firm basis for numerically contrasting the two.

On the other hand, data collected by the Sentencing Commission provide precise information about the prior criminal records of federal defendants charged with distributing crack cocaine versus those charged with distributing powder cocaine. A comparison of federal drug defendants reveals that crack defendants have worse criminal records than any other category of federal drug defendant. Specifically, crack defendants are least likely to have the lowest criminal history score (Category I), with only 44.8 percent in Category I, as compared to 64.4 percent of powder cocaine defendants. Further, 4.1 percent of crack defendants have the most extensive criminal record (Category VI), while only 1.6 percent of powder defendants are found in that category. Of the three most serious criminal history categories, Categories IV-VI, 17.6 percent of crack defendants are found in these categories, compared to only 7.0 percent of powder defendants. Approximately six percent (6.3%) of crack defendants compared to 3.2 percent of powder cocaine defendants qualify for career offender status.²³²

Crack defendants also are more likely to have a recent criminal record than any other category of drug offender, with 33.7 percent under a pre-existing criminal justice sentence at the time of their most recent federal offense, as compared to 18.9 percent of powder defendants. Crack defendants

²³²The career offender provision of the guidelines refers to an offender who has at least two prior crimes of violence or drug trafficking and whose instant offense is a crime of violence or drug trafficking.

(18.7%) commit the instant offense within two years of release from imprisonment at a much higher rate than powder defendants (8.3%) (*see* Chapter 7).

While these numbers show that crack defendants typically have more serious criminal records than other drug defendants, the guidelines already increase an offender's sentence based on the severity and recency of his/her record. As a result, some offenders are punished further under the guidelines for behavior previously considered by Congress in setting an increased ratio for crack offenses.

d. Young People as Users and Distributors of Crack Cocaine

The National Household Survey sheds some light on whether young people are more prone to use crack than powder cocaine (*see* Chapter 3). For reporting year 1991 (the most recent year with complete data), approximately 16.7 percent of all cocaine users smoked crack at least one time (83.3% used powder cocaine at least once). Looking at trend data, the rates of those who reported using cocaine in any form during each of the survey years are consistently and significantly highest for individuals aged 18 to 25 years. The same is true for crack cocaine; it is most popular among young adults (ages 18-25).

A somewhat different picture emerges when one compares powder cocaine use to crack use within age categories. Powder cocaine remains more popular than crack cocaine at each age category. However, of those who used cocaine in the past year, a higher proportion of 12- to 17-year-olds used crack (26.7%), compared to 18- to 25-year olds (13.0%), 26- to 34-year olds (15.7%), or 35 years and older (21.4%).

Studies also show that, while both powder cocaine and crack cocaine distributors often are young, those involved in distributing crack are younger. The DEA cites the crack cocaine phenomenon as responsible in large part for the increase in juvenile involvement in drug trafficking. In addition, considerable research suggests that crack cocaine dealers use juveniles in more visible roles, based on the assumption that juveniles are more likely to escape detection and prosecution. Indeed, the street level sale of crack requires little sophistication and lends itself to the use of young people in a way that larger scale and more "sophisticated" drug trafficking activities might not. Young, unemployed or underemployed, illiterate, and otherwise impoverished persons, accordingly, are particularly susceptible to the allure of profits to be made from drug distribution (*see* Chapter 4).

As part of the Anti-Drug Abuse Act of 1986, Congress expressed its concern about traffickers using young people to distribute drugs when it created a new offense for using individuals under age 18 to distribute drugs. Congress reiterated its concern in the Anti-Drug Abuse Act of 1988 by directing the Commission to assign a minimum guideline base offense level of 26 for that offense generally equivalent to a five-year minimum sentence.

e. Crack Cocaine in Relationship to Ease of Ingestion, Manufacture, Transportation, and Disposal and General Affordability

Crack cocaine typically is "smoked" in pipes constructed of glass bowls fitted with one or more fine mesh screens that support the drug. The user heats the side of the bowl, the heat causes the crack to vaporize, and the user inhales the cocaine-laden fumes through the pipe. Smoking crack cocaine achieves the efficiency of intravenous administration (very fast absorption into the bloodstream) without the inherent dangers associated with injecting powder cocaine directly into the circulatory system.

Powder cocaine that is insufflated (snorted) is equally easy to administer but does not have the same efficiency in terms of speed of absorption. Injecting or freebasing powder cocaine, however, is more complicated and dangerous (*see* Chapter 2).

Freebasing cocaine, popular among cocaine users in the 1970s, permitted the user to smoke powder cocaine and thereby receive the more intense and quick effects associated with injection. Freebasing, however, involved a fairly dangerous process. Media coverage following an incident in which comedian Richard Pryor suffered third-degree burns over his torso and face while freebasing cocaine prompted many freebase cocaine users to shift to smoking crack. Unlike the process for freebasing cocaine, powder cocaine may be converted into crack without the use of flammable solvents. Powder cocaine simply is dissolved in a solution of sodium bicarbonate and water, boiled, and a solid substance separates from the boiling mixture. This solid substance, crack cocaine, is removed and allowed to dry. The crack cocaine is broken or cut into "rocks," each typically weighing from one-tenth to one-half gram (*see* Chapter 2).

Because of its ease of manufacture, any distributor with enough powder cocaine, baking soda, and a stove or microwave has available a steady supply of crack cocaine. The distribution of crack cocaine does not require major trafficking efforts involving importation from other countries; rather, importation occurs when the cocaine is still in powder form. Crack cocaine usually is manufactured in the community in which it will be distributed, virtually eliminating the need to transport the drug long distances (*see* general discussion, Chapter 4).

Accordingly, with crack, distributors have a fairly easy manufacturing process that yields a "safe," smokable form of the drug that can deliver just as intense and as quick a high as could be had through the more cumbersome and less appealing process of injecting powder cocaine. Beyond its ease of manufacture, crack can be marketed in smaller, more cheaply priced units, thereby rendering it more appealing to people with less money. Indeed, as a glut of powder cocaine developed in the early to mid-1980s, prices for both powder cocaine and crack cocaine fell (*see* Chapter 4). Consequently, retail crack cocaine distributors developed new marketing strategies, the most significant of which involved selling crack in single-dosage units, in plastic vials or baggies, weighing between 0.1 and 0.5 grams apiece, affordably priced from \$5 to \$20. In contrast, powder cocaine

was sold typically by the gram) between five and ten doses) for less affordable prices (\$65-\$100). The affordability of crack cocaine expanded its consumer base to lower income individuals.

In addition, because it is sold in smaller quantities than powder cocaine, many law enforcement officials believe that crack is more easily transported, distributed, and, if necessary, hidden or discarded (*see* Chapter 4). Some authorities, however, report that easy disposal is not limited to crack cocaine; these officials relate that retailers of both powder and crack cocaine "drip" traffic whereby they carry small quantities on their person for immediate distribution and leave additional quantities in "drop spots" to which they can return. The ease of disposal and the practice of "drip trafficking" increase the likelihood that, in the event of arrest, the retail dealer's criminal liability will be limited to the quantity on his/her person, a quantity that likely will be less than the total quantity the dealer intended to distribute.²³³

f. Use of Crack Cocaine and Public Health Concerns, such as, "Crack Babies," "Boarder Babies," and the Spread of HIV/AIDS

In the congressional debates of 1986 and 1988, members voiced concern about such social welfare issues as "crack babies," "boarder babies," and HIV/AIDS transmission associated with crack cocaine use. However, because medical tests cannot distinguish between the presence of crack or powder in a mother or newborn child, the relative frequency of use between the two types of drugs among pregnant women cannot yet be medically determined.²³⁴

Similarly, because medically the two forms of cocaine cannot be distinguished, research cannot determine whether a baby born of a crack mother suffers more harm from its mother's drug usage than a baby born of a mother who used powder cocaine. Studies find that cocaine causes constriction of blood vessels, restricting the flow of oxygen and other vital nutrients to the fetus (*see* Chapter 3). Cocaine use also is associated with *in utero* developmental problems, including increased incidence of spontaneous abortion, small head circumference, low birth weight, retarded growth, and urogenital abnormalities. In addition, infants exposed to cocaine prior to birth are at higher risk of Sudden Infant Death Syndrome, seizures, or neurobehavioral dysfunctions. Building on what the Commission has learned with respect to crack cocaine – *i.e.*, because the high and low are quicker when using crack cocaine, crack users are more likely to use increased quantities of the drug or to engage in binging) it is likely that pregnant women who use crack cocaine will expose their infants

²³³ During the congressional debate related to increased penalties for simple possession of crack cocaine, members expressed concern that, because of the relatively small dosage units for crack cocaine, it is difficult to determine whether an individual carrying five grams and less would be carrying the drug for personal use or sale.

²³⁴ To compare the relative usage, a researcher must ask the mother which form of cocaine she had been using. If future research found that significantly more pregnant women use crack cocaine than powder, it arguably would support a policy determination that crack distribution should be more severely sanctioned than powder distribution.

to greater quantities of the drug and, thus, to more harm. Furthermore, babies exposed to crack may experience greater problems because crack smokers achieve higher concentration of the drug in their bloodstreams than do cocaine snorters. These inferences, however, have not been documented in the research literature.

In addition to cocaine-exposed babies, concern has been raised about the influence of substance abuse and maternal neglect, teenage pregnancy, and the phenomenon of boarder babies. The Commission's research, however, reveals virtually no studies that address these concerns as they relate to crack cocaine. Some of the research, although very limited, focuses on cocaine in general, but the majority of studies address the broader question of substance abuse. That these societal problems exist seems quite clear (see discussion Chapter 3); much of the evidence, however, comes from news magazine reports as opposed to medical and scholarly journals. For example, *Time* magazine reported on some of the "tragic chapters in the saga of crack," illustrating its story with anecdotal quotes from individual doctors and gripping accounts of individual children but no empirical research findings.

The numbers associated with the above social pathologies are staggering. In particular:

about 375,000 babies, or 9 percent of births each year, are exposed to illegal drugs in the womb. Nearly 1 of every 3 births is out of wedlock. Two out of 3 African-American babies are born to single mothers ... the figure for white babies is 22 percent and skyrocketing. Black or white, these women) and many are that only biologically given their youth) tend to be ill educated and unable to provide for themselves or their offspring.²³⁵

That these phenomena (neglect, teen pregnancy, boarder babies) coincide with a rise in crack cocaine use leads many to believe that the two are somehow related) and they may be. Although no medical data compare the rate of crack-exposed babies to powder-exposed babies, the dramatic rise in cocaine-exposed babies coincidental with the introduction of crack into this country suggests an obvious relationship.

That there is no empirical research pointing to the respective relationships between crack powder, and the problems of neglect, boarder babies, and teen pregnancy does not suggest that empirical work has not been done. The scholarly journals report a serious problem with substance abuse in general among mothers. One study reports that, in New York City, the proportion of birth certificates indicating maternal illicit substance abuse tripled between 1981 and 1987, and that 40 percent of 300 or more babies boarded in city hospitals each day resulted from maternal drug abuse

²³⁵ M. Ruby, "The Children's Crusade. How to Improve Social Conditions for Children," *U.S. News & World Report*, 112 (Dec. 13, 1993).

(*see* Chapter 3). Another study, pointing to the problem of polydrug use among pregnant women, found that most of the mothers of drug-exposed children had been polysubstance abusers during their pregnancy.

Many states recognize the birth of drug-exposed infants as evidence of maternal neglect. Several states have enacted laws that allow child abuse charges to be brought against any woman with illegal drugs in her bloodstream who gives birth to a child. Other states simply remove drug-exposed babies from their mothers, making them wards of the state. Some states have tried these methods and rejected them in favor of mandatory treatment programs in which mothers must enter treatment or lose their children.

The findings related to HIV/AIDS transmission and cocaine use are mixed as well. More than 30 percent of all individuals with Acquired Immunodeficiency Syndrome (AIDS) are abusers of intravenous (IV) drugs. Thousands of other IV drug abusers carry the Human Immunodeficiency Virus (HIV), the virus that causes AIDS. The spread of the AIDS virus is positively associated with IV drug injection. In the stereotypic "shooting gallery" environment, drug injection equipment is passed from one user to another, producing an increased risk of HIV-transmission. Because of the short-lived euphoria of cocaine, powder cocaine injectors are more likely to reinject frequently than are injectors of other illicit drugs.

However, it cannot be concluded that powder cocaine, because it is injected, creates a greater risk of AIDS transmission than crack (*see* Chapter 3). Increasingly, crack cocaine smokers exhibit sexual behavior that places them at risk of HIV-transmission. These high-risk sexual behaviors may include multiple partners, sex without condoms or other barriers, sex for crack, and sexual activity during or following drug use. Consequently, rates of HIV infection are nearly equal between crack cocaine smokers (at greater risk due to their sexual practices) and powder cocaine injectors (at risk because of the potential for infection from shared injection equipment).

2. Additional Issues Relevant to the Powder Cocaine/Crack Cocaine Differential

In addition to the concerns articulated by members of Congress, the Commission's research has uncovered a number of other issues that are relevant to the debate over the propriety of the current powder to crack cocaine quantity ratio.

a. Polydrug Use and Distribution

Past DAWN reports indicate that cocaine users, in general, are more likely to be polydrug users than are other drug users. DAWN reports that, in 1992, 60.0 percent of cocaine-related emergency room admissions and 73.2 percent of all cocaine-related deaths involved at least one other drug (*see* Chapter 3). For medical emergencies resulting from multiple drug use, the most common combination is cocaine and alcohol. Concurrent use of heroin and cocaine is the second most likely

cause of cocaine-related emergency room admissions. Unfortunately, as these studies do not distinguish between powder and crack cocaine, an important part of the question remains unanswered.

Moreover, researchers and law enforcement officials indicate that cocaine distributors at all levels generally distribute more than one drug. According to the DEA, all of the wholesale drug trafficking gangs (Jamaican Posses, Crips and Bloods, Dominican, and Haitian) began as polydrug traffickers, concentrating primarily on marijuana and powder cocaine, and continue to sell those drugs as they move into new markets. The same generally is true for crack distributors; many started out distributing other drugs and moved to crack cocaine as the market expanded, but continue to offer other drugs for sale as well (*see* Chapter 4).

b. Women as Distributors of Crack Cocaine

In much the same way as youth are used to distribute crack (*see* discussion above), women appear to have a somewhat greater role in crack distribution relative to the distribution of other drugs. Women are used by distributors to make straw purchases of firearms or to rent residences to use as crack and stash houses so that the distributor can remain unknown to the gun dealer or landlord. As with juveniles, women are viewed as less at risk for prosecution and lengthy sentences and therefore more attractive as distributors. Indeed, studies have shown that many of the young people involved in drug distribution are women (*see* Chapter 4).

c. Racial Implications

One of the issues driving the debate concerning the different penalty structures for crack and powder cocaine relates to the perception of disparate treatment for defendants convicted of either possession or the distribution of crack cocaine. Some argue that the 100-to-1 quantity ratio (powder to crack) is not in keeping with the policy, goal, and mission of federal sentencing – that is to be fair, uniformly consistent, and just. That argument goes on to assert that 88.3 percent of the offenders convicted in federal court for crack cocaine distribution in 1993 were Black and 7.1 percent were Hispanic (*see* Chapter 7). While neither the decisions of the courts nor the research conducted by the Commission support a finding that racial bias or animus undergirded the initiation of this federal sentencing law, the problem with perception still obtains. To the extent that a comparison of the harms between powder and crack cocaine reveals a 100-to-1 quantity ratio to be an unduly high ratio, the vast majority of those persons most affected by such an exaggerated ratio are racial minorities. Thus, sentences appear to be harsher and more severe for racial minorities than others as a result of this law, and hence the perception of unfairness, inconsistency, and a lack of evenhandedness.

d. Increased Penalties for Higher Level Distributors

In its determination of the appropriate quantity of a drug necessary to trigger a mandatory minimum penalty for that drug, Congress evaluated the relative harms presented by each drug and set an amount representative of that judgment. Thus, believing heroin and methamphetamine to create more social harms than powder cocaine, Congress set the "ratio" for those drugs higher than that set for powder cocaine. Conversely, believing marijuana to be far less dangerous than powder cocaine, Congress set the quantity necessary for the former to trigger a mandatory penalty at a much higher level than for powder cocaine.

In setting the ratio for crack cocaine versus powder cocaine, Congress likewise expressed its belief about the relative harms of those two substances. Because crack and powder are two forms of the same drug, with one form produced by a simple conversion process applied to the other, the vastly different ratios between the two forms has created tremendous anomalies in the federal sentencing system. Specifically, large scale suppliers of powder cocaine distribute to mid-level suppliers who in turn sell the powder down the distribution chain until it reaches retail dealers who may traffic in the powder, or who may add baking powder to the powder cocaine, heat the mixture, and create crack, which can then be distributed.

When Congress set mandatory minimum penalties for drug trafficking offenses in 1986, one of its primary objectives sought to ensure that major and serious drug dealers received harsher, more certain punishment. Congress assumed that an offender would be punished in proportion to the quantity of drug that he/she sold. In this way, an offender who distributed a greater quantity of a given drug throughout a community, inflicting greater societal harms due to increased availability of the drug to more people, would receive higher penalties. The 100-to-1 quantity ratio between crack and powder cocaine, however, tends to confound that assumption.

Specifically, research suggests that this policy may achieve its intended effect with most drugs, but that often the mandatory minimum penalties are applied to lower-level crack cocaine offenders (*see* Chapter 7). As a result, crack cocaine offenders differ characteristically (*e.g.*, smaller range of activity, less likely to be characterized as performing important functions) from other drug offenders at the higher penalty levels.

Issues of "fairness" or "just punishment") not to mention frustration of some congressional objectives) result when relatively low-level crack retailers receive higher sentences than the wholesale-level cocaine dealer from whom the crack sellers originally purchased the powder to make the crack. For example, two defendants in a recent federal case purchased approximately 255 grams of powder cocaine from their supplier, returned home, and "cooked" the powder cocaine, producing approximately 88 grams of crack cocaine. Unhappy with the amount of crack produced) typically the yield should have been about 200 grams) the defendants called their supplier and complained about the poor yield. The supplier agreed to replace the 255 grams of powder cocaine at no additional cost. The defendants returned to their supplier with the 88 grams of crack in their possession and were arrested prior to completing the transaction.

At sentencing, the supplier's guideline sentencing range (a first-time offender) for selling the 255 grams of powder is 33 to 41 months' imprisonment; the range for the defendants (also first-time offenders) who bought a portion of the supplier's powder and cooked it is 121 to 151 months. In addition, the two "crack" defendants are subject to a mandatory minimum penalty of ten years, while the supplier who sold them the powder cocaine that enabled them to make crack is subject to no statutory minimum penalty. This case illustrates the anomalous effects of the 100-to-1 quantity ratio.

In more general terms, in order to receive a five-year mandatory minimum sentence, a crack dealer must traffic only in five grams of crack. Five grams of crack represents 10-50 doses of crack, with an average retail price of \$225-\$750 for the total five grams. In contrast, a powder cocaine dealer must traffic in 500 grams of powder cocaine in order to receive the same five-year sentence. The 500 grams of powder cocaine represent 2,500-5,000 doses, with an average retail price of \$32,500-\$50,000 for the 500 grams.

Viewed another way, the 500-gram quantity of powder cocaine that can send one powder cocaine distributor to prison for five years can be distributed to up to 89 different street dealers who, if they chose to turn it into crack cocaine, could make enough crack to trigger the five-year penalty for each defendant.

e. Prosecutorial Practices and Resources

In setting stiff mandatory minimum penalties carrying a sharp distinction between powder and crack cocaine, Congress attempted to frame a national policy that would be applied uniformly across the country in federal drug cases. The Commission's research, however, suggests that uniform application is not occurring. Because of widely varying but almost universally lower state penalties for crack, the decision to prosecute in federal versus state court often can make a dramatic difference in an individual's sentence, thereby making the choice of forum perhaps the most important determinant of sentence length. The Commission lacks national data on this important question, but some limited inferences can be drawn based on reported crack convictions.

The present record shows differences in prosecution practices (*see* Chapter 6). For example, the more rural district of Central Illinois has experienced a considerably higher proportion of federal crack cocaine convictions than the largely Chicago-driven district of Northern Illinois. Similarly, Brooklyn, New York, reports a much lower proportion of federal crack sentencings than Northern and Southern West Virginia.²³⁶ Yet, according to New York City Police Department data, 45.8 percent of all drug arrests in 1989 were crack cocaine related (*see* Chapter 6). Consider the fact that

²³⁶The Commission does not mean to suggest that any apparent disparities are unwarranted. As a general matter, the Commission has not analyzed various factors that might explain these and other differences, including the strength of the state and local law enforcement efforts directed at the crack cocaine trade, the relative punishment available through state statutes, differing needs and problems facing each district, and resource allocation issues.

in 1993 the state of South Carolina (n=118) had more crack cocaine cases than the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming combined (n=113). Certainly, resource limitations or differing state/federal priorities may restrict the prosecution of crack cases in larger federal districts and help to explain why some of the smaller, more rural federal districts have experienced larger numbers of crack prosecutions. Nevertheless, these data suggest that the uniform national policy Congress had hoped to engender does not play out in practice.

C. SUMMARY

As discussed above, a review of the relatively sparse empirical evidence available concerning those factors Congress considered in distinguishing crack from powder cocaine leads to mixed conclusions and few clear answers. Nevertheless, the Commission concludes that a policymaker could infer that crack cocaine poses greater harms to society than does powder cocaine. For example, because smoking crack cocaine lends itself to binge use in a way not found with snorting powder – the most popular way of administering that form of the drug – crack has a greater potential for creating dependency. Moreover, the ease by which crack can be administered and its ability to be marketed cheaply have made it particularly appealing and accessible to a broader population including some of the most vulnerable members of society: the poor and the young. Further, both forms of cocaine appear to be associated with systemic violence, that is, violence associated with the marketing of a drug; however, crack dealers generally, tend to have a stronger association with systemic violence and are more likely to possess weapons than powder cocaine dealers. Finally, crack dealers, generally, have more extensive criminal records than other drug dealers, and they tend to use young people to distribute the drug at an increased rate.

A conclusion that crack cocaine poses somewhat greater harm to society, however, does not answer the question whether the 100-to-1 quantity ratio between powder and crack cocaine is one that this Commission would recommend. In addressing that question, the Commission notes that there is no precise method by which one can determine the optimal penalty differential between drugs or even between kinds of offenses. While medical and pharmacological research can calibrate closely the appropriate amount of medication necessary to treat an illness, there is no comparable test to identify the appropriate punishment level for the illegal sale of a controlled substance. Instead, in establishing a penalty level for trafficking in a particular drug, the policymaker must weigh pharmacological evidence and the other societal harms posed by the substance to arrive at a sound penalty level.

Accordingly, even while agreeing that crack may be more harmful than powder cocaine, the Commission is not prepared at this time to say definitely how that additional harm should be accounted for within the current penalty scheme. Indeed, for reasons discussed below, the Commission will not recommend in this report a particular ratio or ratios or a particular structure that

it can endorse. Nevertheless, the Commission firmly concludes that it cannot recommend a ratio differential as great as the current 100-to-1 quantity ratio.

Several factors lead the Commission to a conclusion that a 100-to-1 differential cannot be recommended. First, when Congress established the quantity ratio in 1986, there were no sentencing guidelines; rather, the guidelines took effect in 1987 and were not fully implemented until 1989. Accordingly, Congress had only the possibility of an enhanced ratio to look to in capturing, in a sentencing structure, the additional harms that legislators felt inhered in crack cocaine. Therefore, to the extent that the guidelines now provide a punishment for some of those same factors subsumed in the ratio, those factors generate an enhancement both through an increased ratio differential and through guideline adjustments. In short, they are doubly punished through the interplay of the two structures.

Accordingly, if Congress believed that certain factors warranted a 100-to-1 quantity ratio and if the subsequently adopted guidelines provided a punishment for some of those factors, then, as a logical matter, the ratio should be lowered by an amount commensurate with the extent to which these factors are addressed by the guidelines. For example, Congress was concerned greatly about the increase in crime, and particularly the increase in violent crime, resulting from the trafficking and use of crack cocaine. Some factors, however, such as the more addictive nature of crack, clearly are not addressed by the guidelines. Other factors, such as a tendency toward increased violence associated with crack distribution, are addressed, at least in part.

Specifically, the likelihood of violence in connection with the trafficking of a drug is increased greatly if those trafficking in that drug carry guns or have prior criminal records. Certainly the harm of the crime is greater if someone is killed. The guidelines can provide an enhancement for each of these factors. That is, a defendant who carries a firearm or is involved in a drug conspiracy in which another participant carries a firearm will receive an enhancement for possession of that firearm. In addition, the punishment of a defendant who has a prior record is increased in proportion to the extensiveness of that record. Further, if in relation to the crack distribution a victim is killed, the guidelines typically provide a life sentence and, because there is no parole in the federal system, a life sentence means life in prison.

Although the guidelines provide punishment for some of the factors that led Congress to establish the 100-to-1 quantity ratio, the guidelines do not address all of the factors that concerned Congress. For example, no provision of the guidelines accounts for the increased addictiveness of crack or its increased attraction as a result of its cheap marketability to a broader and more vulnerable part of the population. Neither do the guidelines address completely all aspects of the relationship between crack and crime associated with crack distribution or other social consequences. Thus, concerns about unnecessarily duplicative punishment between the more finely calibrated sentencing guidelines and the broader brush 100-to-1 quantity ratio explain, but only partially, the Commission's conclusion that the 100-to-1 quantity ratio should be reconsidered.

Another central basis for the Commission's rejection of this ratio is the extreme anomalies in sentencing produced by such a high differential in penalties between two easily convertible forms of the same drug. Crack cocaine is made through a simple conversion process applied to powder cocaine. Thus, those who traffic in crack necessarily have obtained the "raw material" for their drug through the powder cocaine distribution chain. One premise of the mandatory minimum sentencing structure is that, all other things being equal, a drug dealer's danger to society is in direct proportion to the quantity of the drug in which he/she deals. Yet, as a result of the ratio differential, a large scale powder cocaine dealer who trafficks in 500 grams (2,500-5,000 dosage units) of powder cocaine will receive the same sentence as a crack dealer who has sold only 5 grams (10-25 doses) of crack cocaine; that is, a five-year sentence of imprisonment.

Such a vast difference in the quantity of drug necessary to trigger the same sentence would be acceptable if the threat of increased dangers and harms created by crack versus powder cocaine appeared commensurate. Yet, even though crack is arguably more addictive than powder, when the latter is only snorted, the Commission cannot say that the increased likelihood of dependency or binge use posed by crack is commensurate with a ratio differential as great as 100-to-1.

Similarly, although evidence suggests that the trafficking and use of crack cocaine have engendered more violence associated with marketing the drug than has powder cocaine, the evidence does not indicate that the increased level of violence and crime justifies a ratio as large as 100-to-1. Moreover, to the extent that some members of Congress expressed concern in 1986 that use of crack tends to alter a person's behavior in such a way as to cause that person to commit a crime (psychopharmacologically induced crime), the evidence does not suggest any greater association for crack than for powder cocaine with that type of criminal activity.

For all of these reasons, the Commission concludes that the 100-to-1 quantity ratio that presently drives sentencing policy for cocaine trafficking offenses should be re-examined and revised.

In the Commission's view, the considerations described above suggesting a need for reexamination of the 100-to-1 quantity ratio underlying cocaine trafficking penalties similarly warrant congressional reconsideration of the dramatic distinction in simple possession penalties for crack versus powder cocaine and other drugs. A number of other concerns also point to the need to modify this policy.

First, focusing on the difficult problem of user/possessors, there appears to be an insufficient basis for punishing heavy crack users who possess a measurable fraction over five grams (10 to 50 doses, at .1 to .5 gram/dose) by a mandatory minimum term of imprisonment (five years) that is five times the maximum imposable sentence (one year) for simple possession of a similar or greater quantity of any other drug. In general, the unique approach to emphasizing severe punishment of those who possess crack for personal consumption is at odds with the prevailing, treatment-oriented approach prescribed by Congress for other drug users/possessors.

Secondly, the crack simple possession penalties have created sentencing anomalies and unwarranted disparities in the treatment of essentially similar defendants, results that conflict with the fundamental purposes of the Sentencing Reform Act. In particular, the sentencing "cliff" between a first offender who simply possesses as much as 5.0 grams of crack (or any quantity of any other drug) and an otherwise similarly situated defendant having a minutely measurable greater quantity (*e.g.*, 5.01 gram) of crack – statutory maximum sentence of one year's imprisonment for the former, minimum sentence of five years' imprisonment for the latter – creates a wide disparity and disproportionality that the sentencing guidelines cannot rectify. And, for repeat possessors of small quantities of crack (greater than three grams but less than five grams for a first repeater, greater than one gram but less than five grams for a second repeater), the unusual statutory scheme creates the anomalous result of the defendant faring better if convicted and sentenced as a trafficker (ordinarily the more serious offense) than if sentenced under the simple possession statute.

D. RECOMMENDATIONS

The Commission strongly recommends against a 100-to-1 quantity ratio. Having said that, the Commission is not prepared in this report to recommend a specific different ratio or a specific different structural approach to deal with the enhanced dangers believed to be presented by crack. Rather, as a priority matter, the Commission intends to develop a model or models for Congress to consider in determining whether to revise the current approach that it takes in the sentencing of crack offenses.

At the outset, the Commission will focus on a model that maximizes the development of offense- and offender-specific guideline enhancements addressing as many of the discrete, substantial harms associated with crack offenses as reasonably can be handled in a guideline system. For example, Congress is rightly concerned with the use of juveniles in distributing crack and the growing problem of cocaine-exposed babies. To address these concerns relating to some but not all crack distribution offenses, the Commission will investigate the feasibility of a guideline enhancement that additionally punishes those who engage youth to distribute drugs and an enhancement for those who sell crack to pregnant women. Currently, an offender does not receive enhancement for these acts unless the government charges the specific act and a conviction results.

Further, Congress accurately expresses concern with the violence associated with crack distribution. The Commission will examine more effective means of incorporating appropriate enhancements for that violence into the guidelines. In addition to the currently available enhancements for weapons and prior criminal record, the Commission might add enhancements for type of weapon, discharge of weapon, injury to victims, bystander injury, and crack houses or shooting galleries.

In comparison to a penalty scheme that relies exclusively or primarily on a quantity ratio to distinguish among offenders warranting greater punishment, this approach is distinctly fairer and more consistent with the more uniform but appropriately individualized sentencing approach Congress envisioned under the Sentencing Reform Act. To illustrate using the youth as distributor phenomenon, consider that, to the extent that a ratio is used as the principal means of meting out greater punishment for crack offenses and that ratio is increased to punish those who engage youth to distribute crack, such an enhancement also has the undesirable effect of overpunishing the defendant who may have never been involved in such a venture. In contrast, a well-crafted guideline provision that is focused specifically on the particular harm of engaging youth to distribute crack will additionally punish only those who have created that identified harm.

Following this approach, the Commission will attempt to identify all such harms frequently and substantially associated with crack offenses and seek to determine the extent to which they can be addressed in a guideline system. More specifically, the Commission will consider, to the extent relevant to congressional concern and the purposes of sentencing as set forth at 18 U.S.C. § 3553(a)(2), the following: 1) the form of cocaine involved; 2) whether a firearm or other dangerous weapon was involved; 3) whether the offense resulted in serious bodily injury or death to another person; 4) the quantity of cocaine involved; 5) the extent to which the powder cocaine defendant knew the drug would be converted into crack; 6) the extent to which the offense involved systemic crime, that is, crime related to the drug's marketing, distribution, and control; 7) the extent to which the offense involved social harms, that is, harms associated with increased addictiveness, parental neglect, child and domestic abuse, and high risk sexual behaviors; 8) whether the offense involved the use or employment of any person under the age of 18; 9) whether the defendant performed a managerial or leadership role in the offense; 10) the defendant's prior criminal record; and 11) any other aggravating or mitigating factors necessary to ensure adequate and appropriate punishment for defendants convicted of cocaine offenses.

The Commission is aware that there may well be some harms that are inherent in the drug itself and that, as a practical matter, are not addressable through this type of specifically tailored guideline provision. For example, to the extent that crack is more addictive than powder cocaine, that concern may be addressable only through an enhanced ratio or penalty differential. Indeed, Congress has recognized, and appropriately so, that some drugs simply are more harmful than others, and it has accounted for those differences by establishing a different ratio or different quantity necessary to trigger a mandatory penalty. Accordingly, if the Commission ultimately concludes that some quantity ratio between powder and crack cocaine is necessary, that differential can be reflected by establishing appropriately different guideline base offense levels for offenses involving the two drugs.

Building on a review of the guidelines for drug trafficking offenses that is already well underway, the Commission expects that it can develop and submit to Congress one or more penalty

scheme models of the general form described above no later than the 1995-96 amendment cycle.²³⁷ Congress, of course, has the prerogative to address the 100-to-1 quantity ratio applicable to cocaine trafficking offenses at any time.

The Commission further recommends that Congress revisit the penalties uniquely applicable to crack simple possession penalties. Much of the rationale for reassessing the 100-to-1 quantity ratio applicable to cocaine trafficking offenses similarly applies to the penalties uniquely applicable to crack simple possession offenses. If Congress were to address the 100-to-1 quantity ratio applicable to trafficking offenses by increasing the amount of crack equating to the five- and ten-year mandatory minimums, some conforming modification in 21 U.S.C. § 844(a) would be necessary to ensure that the lesser-included offense of simple possession of crack is not punished more severely than the more serious trafficking offense.

The Commission is fully cognizant of Congress's ultimate authority over sentencing policy. It also recognizes that approaches other than the approach suggested here could address the fundamental need for a fairer, more effective cocaine sentencing policy. This said, having broadly delegated to the Sentencing Commission responsibility for developing a comprehensive and rational system of sentencing guidelines for all offenses, Congress should consider relying on the same approach to implement appropriate policy adjustments in this specific area. Among other advantages, this approach would permit the Commission, as an ongoing expert body charged with continually refining the guidelines system, greater flexibility to make adjustments reflecting advances in knowledge about cocaine and its societal problems. Most importantly, through the guidelines system, consistent, appropriately individualized, and substantially fairer sentencing results can be achieved that will effectively promote the purposes of sentencing.

²³⁷Under current law, the Commission is restricted in the timing of any submission of proposed guideline amendments to the limited timeframe between the convening of a session of Congress and May 1. *See* 28 U.S.C. § 994(p).