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Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates

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CRACKING THE CODE: “DE-CODING” COLORBLIND SLURS DURING THE CONGRESSIONAL CRACK COCAINE DEBATES

*Richard Dvorak**

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INTRODUCTION

"The chinaman has impoverished our country, degraded our free labor, and hoodlumized our children. He is now destroying our young men with opium."¹

The first anti-narcotic law, which outlawed the smoking of opium, according to the police chief, was designed to "keep [the Chinese] from opening places where whites might resort to smoke."²

[T]here is a violent war being fought in America. For many years this war was fought for us by special agents in dark, stinking alleys—through garbage strewn streets, and in the burned out, abandoned buildings of our large metropolitan areas. But now, the battleground has moved into middle-class neighborhoods, into glass skyscrapers, and even into school playgrounds. This war was once fought only in urban America, but increasingly, there are daily skirmishes on country roads, on remote rural routes, and in the tree-lined streets of small towns and villages.

—Senator Heflin during the crack cocaine debates.³

1. *United States v. Clary*, 846 F. Supp. 768, 775 n.10 (E.D. Mo. 1994) (referencing this quote from an 1879 *San Francisco Post* article, in support of the contention that "[m]edia accounts and inaccurate data influenced public opinion about smoking opium").

2. DIANA R. GORDON, *THE RETURN OF THE DANGEROUS CLASSES: DRUG PROHIBITION AND POLICY POLITICS* 143 (1994) (quoting Jim Baumohl, *The 'Dope Fiend's Paradise' Revisited: Notes from Research in Progress on Drug Law Enforcement in San Francisco, 1875-1915*, in 24 *THE DRINKING & DRUG PRAC. SURVEYOR*, June 1992, at 3-12).

3. 132 CONG. REC. S26,458 (1986) (statement of Sen. Heflin) [hereinafter *Heflin Debate*].

From the first anti-drug law forbidding opium dens in San Francisco in the late 1800s to anti-crack legislation in the 1980s, race has been the driving force behind the movement to outlaw drugs. From opium to heroin, powder cocaine, marijuana, and finally crack cocaine, there has been a pattern of drug criminalization in America motivated by White fear. Those fears were based on a belief that crazed drug addicts would denigrate the White community, and the drug pushers, usually thought to be people of color, would lead vulnerable Whites on a depraved road of crime and prostitution.

In an earlier era, these concerns were voiced by the media and politicians in overtly racist appeals to Whites' fears. By the 1980s, however, members of Congress and the media used "coded" messages to gain support for the passage of the Anti-Drug Abuse Act of 1986,⁴ a criminal sentencing scheme that created a 100:1⁵ disparity in the way crack and powder cocaine are treated under the Federal Sentencing Guidelines.⁶

4. "The Anti-Drug Abuse Act of 1986 . . . set forth mandatory minimum sentences for the manufacture, distribution, dispensation, or possession with intent to manufacture, distribute or dispense, controlled substances." Jesseca R.F. Grassley, Comment, *Federal Sentencing Policy Following the 1995 Cocaine Report: Issues of Fairness and Just Punishment*, 21 *HAMLIN L. REV.* 347, 361 (1998). The Act created the framework of statutory sentences that currently applies to federal drug offenses. See *id.* In 1988, Congress passed the Anti-Drug Abuse Act of 1988, which "amended the controlled substance possession statute by mandating a minimum five-year and maximum twenty-year imprisonment term for simple possession of five grams or more of crack cocaine." *Id.* at 363.

5. This 100:1 ratio however, does not mean that sentences are 100 times greater. As Justice Stevens explained in his dissent in *United States v. Armstrong*, 517 U.S. 456 (1996), the Act "treat[s] one gram of crack as the equivalent of 100 grams of powder cocaine." 517 U.S. at 478. Justice Stevens continued:

The distribution of 50 grams of crack is thus punishable by the same mandatory minimum sentence of 10 years in prison that applies to the distribution of 5,000 grams of powder cocaine . . . These penalties result in sentences for crack offenders that average three-to-eight times longer than sentences for comparable powder cocaine.

Id. at 478.

6. Congress created the United States Sentencing Commission ("the Sentencing Commission") in 1984 to develop federal sentencing guidelines that would reduce inconsistencies in sentencing. See Grassley, *supra* note 4, at 354. "In April, 1987, the Sentencing Commission adopted the Anti-Drug Abuse Act's 100:1 ratio in the first official Guidelines Manual." *Id.* at 363. Further, it is relevant that "[t]he Sentencing Commission did not research or analyze the merits of the 100:1 ratio." *Id.* In 1995, "[i]n response to the Congressional directive to analyze federal cocaine sentencing policy," the Sentencing Commission issued its first report on the 100:1 ratio. *Id.* at 365. The report, entitled *The Special Report to Congress: Cocaine and Federal Sentencing Policy*, found the disparity was too great. See *id.* The Sentencing Commission "strongly" recommended eliminating the 100:1 ratio. *Id.* at 369. On October 30, 1995, Congress rejected that proposal. See *id.*

While the Civil Rights Movement and the changes brought on by political correctness⁷ in the 1990s may have been successful in “educating” Americans about race, it has also made it much more unpopular to express racist sentiments. That does not mean *the end of racism*, as some would suggest,⁸ but a movement to take racism underground.

at 370. In 1997, the Commission again urged the elimination of the 100:1 ratio, calling instead for the adoption of a 5:1 ratio. *See id.* at 371–72.

President Clinton also indicated that he hoped to “bring the penalty for selling powder cocaine closer to that of selling crack cocaine.” DeWayne Wickham, *Gore View Falls Short on Cocaine Disparity*, USA TODAY, Nov. 23, 1999, at 19A. However, he maintained, “You could make an argument for some disparity based on the level of violence associated with crack trade.” *Id.* Ultimately, the Senate failed to reduce the sentencing disparity. *See id.* (explaining that the Senate failed to win the passage of a proposal designed to cut the disparity to 10:1).

Meanwhile, in 1999, Vice President Al Gore, running to become the Democratic presidential nominee, said: “I think the remaining disparities should be dealt with. I respect the views of the law enforcement professionals who argue there is some justification, but I don’t see it myself.” *Id.* (quoting Vice President Al Gore, Address at the Trotter Group Annual Meeting at Clark Atlanta University).

7. For an excellent discussion of the fallacies of the claims of the anti-political correctness campaign, see Jamin B. Raskin, *The Great PC Cover Up*, CAL. LAW., Feb. 14, 1994, at 68. The author posits that political correctness “is never defined, because its polemical power depends on mixing two different meanings: ‘political correctness’ (1) as official compulsion and censorship and (2) as progressive ideas about race, gender and power.” *Id.* at 70. The author notes that “[b]y merging these meanings, the anti-PC party identifies progressive ideas with censorship and dresses up its own political agenda in the noble rhetoric of the First Amendment.” *Id.* at 70. For example, the author criticizes the anti-PC movement as confusing progressive calls for sensitization with state compulsion. *See id.* at 70–72. He cites a *Newsweek* article on political correctness, which quoted a conservative Stanford University student complaining that “[i]f I was at a lunch [in the dorm] and we started talking about something like civil rights, I’d get up and leave . . . I knew they didn’t want to hear what I had to say.” *Id.* at 70.

While this article argues that the political correctness movement has educated society about race, it is debatable whether this movement has been successful in actually changing societal viewpoints. Rather than changing these viewpoints, the PC movement has given rise to an anti-PC culture, which in essence is a “crusade . . . against affirmative action and the ideas associated with ‘multiculturalism.’” *Id.* at 72.

8. *See* DINESH D’SOUZA, *THE END OF RACISM* (1995) (claiming that the lack of progress in the Black community has more to do with a failure of African Americans to take responsibility for their own renewal than with White racism). D’Souza explains:

In the black community, this cultural breakdown is characterized by the following features: (1) a very heavy and perhaps excessive reliance on government; (2) a sometimes virtual paranoia that racism is to blame for all problems, including those that are quite personal; (3) hostility to academic achievement, which is very often, particularly in the inner city, dismissed as a form of *acting white*; (4) a call to violence that has spread and that threatens the integrity of our inner cities; and finally, perhaps most tragically; (5) the normalization of illegitimacy in the inner city.

Indeed, we have created an oxymoron—the sophisticated racist.⁹ These sophisticated racists have learned to “code” their language and not to leave behind “a paper trail”¹⁰ of racism, making it extremely difficult for those who seek to challenge racist legislation as an Equal Protection violation of the Fifth or Fourteenth Amendments of the U.S. Constitution.

This article proposes “de-coding” as a method for unveiling the racist purpose behind the enactment of race-neutral legislation. Through the use of “code words,” defined as “phrases and symbols which refer indirectly to racial themes, but do not directly challenge popular democratic or egalitarian ideals,”¹¹ legislators can appeal to racist sentiments without appearing racist. More importantly, they can do so without leaving evidence that can be traced back as an intent to discriminate. This article proposes to use “de-coding” as a method to unmask the racist purpose behind the enactment of the 100:1 crack versus powder cocaine ratio for mandatory federal prison sentences. However, while this article, like many other law review articles on the subject,¹² argues that the crack cocaine sentencing scheme is unconstitutional, the real purpose of analyzing the constitutionality of the crack statute is to show how “de-coding” can be an effective means of unmasking the racist meaning behind primarily race-neutral comments. When the interpretation of “de-coded,” race-neutral comments falls in line with an un-coded historical pattern of discrimination, it makes sense to infer that there was an intent to discriminate.

Dinesh D'Souza, *Improving Culture to End Racism*, 19 HARV. J.L. & PUB. POL'Y 785, 789–90 (1996) (citations omitted).

9. See *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (noting that “[t]he sophisticated would-be violator [of anti-discrimination laws] has made our job a little more difficult”).

10. “Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it.” *Id.* (quoting *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987)).

11. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* 120 (1986).

12. See, e.g., David H. Angeli, *A ‘Second Look’ at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211 (1997); Melissa C. Brown, *Equal Protection in a Mean World: Why Judge Cahill was Right in United States v. Clary*, 11 NOTRE DAME J.L. ETHICS & PUBLIC POL'Y 307 (1997); Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121 (1994); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233 (1996); Laura A. Wytmsa, *Punishment for ‘Just US’—A Constitutional Analysis of the Crack Cocaine Sentencing Statutes*, 3 GEO. MA-SON INDEP. L. REV. 473 (1995); Jason A. Gillmer, Note, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497 (1995); Grassley, *supra* note 4.

While “de-coding” has some precedent, such as Justice Marshall’s dissent in *Memphis v. Green*¹³ and the Third Circuit decision in *Aman v. Cort Furniture Rental Corp.*,¹⁴ too often courts fail to find the common-sense meaning behind coded messages. “De-coding” as a judicial tool has several benefits. First, as noted, there is some judicial precedent. Second, it fits well within the framework of current Supreme Court jurisprudence.¹⁵ Third, it appeals to common sense, something the Justices have been increasingly urging the lower courts to use.¹⁶

Part I will look at the district court decision in *United States v. Clary*,¹⁷ which found the sentencing scheme unconstitutional, along with the subsequent Eighth Circuit opinion reversing the lower court decision. This article argues that while the district court’s use of the “unconscious racism” theory was logically sound—and a commendable effort to look at racism in a contemporary context—it ultimately failed because such a theory is a poor fit with the Supreme Court’s narrow concept of racist intent.

Part II will document the history of what is referred to in this paper as “race coding”¹⁸ in American politics. Specifically, this article traces how coded racist messages have served White politicians well in appealing to Whites’ fears of crime and drugs, economic instability, a loss of “values” and traditional notions of “equality.” This history of coding political messages of White supremacy, while at the same time washing one’s hands of all accusations of racism, is vital to understanding some of the comments and actions taken during the crack cocaine debates. This section will serve as a backdrop to the possible acceptance of “de-coding” as a valid judicial tool and put the crack cocaine debate in historical perspective.

13. 451 U.S. 100 (1981).

14. 85 F.3d 1074 (3d Cir. 1996).

15. In much of the Court’s Equal Protection Clause doctrine, a violation requires a showing that a decision-making body pass legislation with an intent to discriminate, i.e., it must be shown that the decisionmakers “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effect on an identifiable group.” *Personnel Admin. v. Feeney*, 442 U.S. 256, 279 (1979).

16. Writing for a unanimous Court, Justice Scalia stated, “[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.” *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998).

17. 846 F. Supp. 768 (E.D. Mo. 1994).

18. This article uses the term “race coding” to refer to the historic development that has led to the use of racist code words and phrases, and uses the term “de-coding” to refer to a method jurists can use to unmask the racist intent behind the passage of race-neutral legislation.

Part III will demonstrate how this proposal is supported by Justice Marshall's dissent in *Greene* and the Third Circuit's decision in *Aman*, both of which looked to certain "code words" to find racist intent. Finally, Part IV shows how "de-coding" can be an effective tool to unveil the racist intent behind the enactment of the crack cocaine sentencing scheme. This article argues that "de-coding" further strengthens the argument that the passage of the Act was plagued with racism, and was passed "because of," not merely "in spite of," the disparate impact the legislation would have on Latinos and African Americans.¹⁹

I. THE FAILURE OF EQUAL PROTECTION CHALLENGES TO THE CRACK SENTENCING SCHEME

A. United States v. Clary: *One Court's Use of 'Unconscious Racism' to Show Racial Discrimination*

In modern America, overt racism is not nearly as evident as it was just a few decades ago.²⁰ The difficulty in rooting out racism is explained by Jody Armour, who breaks down modern racists into two main categories: "hypocritical racists" and "aversive racists."²¹ "Hypocritical racists," he explains, are persons who may harbor racist feelings, but "fake it" when confronted by others.²² On the other hand, "aversive racists" are people who think of themselves as non-prejudiced but who "are not so much deceiving others as fooling themselves."²³ In other words,

19. *Feeney*, 442 U.S. at 279.

20. "The explicit rejection of equal opportunity and civil rights for people of color is now virtually an absent political discourse except at the very fringes of national political debate." AMY ELIZABETH ANSELL, *NEW RIGHT, NEW RACISM: RACE AND REACTION IN THE UNITED STATES AND BRITAIN* 58 (1997).

21. JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 118 (1997).

22. Armour cites to controlled experiments on racial attitudes where participants were monitored based on both their physiological and oral responses to questions of race. *See id.* at 120. The "hypocritical racists" registered strong racist feelings on their "covert" physiological monitor, but tailored their verbal responses to what they believed the experimenter wanted to hear. *Id.* at 126.

23. *Id.* Armour posits that "[t]he theory of aversive racism[] begins with the proposition that most Americans are highly committed to egalitarian values . . . [maintaining] a non-prejudiced self-image [But] deep down aversive racist[s] believe[] in White superiority and do not want to associate with Blacks." *Id.* (citations omitted). For example, aversive racists were given hypothetical fact patterns where Blacks and Whites were in distress. *See id.* at 127. These aversive racists did not discriminate between Blacks and Whites when they were asked hypothetical questions about whether to choose to help a Black or White person where the solution to the problem called for a race-specific response. *See id.* However, where there was ambiguity in how to solve a problem, aversive

“hypocritical racists” purposely “code” their language, while “aversive racists” use race-neutral justifications to mask their true racist beliefs. Under either model, however, evidence of one’s true racist belief or motive will not be literally found in the words themselves. Instead, in the muddled labyrinth of modern racism, myopic jurists need better judicial tools to glean the racist meaning behind ostensibly race-neutral comments by legislators seeking to pass legislation that adversely impacts people of color.

In *United States v. Clary*, the only reported federal court decision finding that the federal crack cocaine penalties violated the Equal Protection right found in the Due Process Clause of the Fifth Amendment,²⁴ the

racists chose to help Whites over Blacks by choosing race-neutral justifications, such as relying upon a theoretical third party to help a Black person in distress, while rushing to the aid of distressed Whites. See *id.* at 128.

24. This article argues the crack cocaine sentencing scheme violates the Equal Protection clause of the Fifth Amendment. While the Fifth Amendment has no such express clause, courts have ruled Equal Protection can be found in that amendment’s Due Process Clause. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that “racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution”).

Federal courts have already rejected numerous challenges to the crack sentencing scheme on a variety of other grounds. See, e.g., *United States v. Frazier*, 981 F.2d 92, 95–96 (3d Cir. 1992) (rejecting Eighth Amendment cruel and unusual punishment claim); *United States v. Rodriguez*, 980 F.2d 1375, 1378 (11th Cir. 1992) (rejecting a challenge for vagueness because “cocaine base” can include cocaine derivatives and substances other than crack cocaine); *United States v. Simmons*, 964 F.2d 763 (8th Cir. 1992) (recognizing that had they been writing “from a clean slate,” the Eighth Circuit may have considered the 100:1 disparity a violation of due process, but instead the court felt bound by precedent to reject such arguments); *United States v. Watson*, 953 F.2d 895, 897 (5th Cir. 1992) (also bound by precedent to reject a due process argument); *United States v. Turner*, 928 F.2d 956, 960 (10th Cir. 1991) (expressing their approval of “those circuits holding that the different penalties for cocaine base and cocaine in its other forms do not violate due process”).

Effective November 1, 1993, the Sentencing Commission amended the sentencing guidelines to note that “‘Cocaine base,’ for the purposes of this guideline, means ‘crack.’” U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (1993). “‘Crack’ is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.” *Id.*

For a decision finding that the disparate treatment of crack and powder cocaine violates the Equal Protection Clause of the Minnesota Constitution, see *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (applying rational basis review). The court also noted that strict scrutiny review could be applied to the state’s sentencing scheme: “[M]inorities can also be injured when the government is ‘only’ indifferent to their suffering or ‘merely’ blind to how prior official discrimination contributed to it and how current acts will perpetuate it.” *Id.* at 888 n.2 (quoting LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 16–21, 1518–19 (2d ed. 1988)).

In 1996, the Supreme Court issued its only opinion on the crack cocaine sentencing issue, in a limited ruling on prosecutorial discretion in bringing crack cocaine charges.

district court used Charles Lawrence's "unconscious racism" theory²⁵ to find the legislation violated the Due Process Clause of the Fifth Amendment.²⁶ Drawing on Lawrence's theory, the court suggested that because racism is irrational it is socially and politically unacceptable, and hence racial prejudices will be repressed and relegated to the unconscious by the ego.²⁷ Thus, the court posited that "benign neglect for the harmful impact or fallout upon the black community that might ensue from decisions made by the white community for the 'greater good' of society has replaced intentional discrimination."²⁸ With regard to the crack cocaine sentencing scheme, this "benign neglect" for the harmful impact that anti-drug laws would have on the Black community is based on many Whites' perceptions of African Americans as "dangerous, different or subordinate, [which] are lessons learned and internalized completely outside of our awareness, and are reinforced by the media-generated

In *United States v. Armstrong*, 517 U.S. 456, 469–71 (1996), the Court held a class of plaintiffs, who were charged with conspiring to possess with the intent to distribute more than 50 grams of crack cocaine, were not entitled to discovery based on a claim of race-based selective prosecution. The defendants offered the district court finding based on statistics from the Federal Defender Program in Los Angeles that indicated that of the 24 drug cases involving 50 or more grams of crack cocaine in 1991, all of the defendants were Black. See *id.* at 459. In addition, the defendants offered an affidavit from a criminal defense lawyer who indicated that in his experience many Whites were prosecuted in state court (which has lower penalties) rather than federal court, as well as a newspaper article that indicated that "crack criminals . . . are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black." *Id.* at 460–61. The district court granted the defendant's motion to compel the government to provide statistics of the race of the defendants charged with crack cocaine offenses, the state appealed the decision, and the Ninth Circuit panel reversed. See *id.* at 459–61. En banc, the Ninth Circuit affirmed the district court's ruling, which the Supreme Court reversed, finding that "the defendant . . . [must] produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not . . ." *Id.* at 469.

25. See Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987) (arguing that "[r]acism is in large part a product of the unconscious").

26. See *Clary*, 846 F. Supp. at 796–97 (announcing the court's holding).

27. See *id.* at 780; Lawrence, *supra* note 25, at 332–35. Lawrence writes:

Increasingly, as our culture has rejected racism as immoral and unproductive, this hidden prejudice has become the more prevalent form of racism. The individual's Ego must adapt to a cultural order that views overtly racist attitudes and behavior as unsophisticated, uninformed, and immoral. It must repress or disguise racist ideas when they seek expression.

Id. at 335.

28. *Clary*, 846 F. Supp. at 779.

stereotyping.”²⁹ This “unconscious racism” infected the legislators’ belief that there was an epidemic regarding the spread of crack cocaine, and that Black males were associated with that epidemic.³⁰

Turning to the Equal Protection analysis, the district court noted that “a criminal defendant who alleges an Equal Protection violation must prove that the ‘invidious quality’ of governmental action claimed to be racially discriminatory ‘must ultimately be traced to a racially discriminatory purpose.’”³¹ The court then used the factors set out in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*³² to find circumstantial evidence of an intent to discriminate; in the case of sentencing disparity, “unconscious racism” led to the failure of Congress to see the foreseeable disparate impact on African Americans.³³ Thus, the district court focused on the failure of Congress to take into account the disparate impact due to “unconscious racism,” rather than looking to intent *per se* to find an Equal Protection violation. While this may be a useful and logical tool for analyzing racism in a contemporary context—and the court should be commended for the attempt—its application to the crack cocaine debates has failed because the reasoning is a difficult fit in contemporary Supreme Court jurisprudence.

29. *Id.* at 780–81 (citation omitted).

30. *See id.* at 780.

Given the racially segregated nature of American economic and social life, the media has played an important role in the construction of a national image of Black male youth as ‘the criminal’ in two significant respects, which served to enhance penalties for crack cocaine violators: 1) generating public panic regarding crack cocaine; and 2) associating Black males with crack cocaine. Ergo, the decision maker who is unaware of this selection perception that has produced his stereotype will believe that his actions are not motivated by racial prejudice.

Id.

31. *Id.* at 782 (quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976)).

32. 429 U.S. 252 (1977). Those factors include: (1) the adverse racial impact of the official action; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; (4) departures from normal procedure sequence; (5) substantive departure from routine decisions; (6) contemporary statements by members of the decisionmaking body. *See Arlington Heights*, 429 U.S. at 267–68. The Supreme Court added a seventh factor to that inquiry—the inevitability or foreseeability of the consequence of the law. *See Personnel Admin. v. Feeney*, 442 U.S. 256, 259 (1979).

33. “Although intent *per se* may not have entered Congress’ enactment of the crack statute, its failure to account for a foreseeable disparate impact which would effect black Americans in grossly disproportionate numbers would, nonetheless, violate the spirit and letter of equal protection.” *Clary*, 846 F. Supp. at 782.

B. *Evading Intent: Unconscious Racism A Poor Fit
with Supreme Court Jurisprudence*

On appeal, the Eighth Circuit rejected the lower court's use of Charles Lawrence's "unconscious racism" theory because it does not fit within the Supreme Court's narrow view of the intent required to prove an Equal Protection violation. To find a legislative body acted with "discriminatory purpose," the Eighth Circuit noted the Supreme Court's requirement that "Congress selected or reaffirmed a particular course of action 'at least in part 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group.'"³⁴ The appellate court seemed to chide the district court's attempt to evade the intent issue:

We first question the district court's reliance on 'unconscious racism.' [citation omitted]. The court reasoned that a focus on purposeful discrimination will not show more subtle and deeply-buried forms of racism. [citation omitted]. The court's reasoning, however, simply does not address the question whether Congress acted with a discriminatory purpose. Similar failings affect the court's statement that although intent per se may not have entered into Congress' enactment of the crack statutes, Congress' failure to account for a substantial and foreseeable disparate impact on African Americans nonetheless violates the spirit and letter of equal protection.³⁵

Thus, despite its merits as a theory, the use of an "unconscious racism" analysis was easily dismissed by the Eighth Circuit because it did not squarely address the issue of conscious, purposeful intent. An analysis such as "de-coding", however, offers a modern method of proving intent, but one that stays within the current Supreme Court's requirement that the intent must have been conscious and purposeful. "De-coding," unlike "unconscious racism," does not require a radical

34. *United States v. Clary*, 34 F.3d 709, 713 (8th Cir. 1994) (citing *United States v. Latimore*, 974 F.2d 971, 975 (8th Cir. 1991) (quoting *Feeney*, 442 U.S. at 279)). For a critique of the Supreme Court's narrow definition of intent, see Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983). In her article, Karlan argues that "[t]he Fourteenth Amendment's special concern for minorities . . . requires that a legislature consider the rights of these groups when it makes its 'calculus of effects.' A legislature should be charged with either actual or constructive knowledge of potential burdens its acts will impose on minorities." *Id.* at 124 (citation omitted).

35. *Clary*, 34 F.3d at 713.

shift in jurisprudence and can be seen as a tool to interpret intent within the current legal framework.

II. THE HISTORICAL USE OF RACIST "CODE WORDS" IN AMERICAN POLITICS

A. George Wallace, *The Father of "Race Coding"*

An historical look at the phenomenon of "race coding" is essential to understand how the use of code words operates in today's contemporary socio-political culture. According to Michael Omi and Howard Winant, the roots of "race coding" can be traced to 1968, when George Wallace launched his bid to become president of the United States.³⁶ The authors explained that former segregationists such as Wallace had to code their formerly overtly racist words with subtly racist phrases and symbols that still appealed to Whites' sense of justice and equal opportunity.³⁷ Wallace surprised political experts by expanding his appeal beyond the Dixiecrats³⁸ in the South, managing to garner mass support in northern blue-collar cities like Milwaukee, Detroit, and Philadelphia.³⁹ As Omi and

36. See OMI & WINANT, *supra* note 11, at 121.

37.

[T]he racial upheavals of the 1960s precluded a direct return to this form of racial logic. The new right objective, however, was to dismantle the political gains of racial minorities. Since these gains could not be easily reversed, they had to be *re-articulated*. The key device used by the new right in its effort to limit the political gains of racial minority movements has been 'code words.' These are phrases and symbols which refer indirectly to racial themes, but do not directly challenge popular democratic or egalitarian ideals (e.g. justice, equal opportunity). Beginning with the Wallace campaign of 1968, we can trace the pattern of new right experimentation with these code words, and with the rearticulation of racial meanings they attempt.

Id. at 120–21.

38. The Dixiecrat Party was formed in response to civil rights proposals endorsed by President Harry Truman, a Democrat. See NADINE COHODAS, STROM THURMOND AND THE POLITICS OF SOUTHERN CHANGE 129–31 (1993). Some segregationists believed that if the Southern states, which held 127 electoral votes in the electoral college, could stick together on states' rights, they could create a three-way split of the electoral college between Northern Democrats, Northern Republicans, and Dixiecrats. See *id.* at 133. They believed this could lead to "[a] Northern deadlock," and therefore "the election of a Southern president." *Id.*

39. See OMI & WINANT, *supra* note 11, at 121. The authors note that Wallace's entry into the race was originally seen as a replay of the Dixiecrat strategy, which did not even attempt to receive significant Northern support, and thus pundits were surprised by the support he garnered in the North. See *id.*

Winant noted, “[a]lthough Wallace’s image as a racist politician originally placed him in the national spotlight, it did not make good Presidential politics, and he was forced to incorporate his racial message as a subtext, implicit but ‘coded,’ in a populist appeal.”⁴⁰

The potential of coding racist language, used successfully in the Wallace campaign, was noted by political analyst Kevin Phillips, who submitted an analysis of United States voting trends to Nixon headquarters.⁴¹ Published the following year as *The Emerging Republican Majority*, “Phillips’s book suggested a turn to the right and the use of ‘coded’ anti-black campaign rhetoric (e.g., law and order).”⁴² Wallace’s success⁴³ convinced Phillips that a “southern strategy”⁴⁴ could shift well-entrenched political alignments.⁴⁵ Phillips believed that Republicans, deeply unpopular in the South since the Civil War, could garner support by appealing to White Southern racists.⁴⁶ A New Right coalition emerged in the mid-1970s with a populist style that united previously distinct strands of the right wing by promoting a common agenda of “anti-communism militarism, moral orthodoxy and free market capitalism—themes that would eventually deliver Reagan to the White House.”⁴⁷

40. *Id.* at 121. Consequently:

Wallace thus struck certain chords that anticipated the new right agenda—defense of traditional values, opposition to ‘big government’ and patriotic and militaristic themes. But the centerpiece of his appeal was his racial politics. Wallace was a law-and-order candidate, an anti-statist, an inheritor of classical southern populist traditions.

Id.

41. *See id.*

42. *Id.* (citations omitted).

43. Wallace “won the South and almost 14 percent of the total vote.” ANSELL, *supra* note 20, at 76.

44. Phillips’ argument was that racist campaign rhetoric could win the conservative vote for the GOP in the South. *See* KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* 289 (1969).

45. *See id.*

46. Phillips writes:

[T]he white middle-class influx is making the urban South generally less Negro while the urban North becomes more heavily Negro. For these reasons, Negroes are not likely to exercise a very great direct influence on Southern presidential voting. And where they are most numerous—Mississippi, for example—whites tend to be most firmly united against them.

Id. at 289.

47. ANSELL, *supra* note 20, at 77.

B. *The Reagan Revolution: The Formation of "Colorblind Slurs"*

Building on the emergence of "race coding" that emerged in the 1970s, the "New Right" or "neoconservatives" couched racial themes in notions of law-and-order and individual rights.⁴⁸ The early 1980s witnessed the ascension of Ronald Reagan, a fierce opponent of civil rights legislation who told Mississippians on the 1980 campaign trail that he favored "state's rights," and defended his wife's remark that she wished her husband could be in New Hampshire to "see all these beautiful white people."⁴⁹ Still, he appeared in numerous photo opportunities with African Americans to show that he, in fact, was not a racist.⁵⁰ Quoting political scientist Merle Black, Omi and Winant noted Reagan's appeal to young White conservatives:

Reagan's kind of civilized the racial issue. He's taken what Wallace never could do and made it acceptable. It fits in with their [white students'] sense of perceived injustice, with what they see as the status of being a white person not being as high as it was 15, 20 or 30 years ago.⁵¹

Writing in 1986, the authors concluded on the status of racial politics: "Racial reaction has attained maturity and power, operating behind a subtle and seductive veneer of opposition to 'race thinking.'"⁵²

In the 1980s, words like "fairness," "welfare," and "groups" took on racial meanings in a backlash to the liberal policies of the 1960s, according to Thomas and Mary Edsall.⁵³ They broke down some of this coded language:

48.

[T]he radical democratic demands (of "equality of result") typified by affirmative action particularly threatened certain vulnerable groups. Unionized workers benefiting from *de facto* segregated seniority systems, for example, or white ethnic residents of urban enclaves who felt themselves to be an "endangered species"—hemmed in by ghettos or barrios, fearful of crime—became potential conservative constituencies.

OMI & WINANT, *supra* note 11, at 130.

49. *Id.* at 131–32 (citation omitted).

50. *See id.* at 134.

51. *Id.* at 135 (citing Haynes Johnson *Race, Despite Progress, South Sees this Election in Black and White*, WASH. POST, Sept. 30, 1984).

52. *Id.*

53. THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 213 (1991).

New forces gave new meaning to the coded language of politics. 'Fairness,' championed by [1984 Democratic presidential nominee Walter] Mondale and stressed in the Democratic platform, no longer symbolized to achieve tax equity for 'average' working men and women, to provide access to middle-class homes and incomes, or to insure the right to bargain with management for just compensation; 'fairness' now meant, to many voters, federal action to tilt the playing field in favor of minorities, government unions, feminists, criminal defendants, the long-term jobless, neverwed mothers, drug addicts, and gays.⁵⁴

These appeals, taken in context and loaded with significance, become what this article refers to as colorblind slurs—race-neutral entreaties to Whites' stereotypes and racist prejudices. For example, neo-conservatives ostensibly could be talking about every woman who lives on the dole when they deride "welfare queens."⁵⁵ However, depending on the context in which this phrase is used and considering the historical significance of attaching welfare to race, it does not take a leap of logic to see this term for what it is—a colorblind slur referring to Black, lazy women who drain the tax rolls by having too many babies.⁵⁶

Edsall and Edsall give a number of examples of what I refer to as colorblind slurs. For example, the authors opined that the word "group," in Republican rhetoric, became "claimants for special preference," and "taxes" had come to be seen as "the resource financing a liberal federal judiciary, granting expanded rights to criminal defendants, to convicted felons, and, in education and employment, to 'less qualified' minorities."⁵⁷

54. *Id.* at 214.

55. This term came into popular use in Ronald Reagan's presidential campaign speeches, in which he told the story of a Cadillac-driving Chicago "welfare queen" who was collecting dozens of welfare checks under different names. See Robert Friedman, *Sorry, We Have No Time For Apologies Series: Popular Culture*, ST. PETERSBURG TIMES, June 26, 1988, at Perspective.

56.

It is the image of the 'lazy welfare mother who breeds children at the expense of the taxpayers in order to increase the amount of her welfare check' that is used to sell programs to the public that will adversely affect women. The message is that black women are immoral, unfeminine, undesirable and that white women should not be like them.

Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 369-70 (1996) (quoting Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 25 (1993)).

57. EDSALL & EDSALL, *supra* note 53, at 214.

In 1988, the word “crime” took on a new, coded meaning, with the emergence of the Willie Horton presidential campaign issue.

C. Willie Horton: The Black Male Symbol of Crime

The 1988 presidential campaign witnessed the exploitation of crime and race in the form of one black man—William (Willie) Horton, a convicted killer who raped a White woman and stabbed her fiancé while on furlough from a Massachusetts prison. The George Bush presidential team utilized the Willie Horton issue, highlighted in speeches and a national ad campaign,⁵⁸ to appeal to Whites’ fears of Black male criminals supposedly coddled by his opponent, Massachusetts Governor Michael Dukakis.⁵⁹ The Bush campaign used Willie Horton to symbolize Michael Dukakis’ “soft on crime” attitude, and symbolized the threat of Black males.⁶⁰ In 1984, the Reagan-Bush campaign exploited race as an election issue.⁶¹

58. See Maralee Schwartz & Lloyd Grove, *TV Ads to Depict Gov. Dukakis as Coddling Criminals*, WASH. POST, Sept. 4, 1988, at A14. The ad, which first ran in September 1992, featured a black screen with the words: “A Crime Quiz.” See Sidney Blumenthal, *Willie Horton & The Making of an Election Issue; How the Furlough Factor Became a Stratagem of the Bush Forces*, WASH. POST, Oct. 28, 1988, at D1. Then the announcer asks, “[w]hich candidate for president gave weekend passes to first-degree murderers who are not even eligible for parole?” *Id.* “On one side was a picture of a smiling Bush, bathed in a golden sunny glow. On the other was a picture of a disheveled, double-chinned swarthy Dukakis. His picture came forward in answer to the question.” *Id.* Finally, the announcer asks, “Which candidate can you really trust to be tough on crime?” Bush’s picture came forward.” *Id.*

59. See D. Marvin Jones, “*We’re All Stuck Here for a While*”: Law and the Social Construction of the Black Male, 24 J. CONTEMP. L. 35, 58 n.54 (1998); see also Schwartz & Grove, *supra* note 58, at A14 (quoting Floyd Brown, a political consultant for Americans for Bush: “When we’re through, people are going to think that Willie Horton is Michael Dukakis’ nephew”). For the record, it was Al Gore, a rival of Dukakis for the 1988 Democratic nomination, who first exploited the Willie Horton issue by asking Dukakis during a debate about “weekend passes for convicted criminals.” Blumenthal, *supra* note 58, at D1.

60. Jesse Jackson said the Willie Horton issue was “designed to create the most horrible psychosexual fears . . .” *Id.* Bush campaign manager, Lee Atwater, of course claimed “race . . . has nothing to do with this issue. I would condemn in any way, shape or form the issue used in this way.” *Id.*

61. Atwater once wrote that the Reagan-Bush teams openly courted the “hard-core segregationists” of the South in 1984 in an attempt to win the votes of Southern “populists.” EDSALL & EDSALL, *supra* note 53, at 221.

As for race, it was hardly an issue—it went without saying that the populists’ chosen leaders were hard-core segregationists . . . When social and cultural issues died down, the populists were left with no compelling reason to vote Republican . . . When Republicans are successful in getting certain social issues to the forefront, the populist vote is ours.

Now, in 1988, Willie Horton was the perfect symbol to appeal to Whites' fear of the Black male criminal. Edsall and Edsall quote Bush campaign manager Lee Atwater:

I can't wait until this Dukakis fellow gets down here [the South] There is a story about a fellow named Willie Horton who for all I know may end up to be Dukakis' running mate. Dukakis is making Hamlet look like the rock of Gibraltar in the way he's acted on [selecting a running mate.] The guy [Dukakis] was on TV about a month ago and he said you'll never see me standing in the driveway of my house talking to these [prospective vice presidential running mates]. And guess what, on Monday, I saw in the driveway of his house? Jesse Jackson. So anyway, maybe he'll put this Willie Horton guy on the ticket after all is said and done.⁶²

The message Atwater conveyed was that Jesse Jackson is the same as Willie Horton, and putting Jesse Jackson on the ticket as vice president was essentially the same as putting Willie Horton himself on the ticket.⁶³ Black male equals criminal,⁶⁴ and this association between crime and

Id. (quoting *The South In 1984*, Atwater's unpublished analysis of Southern politics for the Reagan-Bush campaign).

62. *Id.* at 223.

63. "[T]he myth of the black male as archetypal criminal, as Willie Horton, is compressed rhetorically so tightly with observations that they merge into one." Jones, *supra* note 59, at 82.

64. "Crime became a shorthand signal, to crucial numbers of white voters, of broader issues of social disorder, tapping powerful ideas about authority, status, morality, self-control, and race." EDSALL & EDSALL, *supra* note 53, at 224. For another expression of this sentiment, see Richard Cohen, *Campaign Codes for Race*, WASH. POST, Oct. 18, 1988, at A25, noting:

Alexis de Tocqueville, should he peer down at the 1988 campaign, would not be surprised at some of the issues raised. More than a century ago, the French traveler in the United States wrote that race would remain an abiding American issue. The only thing that might confuse Tocqueville is the absence of the word itself. Once he learned the code words, though, he would feel very much at home.

The first of these is "crime." Of course, whites commit crime, but the crime most white Americans fear is black crime. In that regard, George Bush has been given the gift of Willie Horton, the furloughed Massachusetts killer who escaped and raped a woman in Maryland. Furloughs are a routine fixture of the American penal system, but it was Dukakis' bad luck that his wayward prisoner happened to be black. Had Horton been white, it is safe to say the furlough issue would have lost some of its punch.

African American and Latino males⁶⁵ is an important subtext underlying modern political discourse about crime.⁶⁶ The words “criminal,” “drug pusher,” and “drug dealer” become colorblind slurs or code words for young African American or Latino males who threaten the sanctity of White neighborhoods.⁶⁷ The racial meaning behind those words becomes more apparent when used in conjunction with depictions of these “criminals,” “drug dealers,” and “drug pushers” working the “dark, stinking alleys” and “garbage-strewn streets” of the “inner city” of black and brown America,⁶⁸ as was the case during the crack cocaine debates.⁶⁹ These code words are especially effective in exploiting Whites’ fears of young, Black males.

D. *White Fear, A Coded Call to Arms*

In the 1980s, Whites’ fear of crime, largely associated with Black men, resulted in “white flight” from the inner cities to the suburbs.⁷⁰ Commented Democratic Representative Richard Gephardt of Missouri:

When you get underneath all the layers of code words, the emerging definition of where working class Democrats fit is they talk about themselves as ‘the people who work.’ People who don’t work, that describes [their perception] of the black-white problem in our society right now Crime

65. While Black males have been most prominently, and unabashedly, exploited as symbols of crime, young male Latinos similarly face such stereotyping, especially in the context of drugs, which are heavily imported from Latin American countries.

66. See EDSALL & EDSALL, *supra* note 53, at 224.

67. See *id.* See also *infra* notes 246–51 (discussing racist depictions of African Americans as criminals).

68. Alexander Polikoff, *Comments on Alex M. Johnson, Jr.’s Destabilizing Race*, 143 U. PA. L. REV. 1685, 1691 (1995) (discussing the racism implicit in the term “inner city,” based upon the observation that, “the American ghetto is predominantly a black ghetto”).

69. See *Heflin Debate*, *supra* note 3, at S26,458.

70. See Polikoff, *supra* note 68, at 1692 (“[I]n 1990, about 11 million people lived in all metropolitan area ghetto tracts, nearly 6 million of whom were blacks (a 36% increase, by the way, since 1980).”).

Johnson posits that “white flight” is a modern form of segregation:

Although causally linked to racism, the outward flight of whites to suburbia—leaving as one songwriter described, a ‘chocolate city’ surrounded by ‘vanilla suburbs’—is clearly a factor in maintaining residential segregation patterns in an era in which overt racism has diminished and lost flavor.

Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1611 (1995).

and drugs, and a sense of the mobility of crime right now, that it doesn't stay in that neighborhood over there, that it's a real threat to me and my children, that's added a real dimension to black-white relations.⁷¹

Thus, as Representative Gephardt noted, for Whites, crime is a threat only when it spreads from the Black and brown neighborhoods to White ones. This theme was rampant in the crack cocaine debates.⁷² The media and members of Congress repeatedly declared to the American public that crack cocaine was seeping from the inner city into the suburbs and rural America.⁷³ The politicians during the crack cocaine debates did not need to overtly appeal to Whites' racist fears of Black males to get their attention; by the 1980s, many Whites believed that Black men had the power to destroy the sanctity of White neighborhoods and suburbs.⁷⁴ Sociologists suggest white fear is the result of an increasing disconnection between the problems of the inner city and life in the suburbs, and an increasing disconnection along racial lines.⁷⁵ This disconnection made it

71. EDSALL & EDSALL, *supra* note 53, at 226.

72. See, e.g., *infra* notes 225–44 and accompanying text (discussing how members of Congress used coded language to send the message that the White community needs to be protected from Black and Latino drug pushers.).

73. See *Heflin Debate*, *supra* note 3, at S26,458 (Senator Heflin notes that “this war was once fought only in urban America, but increasingly, there are daily skirmishes on country roads, on remote rural routes, and in tree-lined streets of small towns and villages.”).

74. For example, Edsall and Edsall spoke with Peggy Angelair, the president of People Against Crime, which was formed in 1988 by White residents of Chicago's Garfield Ridge neighborhood angered by reports of three rapes and increasing incidents of robbery and vandalism. “I guess our federal government decided it was going to take the minorities and put them with us, and our goodness would rub off on them. But unfortunately, it's turned around the other way. And we have to stay together on this issue.” EDSALL & EDSALL, *supra* note 53, at 237.

75. Edsall and Edsall write:

It has been in the nature of the contact of whites with the black underclass that this contact has routinely violated every standard necessary for the breakdown of racial stereotypes. Most white contact with the underclass is either through personal experience of crime and urban squalor, . . . or through the almost daily reports about crime, drugs, and violence on local and national television news and in newspapers It is precisely the degree to which such media coverage not only amplifies bad news, but in fact accurately reflects a situation that exists across the country, that these reports create such a damaging impact: ‘The stereotype is not a stereotype any more. The behavior pattern [in the underclass] is not stereotypical in the pejorative sense, but it is a statement of fact,’ says Kenneth S. Tollett, a black professor of education at Howard University's Graduate School of Arts and Sciences.

all the easier for Whites to believe the incendiary rhetoric of their White legislators, who got their information from the panic-stricken media, which resorted to shameless hyperbole in describing the situation.⁷⁶ This disconnection also made it easier for members of Congress to appeal to Whites' fears in code, which was by this time a highly developed method of political discourse. Yet, in the 1990s, coded racism became even more veiled and amorphous in the debate over "family values."

E. The 1990s—Race as a "Value"

In 1992, "family values" became a central theme of the presidential race between Bill Clinton and George Bush, with Vice President Dan Quayle criticizing the fictional TV character "Murphy Brown" for having a child out of wedlock.⁷⁷ But when you are talking about something as nebulous as a "family value," the door gets flung wide open for race-baiters to appeal to white America's sense of decline in white power.⁷⁸ In 1992, in through that door walked Pat Buchanan, the conservative politician and former press aide to Ronald Reagan. There was some question as to whether Buchanan's views on gays, blacks, Jews and immigrants were comparable to those of former Ku Klux Klan leader David Duke, whose positions on certain foreign and domestic policies were praised by Buchanan during his run for the Republican nomination.⁷⁹ During his campaign, Buchanan said he was committed to "equal justice under law"

Id. at 236.

76. See, e.g., *infra* notes 174–75 (discussing media portrayals of the crack "epidemic").

77. See John E. Yang & Ann Devroy, *Quayle: "Hollywood Doesn't Get It," Administration Struggles to Explain Attack on TV's Murphy Brown*, WASH. POST, May 21, 1992, at A1.

78. See, e.g., Perry, *supra* note 56, at 352. Perry writes:

Racism is implicated in a number of ways in the family values debate. Although the phrase 'family values' is often used to decry an alleged loss of values in society generally, the phrase also has a lurking racial subtext. The term 'family values,' linked as it often is with welfare and single motherhood, easily becomes a code word for race just as 'welfare dependency,' 'inner city,' and the 'urban underclass,' have.

Id. See also Thomas B. Edsall, *The "Values" Debate: Us vs. Them? At Issue is Which Party Best Represents Heavily White Middle Class*, WASH. POST, July 31, 1992, at A8 (discussing the not-very-subtle struggle between Bill Clinton and George Bush over who better represents middle-class—and heavily White—America that lies beneath the debate over what political strategists call 'values' questions).

79. See E.J. Dionne Jr., *Is Buchanan Courting Bias? Equivocations on Duke Pose Questions About Attitude*, WASH. POST, Feb. 29, 1992, at A1.

and opposed to “reverse discrimination,” terms that appealed to Whites’ sense that their rights were being eroded by minority encroachment.⁸⁰

For example, in Ellijay, Georgia, Buchanan told an almost all-White crowd of about one thousand that his home town, Washington, D.C., was a nice southern town “before all that crowd came rolling in and took over.”⁸¹ The *Washington Post* reported that he never specified who “all that crowd” was, but that he had given an interview about his wife walking down Connecticut Avenue, “and these guys were sitting on the corner playing bongo drums. I mean, this is the town I grew up in.”⁸² This is the same fighter for “equal justice” who remarked on *This Week with David Brinkley* that the United States should favor White Europeans over Zulus and other ethnic groups because Europeans are easier to assimilate.⁸³ Still, Buchanan insisted he was not a racist, even though he stood behind ex-Ku Klux Klan Grand Wizard and Louisiana politician David Duke, writing in an October 1991 newspaper column: “The national press calls these positions [on welfare, affirmative action and foreign aid] ‘code words’ for racism, but in hard times in Louisiana, Duke’s message comes across as middle class, meritocratic, populist and nationalist.”⁸⁴

George Bush ultimately won his party’s nomination, but he allowed Buchanan to be his attack dog to court members of the Right. In his incendiary speech at the Republican National Convention in August 1992, Pat Buchanan declared that there was a “cultural war” in America being waged by supporters of affirmative action, gay rights, legalized abortion, immigration, and feminism.⁸⁵ He ended the speech with an anecdote about the Los Angeles riots: Buchanan described a group from the Eighteenth Cavalry National Guard sweeping into the city, “M-16s at the ready,” representing “force, rooted in justice, backed by moral courage.”⁸⁶ He told the Convention of the “19-year-old boys ready to lay down their lives to stop a mob from molesting old people they did not

80. *Id.*

81. *Id.*

82. *Id.*

83. *See id.*

84. *Id.* *See also* Thomas Edsall, *Republicans Launch Attack on Buchanan; WWII Comments Draw Heavy Fire*, WASH. POST, Sept. 24, 1999, at A1 (detailing various sexist, anti-Semitic and racist comments made by Buchanan in his career as a journalist and politician). Buchanan once wrote, “David Duke is busy stealing from me. I have a mind to go down there and sue that dude for intellectual property theft.” *Id.* (quoting the *Manchester (N.H.) Union Leader*, Dec. 15, 1991).

85. *See* E.J. Dionne Jr., *Buchanan Heaps Scorn on Democrats*, WASH. POST, Aug. 18, 1992, at A1.

86. *Id.*

even know.”⁸⁷ In an emotional call to arms, he concluded: “As these boys took back the streets of Los Angeles, block by block, so we must take back our cities, and take back our culture, and take back our country.”⁸⁸ In other words, Pat Buchanan played on Whites’ fears of non-European immigration, inner-city crime, and cultural diversity. Buchanan fueled those fears by glorifying an era when Whites reigned supreme and non-White, non-Christian culture was considered depraved.⁸⁹

Not to lose the entire “value” debate to the Republicans, Bill Clinton exploited an obscure remark by a Black female rap artist to demonstrate to Whites his willingness to stand up against African American interests.⁹⁰ In a speech before the NAACP, attended by the Reverend Jesse Jackson, then-Governor Clinton chastised the NAACP for giving the rap artist Sister Souljah a forum for her views on race.⁹¹ Clinton criti-

87. *Id.*

88. *Id.* It is interesting to note, however, that the manager of a Los Angeles retirement home told the *Associated Press* the next day that 70 elderly residents were forced to defend themselves after their initial calls to the Eighteenth Cavalry went unheeded. See Maralee Schwartz et al., *Buchanan’s Riot Story of Bravery Disputed*, WASH. POST, Aug. 19, 1992, at A1.

89. Pat Buchanan bluntly states in a 1983 newspaper column: “our civilization [is] superior to the others. And our culture is superior to other cultures . . . because our religion is Christianity, and that is the truth that makes men free.” Edsall, *supra* note 84. Pat Buchanan continues to draw fire for his remarks in his run for the Reform Party presidential nomination, arguing in his latest book, *A Republic, Not an Empire*, that Adolf Hitler was not a threat to American interests. See *id.* Comments like this take on added meaning, considering Buchanan’s past views on Hitler. For example, Buchanan once told members of the Christian Coalition:

Though Hitler was indeed racist and anti-Semitic to the core . . . he was also an individual of great courage . . . His genius was an intuitive sense of the mushiness, the character flaws, the weakness masquerading as morality, that was in the hearts of the statesman who stood in his path.

Id.

90. “[S]ome suggest that when Bill Clinton chided rapper Sister Souljah for her violent lyrics during his presidential campaign, his ulterior motive was to distance himself from African Americans.” Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 50 n.193 (1994) (quoting Toni Morrison, *On the Backs of Blacks*, TIME, Fall 1993, at 57 (stating that “it is a mistake to think that Bush’s Willie Horton or Clinton’s Sister Souljah was anything but a candidate’s obligatory response to the demands of a contentious electorate unable to understand itself in terms other than race”)). See also Dorothy Gilliam, *Clinton’s Low Blow to Black Aspirations*, WASH. POST, June 17, 1992, at C1 (“What made this exploitation so insulting, maddening even, is the belief of many blacks that Clinton would not have treated a white constituency in so cavalier a manner. He seemed like yet another white man slapping down an ‘uppity’ black man.”).

91. See Thomas B. Edsall, *Clinton Stuns Rainbow Coalition; Candidate Criticizes Rap Singer’s Message*, WASH. POST, June 14, 1992, at A1.

cized Souljah for telling *The Washington Post*, “[i]f black people kill black people every day, why not have a week and kill white people?”⁹² Clinton told the shocked NAACP audience: “[i]f you took the words ‘white’ and ‘black’ and reversed them, you might think David Duke was giving that speech.”⁹³ Jackson, meanwhile, said the speech was “purely to appeal to conservative whites by containing [him] and isolating [him].”⁹⁴ By the close of the century, it has become even more apparent that racism is almost always expressed in oblique code.

F. *The Jig is Up: White Supremacists Admit To Coding*

In 1998, Representative Bob Barr, the Republican from Georgia who called for President Clinton’s impeachment before anyone had ever heard of Monica Lewinsky, was “outed” as a White supremacist by Harvard Law Professor Alan Dershowitz, who took offense to Barr’s reference to “real Americans” in hearings on Clinton’s impeachment.⁹⁵ Feeling the remark was anti-Semitic, Dershowitz retorted that Barr was a supporter of a White supremacist group, the Council of Conservative Citizens (“CCC”).⁹⁶ Soon thereafter, it was revealed that Senate Majority Leader Trent Lott, Republican of Mississippi, also was a member and had spoken to members of the organization.⁹⁷ Lott and Barr attempted to distance themselves from the organization, with Lott initially claiming he had “no first hand knowledge of the group’s views.”⁹⁸ However, Arnie Watson, Lott’s “favorite uncle” and CCC board member, told the *New York Times* that Lott was an “honorary member.”⁹⁹ Confronted with growing evidence that he knew of the group’s views, including pictures showing him posing with the group’s leaders, Lott then declared that the group’s use of his name to publicize its views was “wrong.”¹⁰⁰ An examination of the positions of this group, which also had close ties to Mississippi Governor Kirk Fordice and South Carolina Senator Jesse

92. *Id.*

93. *Id.*

94. Dan Balz, *Clinton Says Jackson is Rewriting History; Candidate Reacts to Remarks in Controversy Concerning Rap Singer Sister Souljah*, WASH. POST, June 20, 1992, at A11.

95. See John Kifner, *Lott, and Shadow of a Pro-White Group*, N.Y. TIMES, Jan. 14, 1999, at A9.

96. *See id.*

97. *See id.*

98. *Id.*

99. *Id.*

100. *Id.*

Helms,¹⁰¹ is valuable in understanding how modern White supremacists have transformed their racist rhetoric.

The CCC has a range of causes, “including opposition to unfettered immigration and school busing for desegregation” and to interracial marriage, as well as the promotion of “Southern cultural issues.”¹⁰² The group was formed using the membership lists of the old White Citizens’ Councils, described by a Southern Poverty Law Center spokesperson as “the white-collar Ku Klux Klan” that, among other efforts, raised money for the legal defense of Byron De La Beckwith, convicted in 1994 of the 1963 murder of civil rights leader Medgar Evers.¹⁰³ The group’s newspaper, the *Citizens Informer*, is loaded with racist articles, including one by Robert B. Patterson, a founder of a White Citizens’ Council, which opined that “no one can question the importance of miscegenation [A]ny effort to destroy the [White] race by a mixture of black blood is an effort to destroy Western civilization.”¹⁰⁴ The CCC is the same group to which Lott once spoke, telling them they were a “needed” group to “help protect our flag, Constitution and other symbols of freedom” from “dark forces.”¹⁰⁵ Of course, Lott would deny vehemently that these were code words for racism. Luckily, Mr. Lott’s old pal Gordon Lee Baum, the chief executive officer of the CCC, gave an interview to *The Washington Post* in which he translated the group’s tenets.

In the interview with the *Post* shortly after this controversy surfaced, Baum explicated his views on inter-racial marriage, immigration, crime and a loss of “white culture.”¹⁰⁶ When asked about Patterson’s condemnation of miscegenation, Baum, the neo-racist, offered the segregationist stalwart some linguistic help: “I tried to explain to Bob that miscegenation is 1950s talk, it just doesn’t work in our new context. He felt real bad, too. He’s an old war horse.”¹⁰⁷ Instead, Baum explained how a proper, modern racist should speak, prompting the reporter to write that Baum “talk[ed] in a peculiarly constipated code.”¹⁰⁸ Citing the success of

101. *See id.*

102. *Id.*

103. *Id.*

104. Michael Powell, *White Wash—Suddenly, Gordon Baum, Small-Time Race Baiter, Is Big-Time News. Let’s Hear Him Explain How Reasonable He Is*, WASH. POST, Jan. 17, 1999, at F1.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* For example, Baum pointed to another column written by a CCC member as a fine example of the newspeak of race mixing. This author wrote:

Take 10 bottles of milk to represent all humans on earth. Nine of them will be chocolate and only one white. Now mix all those bottles together

George Wallace's refurbished populist ideology, Baum explained how to appeal to racists in acceptable language: "[y]ou've got to talk crime, talk quotas, talk immigration. You've got to put it down where the chickens can get at it."¹⁰⁹ Baum told the *Post* he is not a racist, but instead merely concerned with a breadth of conservative issues.¹¹⁰

The most frustrating feature of code words is the difficulty some Whites have in recognizing them. Law Professors Richard Delgado and Jean Stephanic explain that people of color discern meanings in such words that Whites generally miss:

Racism's victims become sensitized to its subtle nuances and code-words—the body language, averted gazes, exasperated looks, terms such as 'you people,' 'innocent whites,' 'highly educated black,' 'articulate' and so on that, whether intended or not, convey racially charged meanings. Like an Aleut accustomed to reading the sky for signs of snow or a small household pet skilled at recognizing a clumsy football, racism's perpetual victims are alert to the various guises racism and racial signaling take. Sympathizers of majority hue often must labor to acquire the knowledge that for minorities comes all too easily.¹¹¹

Even Randall Kennedy, a proponent of the "color blind" approach to law, recognizes that Whites find it difficult to detect subtle forms of racism when he refers to "the chameleonlike ability of prejudice to adapt unobtrusively to new surroundings and, further, to hide itself even from those firmly within its grips."¹¹² Thus, it took America's first Justice of color, Thurgood Marshall, to first recognize "coded" racism in a legal opinion.

and you have gotten rid of that troublesome bottle of white milk. There too is the way to get rid of the world of whites . . . genocide via the bedroom chamber.

Id. Baum, who admitted that in the past the group had drawn criticism for being "too dang candid," said of this article: "[n]ow I can live with that." *Id.*

109. *Id.*

110. See *id.* Baum's denial that he is a racist adds credence to the view that racism will always be denied and explained away. After all, if a hard-core White supremacist claims he is not a racist, then who will?

111. Richard Delgado & Jean Stephanic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Social Ills?*, 77 CORNELL L. REV. 1258, 1283 (1992).

112. Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1419 (1988).

III. "DE-CODING" GETS RECOGNIZED IN LAW

A. *Memphis v. Greene*: Justice Marshall First De-Codes Racism

Justice Thurgood Marshall was the first Supreme Court Justice to "de-code" race-neutral comments to reveal their true racist intent in his dissent in *Memphis v. Greene*.¹¹³ In *Greene*, the City of Memphis decided to close the north end of a street that connected a White neighborhood with a Black one in order to reduce the flow of "undesirable traffic" in order to promote the safety of children.¹¹⁴ It also sold a twenty-five foot wide strip of the street to two adjacent White property owners, declaring in a city council resolution that the strip was "closed to the public."¹¹⁵ Closing the thoroughfare impeded Black citizens' access to a public park and zoo that had been segregated until 1963, and both inconvenienced Black home owners and reduced their property values.¹¹⁶ The majority found that these comments were not evidence of intentional discrimination because they were race neutral.¹¹⁷ The court declared, "[t]he inconvenience of the drivers is a function of where they regularly drive—not a function of their race."¹¹⁸ Justice Marshall, in a dissent joined by Justices Brennan and Blackmun, characterized the action differently:

The case is easier than the majority makes it appear. Petitioner city of Memphis, acting at the behest of white property owners, has closed the main thoroughfare between an all-white enclave and a predominantly Negro area of the city. The stated explanation for the closing is of a sort all too familiar: 'protecting the safety and tranquility of a residential neighborhood' by preventing 'undesirable traffic' from entering it. Too often in our Nation's history, statements such as these have been little more than code phrases for racial discrimination, but apparently not, after today's decision, forbidden discrimination.¹¹⁹

Significantly, Justice Marshall did not examine the city's stated aims in a vacuum. He instead looked at those comments in the context of "our

113. 451 U.S. at 135 (1981) (Marshall, J., dissenting).

114. See *id.* at 102–05; see also *id.* at 136 (Marshall, J., dissenting).

115. *Id.* at 112–13 nn.19, 21.

116. See *id.* at 103, 116 n.27.

117. See *id.* at 128.

118. *Id.*

119. *Id.* at 135 (Marshall, J., dissenting).

Nation's history."¹²⁰ Justice Marshall found "highly relevant" a contemporary statement that the action was taken to keep out "undesirable traffic."¹²¹ Because the majority found that this term did not have any particular racial significance, Justice Marshall "de-coded" the comment:

The term 'undesirable traffic' first entered this litigation through the trial testimony of Sarah Terry. Terry, a West Drive resident who opposed the closing, testified that she was urged to support the barrier by an individual who explained to her that 'the traffic on the street was undesirable traffic.' The majority apparently reads the term 'undesirable' as referring to the prospect of having any traffic at all on West Drive. But the *common-sense understanding* of Terry's testimony must be that the word 'undesirable' was meant to describe the traffic that was actually using the street, as opposed to any traffic that might use it. Of course, the traffic that was both actually using the street and would be affected by the barrier was predominantly Negro.¹²²

In other words, while the majority strained to find a race-neutral justification for the term "undesirable traffic," Justice Marshall used "common sense," in the context of "our Nation's history,"¹²³ and called the term what it was—a colorblind slur referring to the undesirability of allowing Blacks into a White neighborhood.¹²⁴ In fact, Justice Marshall's

120. *Id.* at 136. Justice Marshall placed the race-neutral comments in their proper historical context. This approach is supported by Court pronouncements that the evidentiary inquiry involving discriminatory intent must necessarily vary depending on the factual context. *See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977) (discussing racially discriminatory practices in property rezoning plans); *see also Washington v. Davis*, 426 U.S. 229, 253 (1976) (discussing the absence of discriminatory intent with respect to a police department's written personnel tests).

121. *Greene*, 451 U.S. at 141–42 (Marshall, J., dissenting).

122. *Id.* at 141–42 (citations omitted) (emphasis added).

123. *Cf. supra* note 16 (writing for a unanimous court, Scalia stated that "common sense, and an appropriate amount of sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive").

124. The majority opinion was written by Justice Stevens, who today is considered one of the more liberal members of the Court. Oftentimes people of color will be much more attentive to racist code words, while even liberal Whites choose not to detect them. Richard Delgado and Jean Stefanic explain:

Choosing to believe in a race-free world reduces guilt and the need for corrective action. Racism is often a matter of interpretation; when an interpretation renders one uncomfortable and the other does not, which will a person often make?

use of “de-coding” is consistent with decisions subsequent to *Greene*, where the Court in effect used “de-coding” when faced with challenges from White plaintiffs.¹²⁵ This stands in contrast to the Court’s blind ignorance to blatant discrimination against African Americans in *Greene*, where the city of Memphis used race-neutral diction to engage in a practice with a disparate impact on minorities.¹²⁶

B. “Code Word” Analysis Validated in the Employment Context

While the Supreme Court has not utilized Justice Marshall’s “de-coding” as a tool to find discriminatory intent against people of color, the Third Circuit has recognized the use of racist “code words” used in the employment discrimination context. In its decision in *Aman v. Cort Furniture Rental Corporation*,¹²⁷ the Third Circuit held that the use of racist “code words” can be proof of discriminatory intent.¹²⁸ *Aman*, an em-

Delgado & Stefanic, *supra* note 111, at 1283 (citing Darryl Brown, *Racism and Relations in the University*, 76 VA. L. REV. 295 (1990)).

125. See David Kairys, *Unexplainable on Grounds Other than Race*, 45 AM. U. L. REV. 729, 731–36 (1996). For example, in an affirmative action case, the Court declared its duty to “smoke out” racism. *Id.* at 734 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). In a voting rights decision, the Court called the shape of a majority-Black district “bizarre” and “unexplainable on grounds other than race.” *Id.* at 736 (citing *Shaw v. Reno*, 509 U.S. 630, 644 (1993)).

Conversely, the Court set the bar extremely high for the African Americans who complained they were being selectively prosecuted for federal crack offenses because of their race. See *United States v. Armstrong*, 517 U.S. 456 (1996), discussed *supra* note 24 and accompanying text. Unlike in *Shaw*, the Court refused to infer racism from cold statistics, and even “reserve[d] the question whether a defendant must satisfy the similarly situated requirement in a case involving direct admissions by prosecutors of discriminatory purpose.” *Id.* at 469 n.3. Justice Stevens, in a dissenting opinion, chided the Court for turning a blind eye to these startling statistics: “[s]tatistics are not, of course, the whole answer, but nothing is as emphatic as zero.” *Id.* at 482 (Stevens, J., dissenting) (quoting *United States v. Hinds County Sch. Bd.*, 417 F.2d 852, 858 (5th Cir. 1969) (per curiam)).

126. Temple University Law Professor David Kairys criticized the majority’s approach in *Greene*:

Unless there is a written confession of racist motivation, racist officials and institutions are allowed by this analysis to adopt measures that harm minorities without running into any legal obstacles. This rule not only undercuts the constitutional prohibition of discrimination—which, contrary to public understanding, was faithfully enforced for, at most, only two decades—but has made purposeful discrimination quite easy.

David Kairys, *Unexplainable on Grounds Other than Race*, 45 AM. U. L. REV. 729, 734 (1996).

127. 85 F.3d 1074 (3d Cir. 1996).

128. *Id.* at 1083.

ployee, and Johnson, her immediate supervisor, both of whom are African Americans, brought a suit against the company claiming co-workers and superiors created a racially hostile work environment.¹²⁹ Some of the remarks the plaintiffs complained of included references to Aman and Johnson as “another one,” “one of them,” “that one in there,” and “all of you.”¹³⁰ The court found these were code words for racism, especially when viewed in conjunction with other evidence that the company fostered a racially hostile work environment.¹³¹ The key to its finding of purposeful discrimination was the use of “code words”: “[t]he use of ‘code words’ can, under circumstances such as we encounter here, violate Title VII. Indeed, a reasonable jury could conclude that the intent to discriminate is implicit in these comments.”¹³² The court made this ruling by analogizing to ostensibly neutral comments found to be evidence of sex and age discrimination.¹³³ The court also emphasized: “[t]here are no talismanic expressions which must be invoked as a condition-precedent to the application of laws designed to protect against discrimination. The

129. See *id.* at 1077. The plaintiffs, Aman and Johnson, sued under Title VII of the Civil Rights Act of 1964 and the New Jersey Law Against Discrimination. See *id.* at 1080. The plaintiffs alleged that the defendant created a hostile work environment, paid Black employees less than White employees, constructively discharged Aman, and fired Johnson in retaliation for protesting discriminatory practices. See *id.*

130. *Id.* at 1082.

131. See *id.* at 1083. Other Black delivery employees were also harassed on a daily basis by White employees who warned them, “don’t touch anything” in customers’ homes and “don’t steal.” *Id.* at 1078. In addition, Johnson was accused of granting Aman favoritism, while three White co-workers violated company policy by bypassing Aman, the credit manager, to extend credit to customers. See *id.* The court found three instances “particularly troubling.” *Id.* at 1082. First, in a discussion with Johnson, her White supervisor stated that if problems were not resolved, “we’re going to have to come up there and get rid of all of you.” *Id.* When asked whom he meant by “all of you,” the supervisor refused to elaborate. See *id.* Second, a White general manager, in anger, told Aman that he knew all about her and two other employees, yet the only factor the three shared in common was their race. See *id.* Finally, in a meeting attended by all administrative, sales, and warehouse employees, that same general manager said that “‘the blacks are against the whites,’ and that if anyone did not like it at Cort Furniture, they could leave.” *Id.*

132. *Id.* at 1083.

133. The court noted that racism, like sexism, can be coded, and recognized that the intent to discriminate on the basis of sex is implicit in certain sexual propositions, innuendo, and sexually derogatory language, “and thus should be recognized as a matter of course.” *Id.* at 1083 (citing *Andrews v. City of Phila.*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990)). In addition, the Court noted that statements that employees were “‘sharp young people’” or not “‘forward enough thinker[s]’” could reasonably be interpreted as evidence of bias under the Age Discrimination in Employment Act (ADEA). *Id.* at 1083 (citing *Futrell v. J.I. Case*, 38 F.3d 342, 347 (7th Cir. 1994)).

words themselves are only relevant for what they reveal—the intent of the speaker.”¹³⁴

Finally, the *Aman* court urged other courts to be vigilant in seeking out latent racism in a modern world where discriminators have learned to code their language:

Anti-discrimination laws and lawsuits have ‘educated’ would-be violators such that extreme manifestations of discrimination are thankfully rare [However], while discriminatory conduct persists, violators have learned not to leave the proverbial ‘smoking gun’ behind. As one court has recognized, ‘defendants of even minimal sophistication will neither admit discriminatory animus or [sic] leave a paper trail demonstrating it.’¹³⁵

Thus federal courts have recognized that employers often use “code words,” rather than overt language, to comment on an employee’s age,¹³⁶ race,¹³⁷ and sex.¹³⁸ The decisions of these courts are consistent with other federal courts that have had no difficulty interpreting neutral language as code words for “drug talk” in narcotics transactions.¹³⁹ This article emphasizes that, as with employment discrimination and “drug talk,” federal

134. *Id.*

135. *Id.* at 1081–1082 (citing *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987)).

136. See *Futrell*, 38 F.3d at 347. *But see* *Krieg v. Kimball International Inc.*, 33 F.3d 56 (7th Cir. 1994) (finding, inter alia, that a comment that a plaintiff lacked a “sense of urgency” was facially neutral and thus was not evidence of discrimination, but that comments relating to “old salesmen” and “bright young people” were evidence of discrimination).

137. See *Aman*, 85 F.3d at 1083.

138. See *Brown v. City of Aurora*, 942 F. Supp. 375, 380 (N.D. Ill. 1996) (explaining that references to a female employee as “Missy, Missy,” as well as comments about her ponytail, her petite size and that she “should be at home taking care of her daughter” could all be construed as sexist language). The *Brown* court found that “discrimination is much more subtle these days and is frequently cloaked with the appearance of propriety.” *Id.* at 380 n.8 (citing *Aman*, 85 F.3d at 1082).

139. See *United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990) (finding that references to “tar” and “show,” as well as to “red” and “white,” meant heroin, and that “one” and “two” signified the quantity of heroin being discussed). The court noted that drug users are increasingly wary of having their drug conversations intercepted by police, and have thus found it necessary to “code” their drug talk: “Conversations regarding drug transactions are rarely clear. A fact-finder must always draw inferences from veiled allusions and code words.” *Id.*

courts should use “de-coding” in equal protection analysis when legislators use coded racist language to pass discriminatory legislation.¹⁴⁰

IV. “DE-CODING” EQUAL PROTECTION VIOLATIONS

A. *Searching For Intent: “De-Coding” a Good Fit with Factors for Determining Equal Protection Violations*

To challenge a law based on the equal protection clause of the Fourteenth Amendment, the “invidious quality” of governmental action claimed to be racially discriminatory “must be ultimately traced to a racially discriminatory purpose.”¹⁴¹ Absent direct evidence of an intent to discriminate, a prima facie case can be made “by showing [that] the totality of the relevant facts gives rise to an inference of discriminatory purpose.”¹⁴² This requires the reviewing court to conduct a “sensitive inquiry into such circumstantial evidence of intent as may be available.”¹⁴³ Such a motive can be found by circumstantial evidence by using seven non-exhaustive factors. Those “subjects of inquiry” are: adverse racial impact of the official action; historical background of the decisions; specific sequence of events leading up to the challenged action; departures from normal procedure sequence; substantive departure from routine decisions; the inevitability or foreseeability of consequence of the law;¹⁴⁴ and contemporaneous statements made by the decisionmakers.¹⁴⁵ The first factor focuses on the disparate impact of the law, and the remaining factors focus more on the intent behind the enactment. While district courts have been willing to lean heavily on the disparate impact of the crack versus cocaine law, no appellate court has found that Congress acted with a racist motive.¹⁴⁶ This article attempts to use “de-coding” as a tool to

140. Drug dealers understand that any conversations they have over the phone may be used against them in court, and they code their language accordingly. Similarly, employers have become savvy enough over the years to understand that any direct references to an employee’s race, sex or age may be seen as bigoted and used against them in a court of law. Indeed, members of Congress, many of whom are lawyers and nearly all of whom have become masters at carefully parsing their language, are even more likely to code their language than street criminals and employers not versed in the nuances of the law.

141. *Washington v. Davis*, 426 U.S. 229, 240 (1976).

142. *Id.* at 242.

143. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

144. *See id.* at 266–68.

145. *See Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 n.25 (1979).

146. *See United States v. Clary*, 34 F.3d 709, 713 (8th Cir. 1994) (reversing the lower court, noting that “impact alone is not determinative absent a pattern as stark as that in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) . . . or *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) . . .”). The appellate court then went on to note that “the district court’s findings

reveal the purpose behind the statute using the factors set forth in *Arlington Heights*, *Davis*, and *Feeney*.

B. The Equal Protection Factors

1. Adverse Racial Impact

In 1993, 88.3% of those convicted in federal court of selling crack were Black, while only 4.1% of those convicted were White.¹⁴⁷ That same year, 27.4% of those convicted of selling powder cocaine were Black, while 32% were White.¹⁴⁸ These percentages are in line with the general disparate impact of drug laws. Although African Americans represent roughly twelve percent of the population and about the same percentage of illegal drug users, they accounted for almost forty percent of those arrested on drug charges in 1988 and forty-two percent in 1991.¹⁴⁹ In 1994, African Americans made up about thirteen percent of drug users, but accounted for thirty-five percent of drug arrests, fifty-five percent of convictions, and seventy-four percent of those sentenced to prison terms for drug offenses.¹⁵⁰

Yet, the argument persists that African Americans cannot be the victims of an adverse racial impact in this area because African Americans disproportionately benefit from removing Black drug dealers from Black neighborhoods.¹⁵¹ However, recent studies refute this myth, and have

fall short of establishing that Congress acted with a discriminatory purpose in enacting the statute, and that Congress selected or reaffirmed a particular course of action 'at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group.'" *Id.* (stating that the appellate court in *Clary*, like all other appellate courts to have reviewed the matter, found that Congress enacted the statute without the requisite racial intent to warrant strict scrutiny).

147. See Gillmer, *supra* note 12, at 555.

148. See *id.*

149. See *id.*

150. See *id.*

151. For an interesting discussion on this issue, see Paul Butler's review of Randall Kennedy's *Race, Crime and the Law*, in Paul Butler, (*Color*) *Blind Faith: The Tragedy of Race, Crime and the Law*, 111 HARV. L. REV. 1270, 1277 (1988) (book review). "[W]hat is racially discriminatory about the crack-powder distinction?" Kennedy wonders. . . . [L]ocking up black crack dealers probably helps, not harms, the black community. The only person burdened by the law is the bad black." *Id.* (citing RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 375-76 (1997)). Butler responds that the Black community is more concerned about eradicating the drug problem than punishing the criminals. "If there is a monkey on my back—but not on my neighbor's back—I seek to remove the monkey." *Id.* at 1278. See also DOROTHY ROBERTS, *KILLING THE BLACK BODY* 185-87 (1997) (criticizing Kennedy's view that harsh criminal penalties against women

found that African Americans do not support “get tough” measures that will adversely impact the African American community.¹⁵² Regardless, showing a racially disparate impact alone is almost always never enough to prove an Equal Protection violation.¹⁵³ Instead, a comprehensive look at the intent behind the Act is necessary.¹⁵⁴

who use crack cocaine while pregnant protects Black children rather than punishes Black mothers). Roberts notes:

Professor Kennedy’s premise that Blacks benefit from greater law enforcement overlooks America’s history of using criminal laws to subjugate Blacks . . . Many critics of national drug policy argue that the ‘War on Drugs’ serves a similar purpose today . . . This is not a neutral offense that just happens to be applied more often to one group rather than the other. This criminal law is virtually ‘for Blacks only.’

Id. at 186–87. While Professor Roberts’ critique was in relation to the prosecution of mothers who use crack, the same argument can be made with regard to the prosecution of crack users and sellers in general. In fact the argument is even stronger with regard to the possession and sale of crack in general because in those cases the “victim” is either the possessor/user of crack himself, or an adult or teenager who chooses to buy crack cocaine on his or her own, as opposed to a child born addicted to crack, who has no choice in the matter.

152. University of Chicago law professor Tracy Meares has attacked this myth:

These arguments are based on a simple proposition: groups that experience higher levels of criminal victimization should be more likely than groups that experience lower levels of victimization to support ‘get tough’ approaches to crime. However, the data presented here are inconsistent with this proposition as applied to African American support for ‘get tough’ approaches to drug-law enforcement.

Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 *BUFF. CRIM. L. REV.* 137, 160 (1997). Meares found that African Americans as a group were much less likely than Whites to support a “get tough” position on drugs in 1987, even though they experienced the highest rates of victimization the previous year. *Id.* Interestingly, Whites and Blacks favored the “anti-law enforcement,” or libertarian, view of drugs at roughly the same level. *See id.* at 158–60. Meares terms this inconstancy a “dual frustration.” *Id.* Meares quotes economist Glenn Loury: “the young black men wreaking havoc in the ghetto are still ‘our youngsters’ in the eyes of many of the decent poor and working-class black people who are sometimes their victims.” *Id.*

153. *See supra* note 146.

154. As discussed previously, to challenge a law based on equal protection grounds, it must be shown that the decision making body selected or reaffirmed a particular course of action “at least in part ‘because of,’ not merely ‘in spite of’ its adverse effects upon an identifiable group.” *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).

2. Historical Background of the Decision

a. Anti-Chinese Sentiment Leads to America's First Anti-Drug Law

Before 1800, opium was available in the United States as an ingredient in many multi-drug prescriptions, and was itself prescribed by physicians against symptoms of gastrointestinal illnesses, such as cholera, food poisoning, and parasites.¹⁵⁵ Almost all opium in America was imported, and it was subject to a small import tax until 1915, when its importation was outlawed (1909 for smoking opium).¹⁵⁶ The first drug prohibition law, a San Francisco ordinance prohibiting public opium dens, was enacted in an atmosphere of hostility to Chinese immigrants.¹⁵⁷ It was enforced, according to the police chief, "to keep [the Chinese] from opening places where whites might resort to smoke."¹⁵⁸ Momentum carried quickly to the passage of federal legislation.¹⁵⁹ The man behind the passage of the Smoking Opium Exclusion Act of 1909¹⁶⁰ was Dr. Hamilton Wright, sometimes called "the father of American narcotic laws."¹⁶¹ Wright warned that the use of opium was spreading from the Chinese to the White and Black populations.¹⁶² Of particular concern to Wright was the effect of the drug on women: "[o]ne of the most unfortunate phases of the habit of smoking opium in this country [was] the large number of women who have become involved and were living as common-law wives or cohabiting with Chinese in the Chinatowns of our various cities."¹⁶³

Anti-Chinese sentiment and media distortions led to the passage of the 1909 Smoking Opium Exclusion Act,¹⁶⁴ which, *inter alia*, outlawed the importation of smoking opium.¹⁶⁵ America's first anti-narcotic law

155. Opium and derivatives such as morphine grew in popularity as physicians realized that it was cheap, compact, and had a standard strength; it became widely used during the Civil War. See DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 1 (3d ed. 1999).

156. See *id.* at 2.

157. See GORDON, *supra* note 2, at 143.

158. *Id.*

159. "Suddenly, in 1909 smoking opium was excluded from the United States. Weighing heavily against it was its symbolic association since mid-century with the Chinese, who were actively persecuted, especially on the West Coast." MUSTO, *supra* note 155, at 3.

160. 21 U.S.C. § 176-85 (1909) (repealed 1970).

161. MUSTO, *supra* note 155, at 31.

162. See *id.* at 43.

163. *Id.*

164. See *United States v. Clary*, 846 F. Supp. 768, 775 (E.D. Mo. 1994).

165. See 21 U.S.C. § 178 (1909) (repealed 1970).

was passed with racist animus, fueled by media distortion and the willingness of lawmakers to scapegoat people of color.¹⁶⁶ Thus began a trend that has been consistently replicated in the initial prohibition of almost every major narcotic, including crack cocaine.

b. Marijuana and the Mexicans

The use of marijuana as an intoxicant can be traced back “to the earliest beginnings of history,” and it was cultivated in Asia and the Near East “from the earliest known times to the present.”¹⁶⁷ In America, it was first grown for its fiber and was an integral part of the colonial and national economy.¹⁶⁸ From the mid-Nineteenth century until the 1950s, marijuana was used for a wide range of medical purposes.¹⁶⁹ Marijuana entered into general use in 1920 but was not a popular drug until the 1960s.¹⁷⁰

The recreational smoking of marijuana was generally limited to Mexican itinerant workers in the Southwest, and by 1910 its use began to spread into southern port cities, especially New Orleans.¹⁷¹ During the 1920s, Mexican immigrants, who used the drug to relax, began to rapidly migrate into California and Louisiana, then up to Colorado and Utah.¹⁷² As with opium, Whites garnered support for the outlaw of marijuana by linking the drug with dangerous pushers of color; this time those pushers were Mexicans.¹⁷³ Media hysteria was noted by the federal Bureau of

166. On March 1, 1879, the *San Francisco Post* opined that “[t]he chinaman has impoverished our country, degraded our free labor, and hoodlumized our children. He is now destroying our young men with opium.” *Clary*, 846 F. Supp. at 775 n.10.

167. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 70 (1992).

168. *See id.*

169. *See id.*

170. *See id.* at 70 (quoting EDWARD M. BRECHER, *LICIT AND ILLICIT DRUGS* (1972)).

171. *See id.*

172. *See* MUSTO, *supra* note 155, at 219.

173. As Mexicans lost their usefulness as cheap laborers during the Great Depression, scapegoating snowballed into nativist sentiments to outlaw the drug. Groups such as the American Coalition, which favored marijuana prohibition, fueled the fire. As one Coalition member, C.M. Goeth of Sacramento, commented:

Marijuana, perhaps now the most insidious of our narcotics, is a direct by-product of unrestricted Mexican immigration. Easily grown, it has been asserted that it has recently been planted between rows in a California penitentiary garden. Mexican peddlers have been caught distributing sample marijuana cigarets [sic] to school children.

Id. at 220.

Narcotics, which urged a more sober approach to the drug problem,¹⁷⁴ a situation that would repeat itself with the hysteria surrounding crack cocaine.¹⁷⁵

African Americans were also easy scapegoats. In 1926, an expose in a series of articles, under banner headlines, linked the drug with Blacks, schoolchildren, and violent crimes committed by drug-crazed marijuana users.¹⁷⁶ The scapegoating of Mexicans and African Americans eventually led to Congress outlawing the sale, possession and use of marijuana in 1937 with the passage of the Marijuana Tax Act,¹⁷⁷ the first federal law to outlaw the drug.¹⁷⁸ By this time, the Bureau of Narcotics switched course, and its commissioner, Harry J. Anslinger, spearheaded a campaign to outlaw the drug by making outrageous claims linking the use of marijuana with violent crime.¹⁷⁹

174. The 1932 Federal Bureau of Narcotics report found:

This abuse of the drug is noted among the Latin American or Spanish-speaking population. The sale of cannabis cigarettes occurs to a considerable degree in States along the Mexican border and in cities of the Southwest and West, as well as in New York City, and, in fact, wherever there are settlements of Latin Americans.

A great deal of public interest has been aroused by newspaper articles appearing from time to time on the evils of the abuse of marijuana or Indian hemp, and more attention has been focused upon specific cases reported of the abuse of the drug than would otherwise have been the case. This publicity tends to magnify the extent of the evil and lends color to an inference that there is an alarming spread of the improper use of the drug, whereas the actual increase in such use may not have been inordinately large.

Id. at 221.

175. The DEA report stated that “[c]rack is currently the subject of considerable media attention. The result has been a distortion of the public perception of the extent of crack use as compared to the use of other drugs [C]rack presently appears to be a secondary rather than primary problem in most areas.” James A. Inciardi, *Beyond Cocaine: Basuco, Crack and Other Coca Products*, 14 CONTEMP. DRUG PROBS. 461, 482 (Fall 1987). In fact, during the 1980s, crack was unavailable in New York City, except for in the Washington Heights neighborhood, and was nowhere to be found in Chicago. *See id.* at 483–84.

176. *See* MUSTO, *supra* note 155, at 229.

177. Marijuana Tax Act of 1937, ch. 553, 50 Stat. 551.

178. *See* ZIMRING & HAWKINS, *supra* note 167, at 69–74.

179. Anslinger told *American Magazine*:

An entire family was murdered by a youthful addict in Florida They found the youth staggering about in a human slaughterhouse. With an ax he had killed his father, mother, two brothers, and a sister. He seemed to be in a daze He had no recollection of having committed the crime. The boy said that he had [been] . . . smoking . . . marijuana.

c. Cocaine and African Americans

Although chewing coca leaves had been part of Andean culture for a thousand years, it was not introduced into the United States and Europe until the late nineteenth century.¹⁸⁰ The steady progress of science noted cocaine's deleterious effects so that, by 1906, its use was curtailed with the passage of the Pure Food and Drug Act.¹⁸¹ From then on, "the drug moved to the underworld of criminals and the chic."¹⁸²

Momentum gained to prohibit the importation of cocaine and heroin, culminating with the passage of the Harrison Act of 1914,¹⁸³ which was the first federal law to prohibit the distribution of cocaine and heroin.¹⁸⁴ While some members of Congress were concerned that the Act would pave the way to alcohol prohibition (a recreational drug used by many Whites),¹⁸⁵ it was the association of cocaine and heroin with Blacks that fueled the passage of the Act.¹⁸⁶ Congressman Harrison played on Whites' fears that Whites must be protected from the influx of Blacks' cocaine habits,¹⁸⁷ an overtly racist message that would appear in a code during the crack cocaine debates.¹⁸⁸ Wright also played on Whites' fears that cocaine use would lead to Black-on-White violence, especially

Clary, 846 F. Supp. at 775 n.17 (citing LARRY SOLOMAN, REEFER MADNESS: A HISTORY OF MARIJUANA IN AMERICA 34 (1979)).

180. See Inciardi, *supra* note 175, at 461. After importing tons of Peruvian coca leaves to his native land of Corsica, Angelo Mariani produced an extract that he mixed with wine and called Vin Coca Mariani. See *id.* The product, touted as a cure for fatigue, "brought Mariani immediate wealth and fame, as well as a medal of appreciation from Pope Leo XVII, who used the drink as a source of comfort in his many years of ascetic retirement." *Id.* at 461-462. Meanwhile, in Atlanta, Georgia, John Styth Pemberton, who had been marketing various medicines using coca, noted Mariani's success and developed a product that he registered as French Wine Coca—Ideal Nerve and Tonic Stimulant. See *id.* at 462. The next year, Pemberton "added a supplementary ingredient, changed it into a soft drink, and renamed his concoction Coca-Cola." *Id.*

181. Pure Food and Drug Act, ch. 3915, 34 Stat. 768 (1906).

182. Inciardi, *supra* note 175, at 463-64.

183. Ch. 1, 38 Stat. 785.

184. See *Clary*, 846 F. Supp. at 775.

185. See *MUSTO*, *supra* note 155, at 66.

186. Francis Burton Harrison, a representative from Mississippi who sponsored the Act, favored cocaine prohibition because cocaine leaves were used in "Coca-Cola and Pepsi-Cola and all those things that are sold to Negroes all over the South." *Id.* at 46.

187. Harrison "warned Congress of the drug-crazed blacks in the South whose drug habits 'threaten[ed] to creep into the higher social ranks of the country.'" *Clary*, 846 F. Supp. at 775 (citing J. HELLER, DRUGS AND MINORITY OPPRESSION (1975)).

188. See *infra* notes 226-44 (discussing the coded theme that Whites needed to be protected from the harms of crack cocaine, a drug Whites feared was creeping into White neighborhoods).

against White women,¹⁸⁹ more themes that would reappear in code during the crack cocaine debates.¹⁹⁰ Throughout history, Whites associated certain narcotics with certain ethnic groups, believed a pattern of criminal and immoral conduct was the direct result of taking these drugs, and were fearful of the corrupting influence these drugs would have on the White communities.¹⁹¹ This same pattern emerged in the passing of crack cocaine legislation in the 1980s, but by then legislators were savvy enough to couch their racist appeals in “coded” language.¹⁹²

3. Specific Sequence of Events Leading Up to the Challenged Decision

By the 1950s, cocaine use spread into the “beatnik” culture of New York City’s Greenwich Village and San Francisco’s North Beach, and became known as “the rich man’s drug.”¹⁹³ In the late 1960s and early 1970s, the drug moved into mainstream society.¹⁹⁴ “Freebasing,” the smoking of freebase cocaine, became popular in the 1970s, so that by 1977 it was estimated that ten percent of the four million users in the

189. In expert testimony before Congress, Dr. Wright told members of Congress that “it has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by the Negroes of the South and other sections of the country.” MUSTO, *supra* note 155, at 43–44 (citation omitted).

190. See *infra* notes 245–51 (discussing the coded links between crime and crack use); see also *infra* notes 259–65 (discussing the links between crack use and sexual promiscuity and prostitution).

191. Musto writes:

By 1914 prominent newspapers, physicians, pharmacists, and congressmen believed opiates and cocaine predisposed habitués toward insanity and crime. They were widely seen as substances associated with foreigners or alien subgroups. Cocaine raised the specter of the wild Negro, opium the devious Chinese, morphine the tramps in the slums; it was feared that use of all these drugs was spreading into the “higher classes.”

MUSTO, *supra* note 155, at 65.

192. See *infra* notes 226–44 (discussing the coded themes legislators used to appeal to Whites’ fears of African Americans and Latinos).

193. Inciardi, *supra* note 175, at 464.

194. Inciardi notes that this increase was due to legislation curtailing the use of amphetamines and quaaludes and other abused sedatives, in addition to the building of the Pan American Highway through the Huallaga River valley in the high jungles of Peru. The reduction in amphetamines led to an increase in the demand for cocaine, and the World Bank’s construction of the Pan American Highway opened up transportation routes. See *id.*

United States used freebasing as the sole means of cocaine use.¹⁹⁵ (Freebase cocaine is a different chemical product from cocaine itself.¹⁹⁶)

“Crack” cocaine, which is a different chemical product from either powder or freebase cocaine, was known initially as “rock” or “base.”¹⁹⁷ It was first reported in the early 1970s, and it was rediscovered in the early 1980s on the East and West coasts.¹⁹⁸ Although crack appeared in Miami as early as 1982, it was generally limited to the Caribbean and Haitian communities.¹⁹⁹

The first mention of crack in the major media occurred on November 17, 1985, in *The New York Times*.²⁰⁰ The media picked up on the story, and within eleven months more than one thousand stories were written that featured crack prominently.²⁰¹ The word filtered down to the street. As one 14-year-old Black male crack user explained in one of the first studies on the drug:

Sure, we all [knew] about it, but didn't know much [a]bout what it really was. They tell us that, 'ya smoke it mon,' so

195. See *id.* at 465.

196. Inciardi explains:

In the process of freebasing, street cocaine—which is usually in the form of a hydrochloride salt—is treated with a liquid base (such as ammonia or baking soda) to remove the hydrochloric acid. The *free* cocaine, or cocaine *base* (and hence the name freebase) is then dissolved in a solvent such as ether, from which the purified cocaine is crystallized. These crystals are then crushed and used in a special glass pipe. Smoking freebase cocaine provides a more potent “rush” and a more powerful high than regular cocaine (emphasis in original).

Id.

197. “Crack is processed from cocaine hydrochloride by using ammonia or baking soda and water, and heating it to remove the hydrochloride. The result is a pebble-sized crystalline form of cocaine base. Crack is neither freebase cocaine nor purified cocaine.” *Id.* It is less potent than conventional freebase, and ranges in purity from five percent to forty percent. See *id.* at 469. The drug was nicknamed “crack” because of the crackling sound it makes when smoked. See *id.*

198. Due to the Colombian government’s limitation of the use of ether for transforming coca paste, the processing moved into the Caribbean and South Florida. See *id.* at 468–69. “Immigrants from Jamaica, Trinidad and locations along the Leeward and Windward Islands chain introduced the crack prototype to Caribbean inner-city populations in Miami and New York, where it was ultimately produced from cocaine hydrochloride rather than coca paste.” *Id.* at 469–70. At the same time, a Los Angeles chemist rediscovered the rock, and it became a success on the West coast, as well. See *id.* at 470. The success was due to its quicker ‘high,’ lower cost, and easier transportability. See *id.*

199. See *id.* at 475.

200. See *id.* at 481.

201. See *id.*

we'd think it was some fancy freebase. Smoking coke we knew was expensive, least we[] thought it was, so we just didn't do it . . . Guess we[] really didn't understand and all that.²⁰²

The media did not understand the subject very well either, and resorted to shameless hyperbole to sell magazines and newspapers.²⁰³ Researchers were finding crack was not a national plague, but rather a phenomenon isolated to the inner cities of less than a dozen urban areas.²⁰⁴ By late August 1986, the hysteria surrounding crack had reached an outrageous level, such that the Drug Enforcement Administration (DEA) felt compelled to issue a statement attempting to quell the hysteria:

Crack is currently the subject of considerable media attention. The result has been a distortion of the public perception of the extent of crack use as compared to the use of other drugs. With multi-kilogram quantities of cocaine hydrochloride available and with snorting continuing to be the primary route of cocaine administration, crack presently appears to be a secondary rather than a primary problem in most areas.²⁰⁵

Still, just as the media and legislators ignored the recommendations of caution from the former Federal Bureau of Narcotics,²⁰⁶ the media largely ignored the DEA report, and the myth continued that crack was "everywhere."²⁰⁷ Once again, Dr. Inciardi's study refuted this media

202. *Id.* at 476.

203. For example, "*Newsweek* claimed that crack was the biggest story since Vietnam and the fall of the Nixon presidency, and other media outlets compared it to the plagues of medieval Europe." *Id.* at 482.

204. *See id.*

205. *Id.* A study of crack use in the Miami area confirmed the DEA's report that White and Hispanic drug users from the middle and upper-income sections of Dade County could not get their hands on crack. *See id.* at 483. As one student in the study remarked: "I can get you any kind of drug you want, except crack—unless I make it myself and I don't know how. I could always go up to Liberty City, but there's no way I'd go up there without a few bodyguards and a couple of guns." *Id.* Crack was also similarly available only in the Washington Heights neighborhood of New York City, and was nowhere to be found in Chicago. *See id.* at 483–84.

206. *See* MUSTO, *supra* note 155 (discussing the Federal Bureau of Narcotics report issued in response to the irrational reaction to the marijuana problem in the 1920s).

207. *Newsweek* described the crack scene as "an inferno of craving and despair." *Id.* at 484. *USA Today* titillated readers with the story of Katrina Lincoln: "Katrina Lincoln was 17 when she first walked into a crack house in the Bronx. By then she was selling her body to crack dealers just to support her \$900-a-day habit." *Id.* This story is completely implausible.

myth: almost two-thirds of the subjects he studied in the Miami area did not use crack on a daily basis, and use among daily users was generally limited to one or two hits, with compulsive users representing “an extremely small minority.”²⁰⁸

4. Departures from Normal Procedure Sequence

The district court in *Clary* found the media hype surrounding “the horror of crack cocaine” and the proposed 1986 Controlled Substance Act caused Congress to react “irrationally and arbitrarily.”²⁰⁹ The Act was advanced through an election-year Congress, leaving behind a limited legislative record.²¹⁰ Even Eric E. Sterling, counsel to the House Subcommittee on Crime during the crack debate, was taken aback by the frantic rush: “[i]t was sheer panic. Everyone felt that the spotlight for solving the drug crisis was on them. And if it wasn’t, they wanted it to be on them.”²¹¹ Moreover, the disproportionate penalties between powder and crack cocaine skyrocketed, jumping from a 20:1 ratio, when the bill was introduced, to the ultimate 100:1 ratio, for no logical reason.²¹²

In reality, a study of Miami adolescent crack users found the median amount spent on crack was \$18.33 per day; an analysis of Detroit arrestees found the median daily use of \$21.43 per day; and another study of New York addicts found that only one-fourth of heavy crack users spent between \$101 and \$1,000 a month on crack. See STEVEN R. BELENKO, *CRACK AND THE EVOLUTION OF ANTI-DRUG POLICY* 62–63 (1993).

208. Inciardi, *supra* note 175, at 485. Moreover, as the DEA study confirmed, crack cocaine was not the major drug problem. See *id.* at 485. The proportions of crack, powder cocaine and alcohol use were similar. See *id.* at 485. Furthermore, crack was not an initiation drug, and was not even the preferred drug of choice among users; “marijuana established top honors.” *Id.*

209. *Clary*, 846 F. Supp. at 784.

210. See Angeli, *supra* note 12, at 1227. “‘Congress dispensed with much of its typical deliberative legislative process, including committee hearings’[,] when it considered the cocaine sentencing scheme.” *Id.* (quoting United States Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 162 (Feb. 1995)).

211. Howard Manly, *Harsh Line Drawn on Crack Cocaine: Tough Penalties Found to Affect Blacks Most*, THE BOSTON GLOBE, July 24, 1994, at 1.

212. Senator Paula Hawkins initially pushed for tough sentences that did not distinguish between crack and powder cocaine. See Angeli, *supra* note 12, at 1227. Two weeks later, however, Senator Hawkins joined Senator Alfonse D’Amato in proposing a 20:1 ratio. See *id.* Another bill introduced by Senate Majority Leader Bob Dole, on behalf of the Reagan Administration, similarly called for a 20:1 ratio. See *id.* However, by the time the bill was introduced in September, the ratio was bumped up to 50:1. See *id.* The next day, in a last-minute effort to “redouble Congressional seriousness,” Congress arbitrarily set the ratio of crack versus powder cocaine from 50:1 to 100:1. *Id.* at 1228 n.135; *Clary*, 846 F. Supp. at 784.

Furthermore, no congressional committee ever produced a report analyzing the Act's key provisions.²¹³

5. Substantive Departure from Normal Procedure

The penalties were also unusually harsh. The Act made crack the only drug with a mandatory minimum penalty for a first offense of simple possession.²¹⁴ Furthermore, possession of between one and five grams of crack, depending on criminal history, results in a minimum penalty of five years in prison.²¹⁵ In contrast, possession of any quantity of any other drug (heroin, powder cocaine, or any other controlled substance) results in a maximum penalty of one year in prison.²¹⁶

6. The Inevitability or Foreseeability of the Consequence of the Law

The media reports leading up to the enactment led members of Congress to believe that crack was primarily a problem of African Americans and Latinos.²¹⁷ Moreover, another bill targeted so-called "crack houses," which were primarily thought to be located in inner-city neighborhoods that were primarily African American and Latino.²¹⁸ In other words, members of Congress pushed through a bill that punished crack cocaine users and dealers, but also expended extra effort to specifically target the "crack houses" in minority neighborhoods. Thus, it was foreseeable—indeed, inevitable—that the law would have a disparate impact on African Americans and Latinos.²¹⁹ However, as evidenced by several comments by legislators during the crack cocaine debates, what was of

213. See *Angeli*, *supra* note 12, at 1227.

214. See *id.*

215. See *id.* at 1228.

216. See *id.* "This disparity for simple possession is inconsistent with Congress' stated goals of attacking drug distributors and is opposed by both the Sentencing Commission and the Justice Department." *Id.*

217. See 132 CONG. REC. 8292 (1986) (discussing THE PALM BEACH POST & EVENING TIMES article, introduced into the Congressional Record by Senator Lawton Chiles, declaring that "most of the dealers, as with past drug trends, are black or Hispanic" and that "whites rarely sell the cocaine rocks").

218. See *infra* note 231 (describing the high concentration of African Americans and Latinos in the "inner city" neighborhoods of America's large metropolitan areas).

219. In 1998, 49% of the crack users were White, 34% were Black, and 17% were Hispanic. See Wickham, *supra* note 6 (citing a study by the National Clearinghouse for Alcohol and Drug Information). In that same year, 85% of those convicted for selling crack were Black, giving rise to charges of selective arrest and/or prosecution. See *id.*

particular concern to them was the potential for the drug to reach the White community.²²⁰

7. Contemporary Statements Made by the Decision Makers

The crack cocaine debates were filled with coded racist references and the introduction of racist newspaper articles. "De-coding" these references can reveal their racist intent. The aforementioned history of attaching racial significance to anti-drug laws is important because what these "code words" mean is in conformity with the history of attaching racial significance to anti-drug laws.²²¹

Historically, racist anti-drug laws contained three general themes. First, anti-drug laws were passed to "save" Whites from "depraved" minorities.²²² Incorporated into this theme was the notion that the law had to be passed because a certain drug, historically associated with people of color, was suddenly seeping into White communities. Second, previous anti-drug laws were thought to be necessary because the drugs were used by crazed criminals of color.²²³ The exaggerated potency of this drug, and what it made people of color do, is an integral part of this theme. Third, anti-drug laws were passed to protect White women from becoming the sexual slaves of drug-pushing pimps, invariably portrayed as people of color.²²⁴

220. See *infra* notes 226–44 (discussing the three coded racist themes prevalent during the crack cocaine debates.)

221. See *supra* notes 155–92 and accompanying text (discussing the history of racism behind the passage of American anti-narcotics laws).

222. See *infra* notes 226–44 (discussing the history of protecting Whites from drugs associated with minorities). Significantly, with regard to "de-coding" comments in the Record, it is not required to show that a racially neutral law was passed with racial animus; rather it can be shown that a law was passed with an intent to protect, rather than punish, based on race. According to George Washington University Law Professor Michael Selmi, "the Court has always treated affirmative action as a form of intentional discrimination, albeit one that can be justified under certain circumstances." Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 289 (1997). Thus, as Selmi explains, "in the affirmative action context, the motive is usually to aid, rather than to harm, a particular group, and rarely does a question of animus arise in these cases." *Id.*

223. See *infra* notes 245–51 (discussing the historical depiction of drugs used by crazed people of color).

224. See *infra* notes 252–65 (discussing the history of passing anti-drug legislation to protect women from drug- and sex-crazed minorities).

a. *The Need to Protect White Communities
From a "Colored" Drug*

America's first anti-drug legislation was passed to "protect" Whites from the Chinese, who the media and politicians felt were having a corrupting influence on the Whites who came in contact with them.²²⁵ Similarly, the promulgators of the first anti-marijuana legislation in the 1930s were nativist Whites, who felt that "depraved" Mexicans and Blacks were corrupting White schoolchildren.²²⁶ Furthermore, support for the passage of the Harrison Act of 1914, which outlawed cocaine and heroin, was fueled by fears that the drug was spreading from the "wild Negro" and the "devious Chinese" to the upper echelon of White society.²²⁷ David Musto, an expert on the history of America's anti-drug laws, explains:

By 1914 prominent newspapers, physicians, pharmacists, and congressmen believed opiates and cocaine predisposed habitués toward insanity and crime. They were widely seen as substances associated with foreigners or alien subgroups. Cocaine raised the specter of the wild Negro, opium the devious Chinese, morphine the tramps of the slums; it was feared that use of all these drugs was spreading into the 'higher classes.'²²⁸

The same sentiment of the need to protect the White community from the dangers of African Americans and Latinos of the inner city was evident during the crack cocaine debates. Members of Congress, in their comments and in the articles they praised and introduced into the Congressional Record, portrayed crack as an inner-city problem seeping into the suburbs and rural villages. Implicit in this argument is that crack, once only an African American and Latino problem, was suddenly becoming a White problem. Senator Heflin expressed this theme in his depiction of the crack situation:

[T]here is a violent war being fought in America. For many years this war was fought for us by special agents in dark, stinking alleys—through garbage-strewn streets, and in the burned out, abandoned buildings of our large metropolitan areas. But now, the battleground has moved into middle-

225. See *supra* notes 1–2, 166.

226. Musto, *supra* note 155, at 216–29.

227. *Id.* at 65.

228. *Id.*

class neighborhoods, into glass skyscrapers, and even into school playgrounds. This war was once fought only in urban America, but increasingly, there are daily skirmishes on country roads, on remote rural routes, and in the tree-lined streets of small towns and villages.²²⁹

Senator Heflin was clear in articulating the crack dilemma: crack was not a problem when its use was confined to those people who inhabited the “dark, stinking alleys,” “garbage-strewn streets,” and the “burned out, abandoned buildings of our large metropolitan areas”²³⁰—pejorative descriptions of places where African Americans live.²³¹ Yet, in the next sentence he alerts his colleagues to the *real* problem: crack, once only a problem of Black America, was moving into “middle-class neighborhoods,” “glass skyscrapers,” “school playgrounds,” “remote rural routes,” and “the tree-lined streets of small towns and villages”²³²—euphemistic descriptions of places where White people live.²³³ By ‘de-coding’ his statement, Senator Heflin told the American people that, while crack cocaine was once only a problem in the Black neighborhoods, Congress needed to take action swiftly because crack was spreading from the Black and brown inner city to the “country roads,” “remote rural routes,” and the “tree-lined streets of small towns and villages” of White America.

The newspaper and magazine articles were even more forthright about the spread of crack cocaine from the Black inner city to the White suburbs and rural towns and villages. Senator Lawton Chiles introduced into the Congressional Record what he called an “excellent series” of articles whose authors and publisher “should be commended.”²³⁴ The

229. 132 CONG. REC. S8291 (1986) (statement of Sen. Heflin).

230. *Id.*

231. See, e.g., John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair,”* 143 U. PA. L. REV. 1233, 1248 n.76 (1995). Calmore explains: “[t]here is a racialized stigma that is associated with the inner city.” *Id.* (citing Joleen Kirschenman & Kathryn M. Neckerman, “*We’d Love to Hire Them, But . . .*”: *The Meaning of Race for Employers, in THE URBAN UNDERCLASS* 203, 215–17 (Christopher Jencks & Paul E. Peterson eds., 1991)). See also Delgado & Stefánic, *supra* note 111, at 1291 n.221. The authors list a number of “items that today seem innocuous or only mildly troublesome.” Among the list were “[c]ode words such as ‘articulate (or qualified) black,’ ‘those people,’ ‘welfare mothers,’ and ‘inner-city crime.’” *Id.* (emphasis added).

232. 132 CONG. REC. S8291 (1986) (statement of Sen. Heflin).

233. This depiction was not only a coded message that crack was seeping into White neighborhoods, it was also a complete fiction. See Inciardi, *supra* note 175, at 482 (detailing a report from the Drug Enforcement Agency that found that, despite the media hype to the contrary, crack could only be found in small parts of certain large metropolitan areas).

234. 132 CONG. REC. at S8291 (1986) (statement of Sen. Chiles).

article, published by the *Palm Beach Post & Evening Times*, claimed, as a matter of fact, that “most of the dealers, as with past drug trends, are black or Hispanic.”²³⁵ The article also claimed that “whites rarely sell the cocaine rocks.”²³⁶ Then the article drew the reader’s attention to the true victims:

Street sales of cocaine rocks have occurred in the same neighborhoods where other drugs were sold in the past: run-down, black neighborhoods from Delray Beach to Fort Pierce. But the drug market also is creeping into other neighborhoods. An interracial neighborhood east of Howard Park has become one of West Palm Beach’s most highly visible cocaine rock areas. Less than a block from where unsuspecting white retirees play tennis, bands of young black men push their rocks on passing motorists, interested or not.²³⁷

Not only does the article portray African Americans and Latinos as the perpetrators, and “unsuspecting” Whites as the victims, it also clearly states that crack was spreading from minority neighborhoods like a contagion: from the “run-down” Black neighborhoods, into “an interracial neighborhood,” and finally into White neighborhoods. The article thus posits that the crack problem was directly related to the color ratio of that community.

However, the article also states the race problem in reverse. It warns that if African Americans and Latinos do not come to White neighborhoods, White kids will have to do the reverse commute of drug trafficking: “[f]or the growing numbers of the white middle class who have become hooked on cocaine rock, buying the drug can be like stepping into a foreign culture,” the article sympathized.²³⁸ The article also looks to further repercussions of such trips into the “foreign culture” of Latino and Afro-Caribbean neighborhoods:

Police have encountered several houses where Hispanics and Haitians sold cocaine rocks while surrounded by icons of Santeria, a Caribbean folk religion that mixes Catholicism and traditional African beliefs The statues were of Mary and Jesus, but Mary carried a sword and Jesus a club.²³⁹

235. 132 CONG. REC. S8291 (1986) (statement of Sen. Heflin).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 8294.

Other articles warned that the spread of crack had the potential to erode White values and purity. In an article also discussed during the congressional hearings, the reporter found a high school student to talk about drugs. "I'll tell you," said a baby-faced white senior boy, 'you won't find much drugs on campus anyway. Off campus, that's another story. But most of the kids that are into drugs quit school.'"²⁴⁰ Notice the explicit reference to the "baby-faced white senior boy" who held strong against the temptation of crack, ostensibly because he avoided the off-campus world of the African American or Latino crack dealer.

Conversely, the article predicts a rapid plunge for the White kids who seek out the inner-city neighborhoods of color:

At age 14, the Joe his mother knew was his troop's Boy Scout of the Year for the second year in a row. Three years later, the Joe his friends knew was a tall, wiry blond who on trips to buy cocaine rocks at Fred's Motel west of Lantana would pack a .357 Magnum handgun in the waistband of his pants.²⁴¹

Again, note the explicit reference to the "tall, wiry blond," i.e., White child, who went from a Boy Scout to a drug addict who felt compelled to carry a gun. Keeping in line with this theme of protecting White communities is the comment, made by several members of Congress, that crack can hit home *anywhere*.²⁴² Senator Roth warned, "[c]rack seems to be an egalitarian drug, attracting users of all races, colors, and creeds, all walks of life, and income, and all degrees of dependence."²⁴³ Similarly, Senator Heflin urged members of Congress:

All must now lend their efforts and their resolve if we are to win this war. Every day the death tolls and casualty counts rise. This war knows no particular class, race, age or economic group. It damages all segments of society—leaving in its path only waste and sorrow. . . . Mr. President, the enemy of whom I speak is the supplier, pusher, and peddler of illegal drugs—the lowest form of subhumans found on this Earth.²⁴⁴

240. *Id.*

241. *Id.*

242. *See, e.g., id.*

243. "Crack" Cocaine: *Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov't Affairs*, 99th Cong., 2d Sess. 3 (1986) (statement of Sen. Nunn).

244. 132 Cong. Rec. 26458 (1986) (statement of Sen. Heflin).

In other words, the Senators, along with the newspaper articles introduced into the Congressional Record, sent a coded message to White America that crack had the potential of becoming their problem, too. This was not an egalitarian call to arms—it was a colorblind slur.

b. *The Drug is Pushed by Crazy Criminals of Color*

Every major American law first prohibiting a particular narcotic portrayed the problem as one of criminals of color threatening the safety of vulnerable Whites. The Chinese and their opium in the late nineteenth century “hoodlumized our children.”²⁴⁵ Similarly, violent crimes in the South were apparently attributable to drug-crazed blacks who committed crimes, especially rape, because they were high on marijuana and/or cocaine.²⁴⁶ Again, this theme ran throughout the crack cocaine debates.

The *Palm Beach Post & Evening Times* started a series of articles on the crack cocaine problem, introduced into the Congressional Record, by noting how crack was turning the country into criminals:

Men have given up their paychecks. Women have prostituted themselves. Children have stolen from their parents. Men and women have stolen appliances, jewelry and televisions from their families and friends. Why? Over the past year in South Florida, a new marketing form for cocaine, packaged to give the drug its most seductive and addictive punch, has appeared in—and in some cases taken over—quiet residential neighborhoods of Palm Beach County and the Treasure Coast.²⁴⁷

The article explains that “[p]olice admit they have no statistics to show that the rise in cocaine use is related to a rise in the crime rate,” but “they base their belief of a connection on confessions in which suspects arrested in burglary and robbery cases admitted that they stole to support a co-

245. *Clary*, 846 F. Supp. at 775 n.10.

246. Musto notes:

By 1914 prominent newspapers, physicians, pharmacists, and congressmen believed opiates and cocaine predisposed habitués toward insanity and crime. They were widely seen as substances associated with foreigners or alien subgroups. Cocaine raised the specter of the wild Negro, opium the devious Chinese, morphine the tramps of the slums; it was feared that use of all these drugs was spreading into the ‘higher classes.’

MUSTO, *supra* note 155, at 65.

247. 132 CONG. REC. S8291 (1986) (statement of Sen. Heflin).

caine rock habit."²⁴⁸ Claims that crack use led to sharp increases in violent crime, though, have turned out to be grossly overstated.²⁴⁹ However, the series of articles also polluted the debate with the notion that African Americans were predators, and Whites were their victims.²⁵⁰ For example, as discussed earlier, one of the articles explicitly warned Whites of the grave crack problem: "[l]ess than a block from where unsuspecting white retirees play tennis, bands of young black men push their rocks on passing motorists, interested or not."²⁵¹ In other words, members of Congress introduced articles into the Record that sent a coded message to White America that crack was unleashing criminals of color into their communities.

c. *Crack-Crazed Black and Latino Pimps Turn
White Women into Prostitutes*

Historically, protecting the chastity of White women has been a subtext of criminal laws in general, and drug laws in particular.²⁵² In

248. *Id.* at 8292.

249. See, e.g., BELENKO, *supra* note 207, at 103. Belenko reviewed numerous empirical studies on crime and crack cocaine use. He found:

[W]hile the crack subculture can be characterized as more violent and crime-involved as previous or parallel drug subcultures, the reasons for this are complex and not necessarily a function of the psychopharmacological effects of crack. Thus media and public fears of a direct causal relationship between crack and non-drug crime do not seem to be confirmed by the data.

Id. It must be noted that at least one senator, Daniel Patrick Moynihan, warned his colleagues:

If we can blame crime on crack, our politicians are off the hook. Forgotten are the failed schools, the malign welfare programs, the desolate neighborhoods, the wasted years. Only crack is to blame. One is tempted to think that if crack did not exist, someone somewhere would have received a Federal grant to develop it [I]t is long past time that our leaders stop their hysterical grandstanding about new drugs and get to work on the old, persistent problems of crime, race and poverty.

132 CONG. REC. 26455 (1986) (statement of Sen. Moynihan).

250. See, e.g., *id.* at 8292 (statement of Sen. Heflin).

251. *Id.*

252. As far back as 1697, Pennsylvania enacted the death penalty for Black men who raped White women and castrated them for attempted rape, while White men who committed the same offense would be fined, whipped, or imprisoned for one year. See P. Finkleman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2101 n. 187 (1993). According to Representative Sisson of Mississippi, lynching in the South was kept legal to "protect our girls and womenfolk from these black brutes. When these black fiends keep their hands

particular, the notion of “white slavery” of women took hold near the turn of the century, leading to the White Slave Traffic Act (popularly known as the Mann Act) of 1910.²⁵³ The Mann Act made it a felony to “knowingly transport any woman or girl across state lines for prostitution, debauchery or any other immoral purpose.”²⁵⁴ According to Cornell Law Professor Barbara Holden-Smith, the victims were White women, while the perpetrators were immigrants or Black men.²⁵⁵

Professor Holden-Smith traces this sentiment back to journalist George Kibbe Turner’s first major article on “white slavery,” which appeared in *McClure’s Magazine* in 1907 and 1909.²⁵⁶ She explains:

Turner also managed to tap into the society’s other bottomless reservoir of bigotry by suggesting the ‘vicious negro from the countryside,’ along with ‘hundreds of thousands of rough and unrestrained male laborers’ were the major sources of urban lawlessness, bringing prostitution and a threat to ‘the chastity of women.’ Turner ostensibly suggests that immigrants and blacks were the chief customers of the white women enslaved by the prostitution rings.²⁵⁷

Protecting the chastity of White women was also an important subtext behind the passage of anti-drug laws. Supporters of the Harrison Act warned Whites that “it has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by the Negroes of the South and other sections of the country.”²⁵⁸ Following this historical pattern, the crack cocaine debate contained a coded theme that crack had the potential to ruin the chastity of White women.²⁵⁹

off the throats of the women of the South then lynching will stop.” Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 *YALE L.J. & FEMINISM* 31, 55 (1996).

253. See White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421–2424 (1988)).

254. *Id.*

255. See Holden-Smith, *supra* note 252, at 61.

256. *Id.* at 62.

257. *Id.*

258. MUSTO, *supra* note 155, at 43–44.

259. One article noted, “[s]o the pretty young girl with dirty-blond hair, deep blue eyes and a model’s figure says she started stealing. She needed money to buy the rock.” 132 *CONG. REC.* 8294 (1986) (statement of Sen. Heflin). It doesn’t take a huge leap forward to understand that readers were to be alarmed that “the pretty young girl with dirty-blond hair, deep blue eyes and a model’s figure” may even start selling her body if the stealing isn’t enough. It is also significant that nowhere to be found in the Record were articles portraying “baby-faced black girls with curly locks, and rich, brown eyes” who resorted to a life of theft or prostitution to support their crack habit. The articles must

First, the debate was permeated with the notion that women will sell their bodies for crack. One article introduced at the debate notes the particular susceptibility of the drug to turn women into prostitutes: “[m]en have given up their paychecks, [w]omen have prostituted themselves.”²⁶⁰ Quoting police officers, the article warns that “dealers have told them that women freely will trade intercourse or oral sex for a single rock.”²⁶¹ This notion was confirmed during the “Crack” Hearing in the Senate, when a drug dealer named Michael Taylor testified:

[A] prostitute might work the streets all night, returning to the crack house each time she put together a purse of \$200 or \$300. Some crack houses specialize in women customers only, allowing no men inside and catering primarily to prostitutes. Men run such crack houses.²⁶²

Taylor also said the crack houses were a sort of singles scene for crack addicts. “Cocaine smokers may see friends in crack houses, men may make dates with women,” he testified.²⁶³

Second, African Americans and Latinos were portrayed as sexual predators. A *Newsweek* article, which was repeatedly praised by members of Congress, described West 107th Street in Manhattan as “a fringe neighborhood populated by low-income blacks and Hispanics,” that was home to “young girls in doorways trying to sell themselves for the \$5 it costs to get high.”²⁶⁴ It is also home to “the ghetto’s inverted social pecking order,” where “rock cocaine has taken on the social esteem that being a pimp had 20 years ago.”²⁶⁵ Thus, since women—especially White women—were portrayed as vulnerable to sexual exploitation, it is not a long logical leap to conclude these articles raised Whites’ fears of a renewed form of White slavery. Therefore, the anti-crack discourse during the crack cocaine debates fell into an historical pattern of passing criminal laws in general, and drug laws in particular, to protect the chastity of White women.

have assumed that the chastity of Black women wasn’t as important, or that Black women were naturally susceptible to selling their bodies for drugs.

260. *Id.* at 8291.

261. *Id.* at 8292.

262. “Crack” Cocaine: *Hearing Before the Permanent Subcomm. On Investigations of the Senate Comm. on Gov’t Affairs*, 99th Cong., 2d Sess. 40 (1986).

263. *Id.*

264. 132 CONG. REC. 13027 (1986).

265. *Id.*

C. The Crack Statute Violates the Equal Protection Clause

“De-coding” the racist comments of legislators, along with evidence conforming to other factors approved by the Supreme Court in its traditional equal protection analysis, shows that Congress enacted the crack cocaine legislation with a racially discriminatory purpose, and thus, strict scrutiny must be applied. Therefore, the government can only show the law is constitutional when it serves a compelling government interest and is narrowly tailored to meet that interest.²⁶⁶

Congress increased the penalties for crack cocaine due to a belief that it had greater potency, was more addictive, cost less, and was increasingly prevalent in comparison to powder cocaine.²⁶⁷ However, members of Congress failed to present evidence for these assertions.²⁶⁸ For example, Dr. Charles R. Schuster testified before the Senate that while smoking “crack” cocaine produces a more intense “high” than snorting cocaine, it is not more potent than taking cocaine intravenously.²⁶⁹ Further, crack is not more pure than powder cocaine.²⁷⁰ Supporters of the crack disparity also pointed to its low cost. However, while crack is less expensive than cocaine because of its smaller packaging, the per gram cost is sometimes more expensive than powder cocaine.²⁷¹ Further, as witnessed by the DEA report, Congress was simply wrong in asserting that crack use was at epidemic levels.²⁷² Finally, there is no evidence that the smoking of crack cocaine leads to significantly more criminal activity than the ingestion of powder cocaine.²⁷³

Even if there were a compelling interest for the 100:1 ratio of powder versus crack cocaine, the crack statute was not narrowly tailored to meet that government interest. The lower court in *Clary* noted that it is illogical to punish users and dealers of the derivative source more than those using and selling the original drug.²⁷⁴ Furthermore, the great dispar-

266. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

267. See *United States v. Clary*, 846 F. Supp. 768, 791 (E.D. Mo. 1994).

268. See *id.*

269. See “Crack” Cocaine: Hearing Before the Permanent Subcomm. On Investigations of the Senate Comm. on Gov’t Affairs, 99th Cong., 2d Sess. 1 (1986) (testimony of Dr. Schuster).

270. See Gillmer, *supra* note 12, at 560–61 n.525; see also *State v. Russell*, 477 N.W. 2d 886, 890 (1991) (noting that “the mood altering ingredient in both powder and base was the same—cocaine”).

271. See Gillmer, *supra* note 12, at 561.

272. See *supra* note 205.

273. See *Clary*, 846 F. Supp. at 792; see also BELENKO, *supra* note 207 (discussing the link between crime and crack cocaine).

274. As the *Clary* district court stated: “Cocaine is cocaine.” *Clary*, 846 F. Supp. at 792.

ity in the punishment of African Americans compared to Whites, in numbers grossly disproportionate to their use of the drug, forces African Americans to shoulder more of the burden of achieving the government interest of lowering the use of crack cocaine. Thus, because there is no compelling need to warrant such a large disparity in sentencing between crack and powder cocaine, and the means used to achieve that end are not narrowly tailored, the crack cocaine sentencing scheme violates the Equal Protection component of the Fifth Amendment's due process clause.

CONCLUSION

Race relations are dynamic. Beginning with George Wallace's populist rhetoric in the 1960s, through racist appeals in the guise of egalitarianism in the 1970s and 1980s, and continuing into the racist debate on "values" in the 1990s, the American racial discourse has been cloaked in the rhetoric of equality more often than not. In recent years, even avowed White supremacists have begun to code their language to obscure the fact that they preach racism.

The purpose of this article on "race coding" in American politics is to emphasize that in today's muddled discourse on race, courts cannot wait for the discovery of smoking gun evidence prior to finding legislators have acted with racist intent. Racists have caught on; smoking guns are fewer and farther between. It is time for courts to make equally savvy assessments.

This article argues that the federal government's crack cocaine sentencing scheme violates the equal protection component of the Fifth Amendment. By "de-coding" certain "coded" messages in the Congressional Record and putting those comments in their proper historical context, the racist intent becomes clear. There is a long history of Congress passing legislation through blatant appeals to racist sentiment. Those days have passed. However, while the enactment of modern legislation, such as the Anti-Drug Abuse Act of 1986, may not be greased by overtly racist rhetoric, injecting into the debate "colorblind slurs" that appeal to Whites' fears has the same effects. Unfortunately, legislators will most likely continue to pass legislation by coding their messages and sanitizing their paper trail of racism. Hopefully, "de-coding" will serve as a useful guide for not only challenging the crack cocaine sentencing scheme, but also for scrutinizing other legislation where legislators may rely on racist code words to garner support for laws that disproportionately harm people of color.