

# NOTE

## UNITED STATES *v.* CLARY: EQUAL PROTECTION AND THE CRACK STATUTE

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The War on Drugs is not the first battle in which zealous warriors, frustrated by the limits of the law, have called for the abridgement or abolition of fundamental civil liberties. We have seen other wars and other constitutional casualties . . . . And when the war is over, we find that departures from constitutional norms, legitimized by the courts, have lasting and wide-ranging effects. Constitutional principles, once abandoned, are not easily reclaimed.<sup>1</sup>

## INTRODUCTION

Former President Ronald Reagan declared war on drugs in 1982.<sup>2</sup> His successors, George Bush and Bill Clinton, both swore to continue the fight.<sup>3</sup> The federal government has since spent billions of dollars waging this war,<sup>4</sup> allocating most of the money for enforcement.<sup>5</sup>

1. *Hartness v. Bush*, 919 F.2d 170, 175 (D.C. Cir. 1990) (Edwards, J., dissenting) (discussing constitutional validity of random drug testing), *cert. denied*, 501 U.S. 1251 (1991).

2. John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 557 (1991) (citing President Reagan's Radio Address to the Nation, 18 WEEKLY COMP. PRES. DOC. 1249, 1249 (Oct. 2, 1982)); see also Alfred W. McCoy & Alan A. Block, *U.S. Narcotics Policy: An Anatomy of Failure*, in WAR ON DRUGS: STUDIES IN THE FAILURE OF U.S. NARCOTICS POLICY 1 (Alfred W. McCoy & Alan A. Block eds., 1992) (claiming that drug war is really war on cocaine).

3. See Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1391 (1993) (noting how President Clinton "articulated his opposition to any fundamental change in American policy toward drugs"); Powell & Hershenov, *supra* note 2, at 557 (discussing former President Bush's promise to fight drug war).

4. See OFFICE OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: BUDGET SUMMARY 2 (1994) (stating that federal anti-drug spending soared from \$1.5 billion in

Although record numbers of drug offenders are being locked up in our prisons,<sup>6</sup> statistics indicate that drug use and drug dealing remain constant.<sup>7</sup> While some observers question whether the war on drugs is working,<sup>8</sup> one conclusion is inescapable: the principal victims of the war on drugs are racial minorities and the Constitution itself.<sup>9</sup>

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1981 to just under \$12 billion in 1992, and that President Clinton requested record \$13.2 billion for 1995); Sam Vincent Meddis, *Is the Drug War Racist? Disparities Suggest the Answer is Yes*, USA TODAY, July 23, 1993, at A1 (noting that federal anti-drug spending went from approximately \$1.2 billion in 1981 to nearly \$12 billion in 1992).

5. See Powell & Hershenov, *supra* note 2, at 567 n.26 (explaining that National Association of Criminal Defense Lawyers (NACDL) estimates that Bush administration allocated three-fourths of drug budget for law enforcement and remaining one-fourth for treatment) (citing NACDL, *The Black Community and the Cost of the "War on Drugs"*, CHAMPION, Nov. 1990, at 18, 19). The Clinton administration has set aside 35% of the drug budget for treatment and prevention in 1995, with the rest going toward law enforcement. OFFICE OF NAT'L DRUG CONTROL POLICY, REDUCING THE IMPACT OF DRUGS ON AMERICAN SOCIETY 12 (1995).

6. See *United States v. Clary*, 846 F. Supp. 768, 786 n.62 (E.D. Mo.) (noting that, as of July 1993, 60.4% of inmates in federal prisons were convicted of drug-related offenses, up from 24.9% in 1980), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995); OFFICE OF NAT'L DRUG CONTROL POLICY, *supra* note 5, at 12 (illustrating that during 1992, approximately 48,000 of 80,000 federal prisoners were drug offenders); Pierre Thomas, *1 in 3 Young Black Men in Justice System: Criminal Sentencing Policies Cited in Study*, WASH. POST, Oct. 5, 1995, at A1, A4 (noting that estimated number of drug inmates jumped from 57,975 in 1983 to 353,564 in 1993); see also Finkelman, *supra* note 3, at 1396 (stating that United States has larger percentage of its population in prison than any other nation).

7. See McCoy & Block, *supra* note 2, at 2-3 (reporting that daily cocaine use by "hard core addicts" increased 15% between 1988 and 1990). The National Institute on Drug Abuse (NIDA) estimated that the number of daily cocaine users jumped from 292,000 in 1988 to 336,000 in 1990. *Id.* at 3 (citing Joseph B. Treaster, *Bush Hails Drug Use Decline in a Survey Some See as Flawed*, N.Y. TIMES, Dec. 20, 1990, at B14). Furthermore, in 1991, the General Accounting Office reported that "the estimated volume of drugs entering the country during 1989 and 1990 did not decline." *Id.*

8. See McCoy & Block, *supra* note 2, at 2 (claiming that, despite White House claims to contrary, mounting evidence suggests drug war and its underlying policy of repression have failed); Powell & Hershenov, *supra* note 2, at 614-15 (arguing that war on drugs is more than just ineffective, it has severe constitutional costs and hurts opportunities for blacks). Several commentators have also criticized the use of mandatory minimum sentences for drug offenses as either unwise or unfair to racial minorities. See Nancy E. Roman, *Mandatory Drug Sentences Lead to Inequities; Rules Force Jails to Free Violent Felons*, WASH. TIMES, Aug. 24, 1994, at A8 (questioning mandatory minimum prison terms for drug offenders because they keep low-level drug offenders in jail, forcing parole boards to release violent criminals instead); *id.* (noting that Representative E. Clay Shaw, Jr., an advocate for mandatory minimums in 1986, now calls for Congress to reconsider them, stating that politicians have to correct mistakes they make). Shaw noted that "[i]n politics as everything else, people have to take a look at what they did, and if they think they made a mistake, correct it." *Id.*; see also *Mandatory Sentencing is Criticized by Justice*, N.Y. TIMES, Mar. 10, 1994, at A22 (quoting Justice Kennedy's statement to subcommittee of House of Representatives on problems of mandatory minimums for drug crimes). Justice Kennedy stated that "I simply do not see how Congress can be satisfied with the results of the mandatory minimums for possession of crack cocaine." *Hearings Before the Subcomm. of the House Comm. on Appropriations*, 103d Cong., 2d Sess. 29 (1994) (statement of Justice Kennedy).

9. Powell & Hershenov, *supra* note 2, at 559; see also Ron Harris, *Blacks Take Brunt of War on Drugs*, L.A. TIMES, Apr. 22, 1990, at A1 (commenting that "around the country, politicians, public officials and even many police officers and judges say, the nation's war on drugs has in effect become a war on black people"); Sheryl McCarthy, *Off Target Targets of Drug War*, N.Y. NEWSDAY, Oct. 22, 1990, at 6 (reporting that "as the so-called 'war on drugs' escalates, it is becoming increasingly clear that the targets of choice in this crusade are overwhelmingly blacks and Latinos").

Cocaine base, otherwise known as "crack cocaine" or "crack," caused a scare in the mid-1980s as many commentators warned of the growing availability and use of this "cheap, highly addictive, and deadly form of cocaine."<sup>10</sup> The media sparked this concern, declaring the outbreak of a national "crack epidemic."<sup>11</sup> One journalist wrote that because of crack, "[m]en 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."<sup>12</sup> Many people feared that use of crack by young adults was on the rise<sup>13</sup> and realized, as the death of basketball star Len Bias demonstrated, that cocaine could kill.<sup>14</sup> This perception led former federal drug czar William Bennett to proclaim crack cocaine to be "our biggest and most immediate problem."<sup>15</sup>

Congress responded swiftly and decisively to the hysteria over crack cocaine.<sup>16</sup> In 1986, Congress passed the Anti-Drug Abuse Act,<sup>17</sup> which contained the so-called "crack statute," under which it adopted a hundred-to-one ratio, treating one gram of crack as equivalent to

10. "Crack" Cocaine: *Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 99th Cong., 2d Sess. 1 (1986) [hereinafter *Crack Cocaine Hearing*] (statement of Sen. Roth).

11. See Peter Kerr, *Drug Treatment in City Is Strained by Crack, a Potent New Cocaine*, N.Y. TIMES, May 16, 1986, at A1 (referring to increase in crack cocaine use as "crack epidemic"); Jacob V. Lamar Jr., "Crack": *A Cheap and Deadly Cocaine Is a Spreading Menace*, TIME, June 2, 1986, at 16, 16 (announcing that crack is "highly potent, highly addictive form of cocaine that is rapidly becoming a scourge"); Tom Morganthau et al., *Kids and Cocaine*, NEWSWEEK, Mar. 17, 1986, at 58, 58 (claiming that, in 1986, cocaine abuse was fastest growing drug problem in America), reprinted in 132 CONG. REC. 4418 (1986); Richard M. Smith, *The Plague Among Us: The Drug Crisis*, NEWSWEEK, June 16, 1986, at 15, 15 (likening spread of crack to plagues of medieval Europe and promising to cover crack "crisis" as aggressively as civil rights struggle, war in Vietnam, and end of Nixon's presidency).

12. 132 CONG. REC. 8291 (1986) (citing Paul Blythe, *It's Cheap, It's Available and It's Ravaging Society*, PALM BEACH POST & EVENING TIMES).

13. See *Crack Cocaine Hearing*, supra note 10, at 1 (statement of Sen. Roth) (noting recent survey showing that 30% of college students had used cocaine by end of their senior year); Morganthau et al., supra note 11, at 58 (discussing how American children are "increasingly at risk to the nightmare of cocaine addiction"), reprinted in 132 CONG. REC. 4418 (1986).

14. See *Crack Cocaine Hearing*, supra note 10, at 2 (statement of Sen. Roth) (discussing death of Len Bias from suspected cocaine overdose); Nancy Cooper et al., *The Mystery of a Star's Death*, NEWSWEEK, June 30, 1986, at 29, 29 (describing events leading up to tragic death of Len Bias).

15. Bennett Asks Tougher Drug Fight, Declaring Crack "Biggest Problem," N.Y. TIMES, Aug. 1, 1989, at A14; see also BARBARA C. WALLACE, CRACK COCAINE: A PRACTICAL TREATMENT APPROACH FOR THE CHEMICALLY DEPENDENT 9 (1991) (discussing problem of crack cocaine). But see Adam Paul Weisman, *I Was a Drug-Hype Junkie: 48 Hours on Crack Street*, NEW REPUBLIC, Oct. 6, 1986, at 14, 16 (stating that experts agree that number one drug threat in America is alcohol).

16. H. Scott Wallace, *The Drive to Federalize Is a Road to Ruin: When More Is Less*, 8 CRIM. JUST. 8, 12 (1993) (explaining that under Controlled Substances Act of 1970 Congress abolished Commerce Clause limitation on narcotics control; thus, every drug crime that is offense under state law can also be prosecuted in federal courts).

17. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 841 (1994)).

one hundred grams of powder cocaine for sentencing purposes.<sup>18</sup> The sentencing provisions in the crack statute provide that a person convicted of possession and distribution of fifty grams of crack be given a mandatory minimum sentence of ten years, the same as a defendant convicted of possession and distribution of five thousand grams of powder cocaine.<sup>19</sup> In other words, both provisions punish the same drug—cocaine—but crack is penalized one hundred times more than powder cocaine.<sup>20</sup>

Recent statistics reveal that, nationally, close to ninety percent of the defendants convicted of federal crack violations have been black, while only about four percent have been white.<sup>21</sup> Because each of these defendants is given the ten year mandatory minimum sentence, district court Judge Cahill, in *United States v. Clary*,<sup>22</sup> concluded that the crack statute “has been directly responsible for incarcerating nearly an entire generation of young black American men for very long periods, usually during the most productive time of their lives.”<sup>23</sup> In 1994, in fact, 32.2% of young black men between the

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18. 21 U.S.C. § 841(b)(1)(A)(iii) (1994). Section 841(b)(1)(A)(iii) provides that any person convicted of possession with intent to distribute “50 grams or more of a mixture or substance . . . which contains [crack]” shall be sentenced to no less than 10 years in prison. *Id.* The same penalty, under 21 U.S.C. § 841(b)(1)(A)(ii)(II), is imposed on a person possessing 5000 grams or more of cocaine powder. Similarly, United States Sentencing Guidelines (U.S.S.G.) §§ 2D1.1(a)(3) and (c)(13) equate one gram of cocaine base with 100 grams of powder cocaine for sentencing purposes. U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 2D1.1 (1994) [hereinafter SENTENCING GUIDELINES MANUAL]. Because the Sentencing Commission derived the hundred-to-one ratio from § 841(b), see *United States v. Clary*, 846 F. Supp. 768, 770 n.2 (E.D. Mo.), *rev’d*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995), this Note treats the mandatory minimum disparity in § 841(b) and U.S.S.G. § 2D1.1 as the same. In *Clary*, the district court and the Eighth Circuit did so also. *Clary*, 846 F. Supp. at 770 n.2; *Clary*, 34 F.3d at 710 n.1.

19. See *supra* note 18 and accompanying text (outlining provisions of crack statute). A person convicted of simple possession of five grams (the weight of two pennies) of crack cocaine receives a mandatory minimum sentence of five years. 21 U.S.C. § 841(b)(1)(B)(iii) (1994). The same amount of powder cocaine, on the other hand, is a misdemeanor that carries no mandatory minimum and a maximum penalty of one year in jail. *Id.* § 844(a).

20. *Clary*, 846 F. Supp. at 770.

21. See *id.* at 786 (noting that in 1992, 92.6% of those convicted of federal crack violations were black, while only 4.7% were white) (citing U.S. Sentencing Commission representative sample of all drug cases received for fiscal year 1992). In comparison, 45.2% of those sentenced for cocaine powder violations in 1992 were white while 20.7% were black. *Id.* In 1993, 88.3% of those convicted of selling crack were black and 4.1% were white. *Cocaine: Crack and Powder*, WASH. POST, Mar. 10, 1995, at A20. During the same year, 32% of those convicted for selling powder cocaine were white and 27.4% were black. *Id.*

22. 846 F. Supp. 768 (E.D. Mo.), *rev’d*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

23. *United States v. Clary*, 846 F. Supp. 768, 770 (E.D. Mo.), *rev’d*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995); see also *powell & Hershenov, supra* note 2, at 569-70 (noting that there are more black men in prison than in college). Jailing young black men can have long term affects as well. See *Harris, supra* note 9, at A26 (noting that low-income blacks, some of whom are already crippled by lack of education and job skills, are released with felony records that make them even less employable).

ages of twenty and twenty-nine were either in prison, jail, or on probation or parole compared to only 6.7% of young white males.<sup>24</sup> The number of young black men under judicial system supervision is up more than thirty percent since 1989 when about twenty-five percent were under the supervision of the criminal justice system.<sup>25</sup> Experts argue that the number of young black men in prison is a result of "a greater number of defendants receiving prison sentences, especially for drug offenses, rather than an increase in the number of crimes committed by black men."<sup>26</sup>

In early 1995, the United States Sentencing Commission examined the crack and powder cocaine sentencing disparity.<sup>27</sup> In April of that year, the Commission recommended that defendants convicted of crack cocaine and powder cocaine offenses be treated equally, recommending increased penalties only when weapons were used or injuries occurred during the drug crime.<sup>28</sup> These recommendations were scheduled to become law unless Congress passed blocking legislation before November 1, 1995.<sup>29</sup> Attorney General Janet Reno strongly urged Congress to reject such proposals.<sup>30</sup> In the fall of 1995, both the House and the Senate passed legislation to kill the Sentencing Commission's recommendations, which President Clinton signed into law on October 30, 1995.<sup>31</sup> The disparate treatment of

24. Thomas, *supra* note 6, at A1.

25. Thomas, *supra* note 6, at A1.

26. Thomas, *supra* note 6, at A1. The study was conducted by the Sentencing Project, a Washington-based, non-profit organization. *Id.*

27. Toni Locy, *Reno Assails Parity in Drug Crime Penalties: Punishment Depends on Form of Cocaine*, WASH. POST, Apr. 16, 1995, at A17.

28. *Id.*

29. Jeffrey Abramson, *Making the Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at A15 (editorial).

30. Locy, *supra* note 27, at A17.

31. Ann Devroy, *Clinton Retains Tough Law on Crack Cocaine: Panel's Call to End Disparity In Drug Sentencing is Rejected*, WASH. POST, Oct. 31, 1995, at A1. The joint effort by Congress and President Clinton in passing legislation to kill the Sentencing Commission's recommendations was the first time in the Commission's seven-year history that Congress and the White House blocked one of its recommendations. *Id.* at A4. The public has expressed its outrage at President Clinton and Congress. *See id.* (stating that Jesse L. Jackson called Clinton's decision "a moral disgrace" and Congressional Black Caucus said sentencing disparities "make a mockery of justice"); Francis X. Clines, *After March, House Votes on Emotional Racial Issue*, N.Y. TIMES, Oct. 19, 1995, at B12 (explaining that disparity between crack and powder cocaine sentences was "an emphatic concern" at Million Man March held in Washington, D.C., on October 16, 1995); Mary Pat Flaherty & Pierre Thomas, *Crack Sentences Angered Inmates, Officials Warned: Prison Bureau Raised Possibility of Riots*, WASH. POST, Oct. 27, 1995, at A1, A12 (noting that Federal Bureau of Prisons warned that House's decision to keep disparities between sentences for crack and powder cocaine offenses may have caused prison riots in Alabama, Tennessee, Pennsylvania, and Illinois); *President Clinton and Crack*, WASH. POST, Nov. 2, 1995, at A30 (editorial) (stating that President Clinton's decision to sign legislation designed to maintain enhanced penalty provisions for crack was "the easy, politically safe choice, but it was the wrong one").

crack and power cocaine, therefore, remains the law.<sup>32</sup>

The statistical correlation between race and convictions under the crack statute implicates the Equal Protection Clause of the Fourteenth Amendment<sup>33</sup> and the equal protection component of the Fifth Amendment Due Process Clause.<sup>34</sup> As one court noted, "the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection."<sup>35</sup> The equal protection argument is that the penalty differential of the hundred-to-one ratio of crack to cocaine has a disproportionate impact on blacks because they are more likely to possess crack than whites, who more often possess powder cocaine.<sup>36</sup> Therefore, providing longer sentences for possession of crack than for the same amount of powder cocaine treats a similarly situated person in a dissimilar manner, violating his or her equal protection right under the law.<sup>37</sup>

This Note uses *United States v. Clary* to analyze the issue of whether the hundred-to-one ratio in § 841(b) violates the equal protection component of the Fifth Amendment Due Process Clause. Part I sets forth the legal standards relevant to any equal protection challenge. Part II discusses the legislative rationale behind enactment of the crack statute. Part III analyzes the reasons behind both the district court's conclusion that the crack statute violates equal protection and the Eighth Circuit's reversal. Part IV discusses unconscious racism and the widespread public association of crack with race at the time Congress provided the enhanced penalty provisions for crack cocaine. Finally, Part V uses unconscious racism together with other factors to conclude that the Eighth Circuit erred in failing to find proof of discrimination. Part V argues that the district court, instead, correctly applied the highest level of judicial scrutiny and properly found the crack statute to be unconstitutional.

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32. *But see* Joan Biskupic, *Justices to Hear L.A. Case Alleging Racial Prosecution*, WASH. POST, Oct. 31, 1995, at A6 (discussing Supreme Court's decision to hear case that federal prosecutors selectively prosecuted blacks for crack cocaine violations); Joan Biskupic, *High Court to Hear Mandatory Sentence Dispute: At Issue Is Discretion of Federal Judges in Relaxing Terms for Cooperative Defendants*, WASH. POST, Nov. 7, 1995, at A10 (noting Supreme Court's announcement to hear case raising issue of whether federal judges have discretion to lower sentences of drug traffickers who are subject to mandatory minimum sentence but who cooperate with prosecutors).

33. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

34. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.")

35. *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991).

36. *Clary*, 846 F. Supp. at 770.

37. *Id.* (noting arguments from defendant's brief).

## I. BACKGROUND

The district court in *Clary* stated that the hundred-to-one ratio of crack to powder cocaine, coupled with the mandatory minimum sentencing provided by the crack statute, “reeks with inhumanity and injustice.”<sup>38</sup> 21 U.S.C. § 841(b) purports to punish criminal activity for both crack and powder cocaine, but blacks using crack are punished more severely than whites using the same amount of powder cocaine.<sup>39</sup> In fact, the disparity is so disproportional that the district court found it “shocks the conscience.”<sup>40</sup> This disparate impact, in turn, raises equal protection issues. If race rather than conduct was the motivating factor behind the enhanced penalty provisions for crack cocaine, the crack statute violates the equal protection rights of black Americans.<sup>41</sup>

### A. *The Equal Protection Clause and Suspect Classifications*

The Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment command that similarly situated people be treated alike.<sup>42</sup> To determine whether a law violates equal protection, courts must first ask if the law treats similarly situated people in a dissimilar manner; if it does, courts must then balance the interests of the individual against the interests of the government seeking to regulate the individual.<sup>43</sup> This balancing approach focuses on the ends sought by the government and the means chosen to achieve those ends.<sup>44</sup>

38. *Id.* at 772.

39. *Id.* at 770 (stating that punishment for possession and distribution of 50 grams of crack cocaine is same as for 5000 grams of powder cocaine).

40. *Id.*

41. *Id.* (noting defendant's argument that because blacks are more likely to possess crack than whites, similarly situated defendants are being treated in dissimilar manner).

42. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954); *Clary*, 846 F. Supp. at 773. The United States Supreme Court originally interpreted the Fourteenth Amendment to prohibit government officials from discriminating on the basis of race. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71-72 (1873) (construing Fourteenth Amendment to proscribe all state-imposed discrimination against blacks). The Court later interpreted the Equal Protection Clause to prohibit regulations disparately burdening “discrete and insular” minorities historically subjected to discriminatory treatment. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (suggesting that there should be additional protection for suspect classifications). The Court has held that where the federal government makes a classification which, if made by a state, would violate the Equal Protection Clause of the Fourteenth Amendment, then the classification violates the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

43. Ann L. Iijima, *Minnesota Equal Protection in the Third Millennium: “Old Formulations” or “New Articulations”?*, 20 WM. MITCHELL L. REV. 337, 340 (1994).

44. *Id.* at 340; see *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (evaluating whether state's goal of targeting street drug dealers was met by statute providing harsher penalties for

Courts apply one of three different standards of review depending on the group being burdened and the nature of the constitutional interest at issue.<sup>45</sup> They use the “rational basis” standard to review general social welfare or economic regulations.<sup>46</sup> Under this lowest level of review, the government’s ends need only be legitimate and the means must be rationally related to the achievement of those ends.<sup>47</sup> Equal protection of the laws does not always mean equal treatment, but it does require that differential treatment have some relevance to the purpose for which the legislation is made.<sup>48</sup>

Courts use the next level of review, the “intermediate scrutiny” standard, to review classifications by gender.<sup>49</sup> This test requires that the gender-based legislation serve important government objectives and be substantially related to the achievement of those objectives.<sup>50</sup>

The highest level of review, the “strict scrutiny” standard, applies when a court faces legislation which burdens persons based on race or national origin, or burdens fundamental individual liberties.<sup>51</sup> Under this standard, the government must show that the classification

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possession of crack than for powder cocaine).

45. See *Clark v. Jester*, 486 U.S. 456, 461 (1988) (noting that to determine whether legislation violates equal protection, Court applies different levels of scrutiny to different types of classification); see also *Iijima*, *supra* note 43, at 341 (listing three factors courts apply to determine standard: (1) nature of government’s interest; (2) nature of individual interest burden; and (3) identity of class burdened).

46. See *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (applying rational basis standard to statute regulating pumping of gas); see also *Iijima*, *supra* note 43, at 342 (noting that between 1865 and 1937, Supreme Court used rational basis test to invalidate numerous economic regulations).

47. *Montague v. Richardson*, 24 Conn. 338 (1856); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (laying foundation for rational basis standard of judicial review). In *McCulloch*, Chief Justice Marshall stated, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *Id.*

48. See *United States v. Clary*, 846 F. Supp. 768, 773 (E.D. Mo.) (“Equal protection does not require that all persons be dealt with identically . . . [but] it does require that a distinction [that is] made have some relevance to the purpose for which the classification is made.”) (quoting *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966)), *rev’d*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

49. *Iijima*, *supra* note 43, at 345.

50. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“Classifications by gender must serve important government objectives and must be substantially related to achievement of those objectives.”); see *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1422 (1994) (holding that intentional discrimination on basis of gender in use of peremptory strikes violated Equal Protection Clause); *Craig*, 429 U.S. at 204 (holding that gender-based differential on sales of 3.2% beer violated Equal Protection Clause); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (holding that mandatory preference of one gender over other in appointment of administrators of intestate decedents’ estates violated Equal Protection Clause).

51. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (expressing view that legal restrictions on single racial group must be subject to most rigid scrutiny); see also *Iijima*, *supra* note 43, at 344 (noting that disparate treatment based on race or national origin is subject to rigid scrutiny).

is necessary to further a compelling government interest.<sup>52</sup> Courts only subject a race-based statute to strict scrutiny, however, where they find proof of racial discrimination.<sup>53</sup> If they fail to find proof of discrimination, courts review the statute under the rational basis standard.<sup>54</sup>

### B. Proof of Racial Discrimination

The Supreme Court, in *Washington v. Davis*,<sup>55</sup> set forth the "basic equal protection principle" that the governmental action "claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."<sup>56</sup> An invidious discriminatory purpose is present where a statute discriminates on its face by creating, for example, segregated facilities such as schools, rest rooms, and drinking fountains.<sup>57</sup> An invidious discriminatory purpose, however, need not be expressed or appear on the face of the statute.<sup>58</sup> It can be found where the government applies the statute so as to invidiously discriminate on the basis of race.<sup>59</sup> Additionally, an invidious

52. See *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993) (holding that North Carolina's redistricting plan was unconstitutional attempt to segregate people to improve voting power); see also *Iijima*, *supra* note 43, at 344-45 (stating that under strict scrutiny, governmental action must have compelling purpose).

53. See *infra* notes 55-69 and accompanying text (discussing proof of racial discrimination).

54. See, e.g., *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-71 (1977) (upholding district court's finding that legislators were not motivated by racial discrimination or intent to discriminate); *Washington v. Davis*, 426 U.S. 229, 246 (1976) (failing to find proof of discrimination, Supreme Court found that legislative act in question was neutral on its face and was rationally related to purpose government was constitutionally empowered to pursue).

55. 426 U.S. 229 (1976).

56. *Washington v. Davis*, 426 U.S. 229, 240 (1976). In *Davis*, the plaintiffs challenged a police testing procedure in which four times more blacks than whites failed the test. *Id.* at 237. The plaintiffs relied on this disproportionate impact for their equal protection challenge. *Id.* The Supreme Court held that discriminatory intent was a prerequisite to a finding of an equal protection violation. *Id.* at 240.

57. See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (holding that "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities").

58. *Davis*, 426 U.S. at 241.

59. *Id.*; see, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (finding government unfairly applied local ordinance against Chinese). The Court stated:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

*Id.* In *Yick Wo*, a San Francisco ordinance made it unlawful to operate a laundry in other than a brick or stone building without obtaining the consent of the board of supervisors. *Id.* at 368. Concluding that the ordinances were administered exclusively against Chinese, the Court held that "whatever may have been the intent of the ordinances as adopted, they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of . . . equal

discriminatory purpose "may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another."<sup>60</sup>

In reaffirming the *Davis* standard, the Supreme Court, in *Personnel Administrator v. Feeney*,<sup>61</sup> stated that a facially neutral law, "even if [it] has a disproportionately adverse effect upon a racial minority, . . . is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose" on the part of the legislature.<sup>62</sup> The Court noted that a discriminatory purpose "implies that the legislature 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."<sup>63</sup>

The Supreme Court further emphasized in *Arlington Heights v. Metropolitan Housing Development Corp.*<sup>64</sup> that *Davis* does not require the person bringing an equal protection claim "to prove that the challenged action rested *solely* on racially discriminatory purposes;"<sup>65</sup> it need only be a "motivating factor."<sup>66</sup> In deciding whether an invidious discriminatory purpose is a motivating factor, courts must make a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available."<sup>67</sup> The district court in *Clary* listed the "subjects of proper inquiry":

- (1) adverse racial impact of the official action,
- (2) historical background of the decisions,
- (3) 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 made by the decisionmakers, and
- (7) the inevitability or foreseeability of the consequence of the law.<sup>68</sup>

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protection." *Id.* at 373.

60. *Davis*, 426 U.S. at 242; *see, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985) (determining that provision in Alabama Constitution disenfranchising persons convicted of "crimes involving moral turpitude" violated Equal Protection Clause).

61. 442 U.S. 256 (1979).

62. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979).

63. *Id.* at 279.

64. 429 U.S. 252 (1977).

65. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (emphasis added).

66. *Id.* at 266; *see also id.* at 269-70 (upholding zoning board decision that tended to perpetuate racially segregated housing patterns because, apart from its disproportionate impact, board's decision was shown to be application of constitutionally neutral zoning policy).

67. *Id.* at 266.

68. *United States v. Clary*, 846 F. Supp. 768, 783 (E.D. Mo.) (citing *Arlington Heights*, 429 U.S. at 266-67, for factors one through five; *Washington v. Davis*, 426 U.S. 229, 252 (1976), for

The Supreme Court specifically noted that these factors are not exhaustive.<sup>69</sup>

The crack statute does not discriminate on its face.<sup>70</sup> As such, in order for a court to find a racially discriminatory purpose, a defendant challenging the crack statute must demonstrate either that the government has applied the crack statute so as to invidiously discriminate on the basis of race, or that a racially discriminatory purpose should be inferred from the totality of relevant facts.<sup>71</sup> No court has struck down the crack statute based on the former rationale,<sup>72</sup> but the district court in *Clary* found that the totality of relevant facts demonstrated that race rather than conduct was a motivating factor in enacting the crack statute.<sup>73</sup>

## II. ENACTMENT OF THE CRACK STATUTE

America's concern with drugs is more than just a medical anxiety related to overuse; it is, according to historian David Musto,<sup>74</sup> a political problem.<sup>75</sup> Lawmakers are generally concerned not so much with the potential health dangers of drugs, but with the violence and crime, whether real or imagined, often associated with drugs.<sup>76</sup> Apparently, it is this concern that led Congress to adopt tougher laws to combat the crack cocaine "epidemic" of the mid-1980s.<sup>77</sup>

"Smoking" crack cocaine is a form of "freebasing" cocaine, which means to inhale vapors of cocaine base.<sup>78</sup> Crack is not, however,

sixth factor; and *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 n.25 (1979), for seventh factor), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

69. *Arlington Heights*, 429 U.S. at 268.

70. See 21 U.S.C. § 841(b)(1)(A)(iii) (1994) (declaring that "any person" convicted of possession with intent to distribute 50 grams of crack shall be sentenced to no less than 10 years in prison (emphasis added)).

71. See *supra* notes 58-60 and accompanying text (discussing methods of proving discriminatory purpose).

72. *But see Clary*, 846 F. Supp. at 787 (implying that statistical evidence of racial disparity may be enough to show intent to discriminate and thereby strike down crack statute under *Yick Wo* analysis).

73. *Clary*, 846 F. Supp. at 787.

74. See Michael Tonry, *Toward a Rational Drug Policy: Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 37 (referring to David Musto as "the leading historian of American drug policy").

75. DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 244 (1973).

76. See *powell & Hershenov, supra* note 2, at 559-60, 559 n.4 (arguing that legislators have focused on crime and violence associated with use of drugs and have virtually ignored medical aspects of problem).

77. *powell & Hershenov, supra* note 2, at 560.

78. James A. Inciardi, *Beyond Cocaine: Basuco, Crack, and Other Coca Products*, 14 CONTEMP. DRUG PROBS. 461, 468-69 (1987). Inciardi notes that crack is technically not "smoked," it is "inhaled." *Id.* at 489 n.21. Whereas smoking implies combustion, burning, and the inhalation of smoke, crack, rather than burning, vaporizes and the fumes are inhaled. *Id.*

“freebase” cocaine.<sup>79</sup> To convert cocaine to its freebase form, an alkali, such as ammonia or baking soda, is added to cocaine hydrochloride (powder cocaine) to remove the hydrochloric acid.<sup>80</sup> The *free* cocaine, or cocaine *base* (and hence the noun “freebase”) is then extracted with a flammable solvent, such as ether.<sup>81</sup> The result is a crystalline form of cocaine which is then smoked in a special glass pipe.<sup>82</sup> Thus, “freebase” is a drug, a cocaine product converted to the base state *after* adulterants have been chemically removed, and one inhales the vapors of the base through a process called “freebasing.”<sup>83</sup>

Most Americans first heard about freebasing, popular since the 1970s,<sup>84</sup> when comedian Richard Pryor sustained third-degree burns in 1980 when he accidentally ignited a container of ether while converting cocaine to its freebase form.<sup>85</sup> This terrible accident highlights the special danger of the freebase conversion process—the proximity of highly flammable ether to an open flame.<sup>86</sup> Converting powder cocaine to crack cocaine, however, provides an easier and safer method than converting powder cocaine to freebase cocaine because the process only requires water, baking soda, and a microwave oven<sup>87</sup> and does not involve ether.<sup>88</sup> The person making crack mixes powder cocaine with baking soda and water to create a paste<sup>89</sup> and then heats this paste in a microwave to evaporate the fluid.<sup>90</sup> This process produces a pebble-sized crystalline form of cocaine base<sup>91</sup> which is then cut and smoked in a glass pipe. Thus, crack, a cocaine product converted to the base state *without* removing the adulterants, is a different form of cocaine than freebase cocaine.<sup>92</sup> Nevertheless, the chemical make-up of crack and freebase

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79. *Id.* at 468.

80. See *Crack Cocaine Hearing*, *supra* note 10, at 14 (statement of Charles R. Schuster, Ph.D., Director, National Institute on Drug Abuse (NIDA)); Inciardi, *supra* note 78, at 465.

81. See *Crack Cocaine Hearing*, *supra* note 10, at 14 (statement of Dr. Schuster); Inciardi, *supra* note 78, at 465.

82. Inciardi, *supra* note 78, at 465.

83. Inciardi, *supra* note 78, at 468.

84. See Inciardi, *supra* note 78, at 465 (noting that freebasing began in 1970s and that, by 1977, as many as 10% of cocaine users were exclusively freebasers); Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 149 (1994) (stating that smoking only recently became popular means of ingesting cocaine).

85. Morgenthau et al., *supra* note 11, at 58-59, *reprinted in* 132 CONG. REC. 4418 (1986).

86. Inciardi, *supra* note 78, at 466.

87. Lowney, *supra* note 84, at 149.

88. Morgenthau et al., *supra* note 11, at 58, *reprinted in* 132 CONG. REC. 4418 (1986).

89. Morgenthau et al., *supra* note 11, at 59, *reprinted in* 132 CONG. REC. 4418 (1986).

90. Lowney, *supra* note 84, at 149.

91. Inciardi, *supra* note 78, at 468. Crack gets its name from the crackling sound caused by the residue of the baking soda when the substance is smoked. *Id.* at 469.

92. Inciardi, *supra* note 78, at 468.

cocaine is virtually identical, and smoking either crack or freebase is "essentially smoking cocaine."<sup>93</sup>

Although Congress was aware that crack cocaine was a new form of freebasing cocaine rather than a new drug,<sup>94</sup> it enacted the crack statute based on its conclusion that crack was more dangerous than powder cocaine.<sup>95</sup> Congress reached this conclusion after being presented with evidence of crack's potency, its highly addictive nature, its affordability, and its increasing prevalence.<sup>96</sup> Additionally, members of Congress felt that more crime accompanied crack than powder cocaine.<sup>97</sup>

Senator Roth declared crack to be more potent than powdered cocaine because crack, he claimed, is a purified form of cocaine.<sup>98</sup> Consequently, he reasoned, one gets a more rapid and intense rush from smoking crack than snorting powder cocaine.<sup>99</sup> Senator Chiles likewise argued that crack is more potent than powder cocaine because it is "purer" than powder cocaine.<sup>100</sup> He claimed that because crack is purer, it reaches the brain in less than ten seconds, while powder cocaine requires up to eight minutes to reach the brain.<sup>101</sup>

93. See Lowney, *supra* note 84, at 149-50 ("Examination of the chemical substance, pharmacology, and distribution of crack indicates that crack and powder cocaine are in fact not substantially distinct drugs . . . . Despite the different modes of preparation, smoking crack . . . is essentially smoking cocaine.").

94. See *Crack Cocaine Hearing*, *supra* note 10, at 71 (prepared statement of Dr. Charles R. Schuster, Ph. D., Director, NIDA) (stating that "'crack' cocaine is a new form of freebase cocaine, not a new drug" (emphasis added)). According to Inciardi, and as this Note has outlined, see *supra* notes 78-93 and accompanying text, this statement is not technically accurate in that crack is not freebase cocaine but is, rather, a form of freebasing cocaine. See Inciardi, *supra* note 78, at 468-69 (distinguishing "freebase" (noun) from "freebasing" (act)). Despite his misstatement that crack was a form of freebase cocaine, Dr. Schuster correctly explained that crack was not a new drug.

95. See *Crack Cocaine Hearing*, *supra* note 10, at 4 (statement of Sen. Nunn) (referring to crack as "the most dangerous illicit drug that [law enforcement officials] have ever confronted").

96. See *United States v. Clary*, 846 F. Supp. 768, 791 (E.D. Mo.) (reviewing legislative history of statute and suggesting that Congress accepted premises relating to crack's relative dangerousness despite lack of "hard" or "reliable" evidence), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

97. See *Crack Cocaine Hearing*, *supra* note 10, at 6 (prepared statement of Sen. Nunn) (stating that law enforcement officials predict increase in crimes against persons and property as result of crack cocaine).

98. *Crack Cocaine Hearing*, *supra* note 10, at 2 (statement of Sen. Roth). But see *infra* note 527 (citing Dr. Inciardi who explains that despite claims to contrary, crack is not purified cocaine).

99. *Crack Cocaine Hearing*, *supra* note 10, at 2 (statement of Sen. Roth).

100. *Crack Cocaine Hearing*, *supra* note 10, at 9 (prepared statement of Sen. Chiles).

101. *Crack Cocaine Hearing*, *supra* note 10, at 9 (prepared statement of Sen. Chiles).

Supporters of the crack statute also warned of crack's addictiveness.<sup>102</sup> Senator Roth claimed that the intense rush resulting from smoking crack is followed by an equally intense "crash" of severe depression.<sup>103</sup> Rather than being satisfied with one or two snorts of powder cocaine, he argued, "[c]rack users demand multiple hits immediately to offset the physical and psychological depression they experience each time they crash."<sup>104</sup> Senator Roth implied, therefore, that crack was more addictive than powder cocaine.<sup>105</sup>

Advocates of the statute also asserted that the low cost of crack contributed to its dangerousness. Dr. Charles R. Schuster, of the National Institute on Drug Abuse, testified before Congress that dealers had previously sold cocaine in lots of at least a gram for a price around one hundred dollars, but sold crack in small vials for around ten dollars each.<sup>106</sup> This packaging, Dr. Schuster stated, "reduces the price barrier that prohibited young children from being able to purchase the drug in the past."<sup>107</sup> Senator Roth argued a similar point, stating that because of its low cost, "crack is endangering the lives and futures of many people who previously would not have had access to cocaine."<sup>108</sup>

To illustrate the increasing prevalence of crack, Senator Chiles noted that in early 1985 he had never heard of crack cocaine.<sup>109</sup> Senator Nunn added that later that year, "[c]rack hit our society with a suddenness unprecedented in the history of illicit drug use."<sup>110</sup> He referred to the introduction of crack into the drug scene as "an overnight phenomenon."<sup>111</sup> Dr. Schuster explained crack's popular-

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102. See *Crack Cocaine Hearing*, *supra* note 10, at 5 (statement of Sen. Nunn) (asserting that "crack is quite possibly the most addictive drug on Earth").

103. *Crack Cocaine Hearing*, *supra* note 10, at 2 (statement of Sen. Roth).

104. *Crack Cocaine Hearing*, *supra* note 10, at 2 (statement of Sen. Roth); see also *id.* at 8 (statement of Sen. Chiles) (discussing cocaine effects). Senator Chiles noted that the high of crack is so high and the low is so low that the word on the street was "[d]on't smile at anybody that you think might be on a cocaine low, because if you smile at him, he is liable to kill you. He is liable to kill you because he is paranoid that he is in that kind of low." *Id.*

105. See *Crack Cocaine Hearing*, *supra* note 10, at 2 (statement of Sen. Roth) (stating that crack tends to be "extremely addictive"); see also 132 CONG. REC. 4412 (1986) (statement of Sen. Hawkins) (quoting Arnold Washton, specialist at New Jersey's Fair Oaks Hospital). Washton testified that "[c]rack is almost instantaneous addiction, whereas if you snort coke it can take 2 to 5 years before addiction sets in. There is no such thing as the recreational use of crack. It is the most addictive drug known to man right now." *Id.* at 4412.

106. *Crack Cocaine Hearing*, *supra* note 10, at 15 (statement of Dr. Schuster).

107. *Crack Cocaine Hearing*, *supra* note 10, at 15 (statement of Dr. Schuster).

108. *Crack Cocaine Hearing*, *supra* note 10, at 2 (statement of Sen. Roth).

109. See *Crack Cocaine Hearing*, *supra* note 10, at 7 (statement of Sen. Chiles) (declaring that "[e]ight months ago, I had never heard of crack cocaine").

110. *Crack Cocaine Hearing*, *supra* note 10, at 5 (statement of Sen. Nunn).

111. *Crack Cocaine Hearing*, *supra* note 10, at 5 (statement of Sen. Nunn). But see Inciardi *supra* note 64, at 468 (noting that crack has been around since early 1970s).

ity, noting that it attracted first-time users because it did not require the use of elaborate paraphernalia, it attracted younger and less affluent customers because it sold at a low price, and it attracted experienced users because it had a rapid effect.<sup>112</sup>

Additionally, at least one supporter of the crack statute cautioned that crack accompanied a renewed traffic in stolen property and led to an increase in crimes against persons.<sup>113</sup> Senator Nunn noted reports indicating that, while dealers of powder cocaine do not barter in stolen goods, crack dealers appear to accept stolen property as payment.<sup>114</sup> Moreover, he argued that, unlike users of powder cocaine (a substance which he claimed was less addictive than crack), crack addicts will undoubtedly turn to burglaries and similar crimes to support their habit.<sup>115</sup>

Based on this rationale, Congress felt justified in enacting 21 U.S.C. § 841(b)(1)(A)(iii), the so-called crack statute. Under this statute, Congress effectively adopted a hundred-to-one ratio, treating one gram of crack as equivalent to one hundred grams of powder cocaine for sentencing purposes.<sup>116</sup> Edward Clary, an eighteen-year-old black male with no prior criminal convictions, pleaded guilty to a charge of possession with intent to distribute crack cocaine under this statute.<sup>117</sup>

### III. UNITED STATES V. CLARY

Edward Clary was arrested and charged with possession with intent to distribute 67.76 grams of crack cocaine.<sup>118</sup> Clary entered a guilty plea to the charge, pursuant to 21 U.S.C. § 841(b)(1)(A)(iii), which imposes a ten-year mandatory minimum sentence.<sup>119</sup> After he pleaded guilty, but before sentencing, Clary filed a motion arguing that the ten-year mandatory minimum in § 841(b)(1)(A)(iii)<sup>120</sup> and

112. *Crack Cocaine Hearing, supra* note 10, at 15 (statement of Dr. Schuster).

113. *Crack Cocaine Hearing, supra* note 10, at 6 (prepared statement of Sen. Nunn).

114. *See Crack Cocaine Hearing, supra* note 10, at 6 (prepared statement of Sen. Nunn) (stating that police have found stolen property during raids of crack houses).

115. *See Crack Cocaine Hearing, supra* note 10, at 6 (prepared statement of Sen. Nunn) (declaring that "[p]olice are anticipating an increase in burglaries and similar violations as crack use spreads").

116. *See* 21 U.S.C. §§ 841(b)(1)(A)(ii)-(iii) (1994). While the minimum 10 year sentence applies to a person convicted of possessing just 50 grams of "a mixture or substance . . . which contains cocaine base," *id.* § 841(b)(1)(A)(iii), this penalty only applies to possessors of powder cocaine if the amount is five kilograms or more, *id.* § 841(b)(1)(A)(ii)(II).

117. *United States v. Clary*, 846 F. Supp. 768, 797 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

118. *Id.* at 769-70.

119. *Id.* at 770.

120. 21 U.S.C. § 841(b)(1)(A)(iii) (1994).

in the United States Sentencing Guidelines (U.S.S.G.) § 2D1.1<sup>121</sup> violated his Fifth Amendment equal protection rights.<sup>122</sup> District court Judge Cahill concluded that the sizable disparity in the penalties for crack and powder cocaine possession did in fact violate the equal protection component of the Fifth Amendment Due Process Clause, both generally and as applied.<sup>123</sup> The Eighth Circuit reversed this decision on appeal.<sup>124</sup>

#### A. District Court Decision

The Eighth Circuit has consistently upheld the constitutionality of the disparate treatment of powder cocaine and crack for sentencing purposes.<sup>125</sup> In *United States v. Marshall*,<sup>126</sup> however, the Eighth

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121. SENTENCING GUIDELINES MANUAL, *supra* note 18, § 2D1.1, at 79.

122. *Clary*, 846 F. Supp. at 770. The district court consolidated the separate challenges to U.S.S.G. §§ 2D1.1(a)(3) and (c)(13) and to 21 U.S.C. §§ 841(b)(1)(A)(iii) and (ii)(II) because the guidelines are simply the direct implementation of the statutory directive. *Id.* at 770 n.2. This Note does so as well.

123. *Clary*, 846 F. Supp. at 797. The district court also held that the selective prosecution of crack cases on the basis of race was constitutionally impermissible as applied to *Clary*. *Id.* *Clary* conceded before the Eighth Circuit, however, that, in the district court, he “did not claim that he was selectively prosecuted because of his race . . . [because he] was mindful of the even more difficult burden of proof he would have had to carry.” *United States v. Clary*, 34 F.3d 709, 714 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995) (alteration in original) (quoting Appellee’s Brief at 43). The Eighth Circuit, therefore, rejected the claim of selective prosecution, *id.*, and this Note does not contest this issue.

124. *Clary*, 34 F.3d at 709.

125. *See, e.g.*, *United States v. Maxwell*, 25 F.3d 1389, 1396-97 (8th Cir.) (rejecting equal protection challenge to more severe crack penalties because there was no evidence to suggest that Congress permitted them to remain in effect to further racially discriminatory purpose), *cert. denied*, 115 S. Ct. 610 (1994); *United States v. Simms*, 18 F.3d 588, 595 (8th Cir. 1994) (holding that hundred-to-one disparity in sentencing guidelines between crack and powder cocaine offenses did not violate due process or equal protection rights); *United States v. Parris*, 17 F.3d 227, 230 (8th Cir.) (rejecting equal protection challenge based on alleged disparate racial impact resulting from stricter penalties for crack versus powder cocaine), *cert. denied*, 114 S. Ct. 1662 (1994); *United States v. Johnson*, 12 F.3d 760, 763-64 (8th Cir. 1993) (rejecting constitutional challenges to more severe sentences for crack cocaine and restating that “requiring more severe penalties for cocaine-base offenses than for cocaine-powder offenses is ‘rationally related to Congress’ objective of protecting the public welfare” (quoting *United States v. Buckner*, 894 F.2d 975, 980 (8th Cir. 1990))), *cert. denied*, 114 S. Ct. 2689 (1994); *United States v. Echols*, 2 F.3d 849, 850 (8th Cir. 1993) (*per curiam*) (refusing to reconsider previous holding that Sentencing Guidelines’ disparate treatment of crack cocaine and powder cocaine did not violate equal protection); *United States v. Womack*, 985 F.2d 395, 400-01 (8th Cir.) (rejecting claim that different sentences imposed for distribution of crack and powder cocaine violated equal protection and relying on previous cases as conclusive resolution of issue), *cert. denied*, 114 S. Ct. 276 (1993); *United States v. Williams*, 982 F.2d 1209, 1213 (8th Cir. 1992) (reaffirming previous holdings that hundred-to-one ratio does not violate equal protection or due process, yet failing to address apparent statistical proof of disparate racial impact); *United States v. Latimore*, 974 F.2d 971, 974-76 (8th Cir. 1992) (rejecting due process challenge and equal protection challenge on ground of disparate impact due to absence of evidence that Congress or Sentencing Commission had racially discriminatory motive), *cert. denied*, 113 S. Ct. 1819 (1993); *United States v. Willis*, 967 F.2d 1220, 1225-26 (8th Cir. 1992) (declining to reconsider previous holdings that hundred-to-one ratio did not violate equal protection even though Minnesota Supreme Court had recently found that similar state statute violated equal

Circuit suggested that it would reconsider the issue if presented with "new facts or legal analysis."<sup>127</sup> In *Clary*, the district court accepted this invitation by entertaining Edward Clary's equal protection challenge.<sup>128</sup> The district court rejected the argument that overt racism was the basis for the crack penalties.<sup>129</sup> Instead, it relied on unconscious racism<sup>130</sup> and the rules announced in *Arlington Heights*<sup>131</sup> to conclude that Congress' "failure to account for a foreseeable disparate impact which would effect [sic] black Americans in grossly disproport-

protection clause of state constitution in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991)); *United States v. Simmons*, 964 F.2d 763, 767 (8th Cir.) (rejecting, "without lengthy discussion" and with strong regard for *stare decisis*, due process challenge, equal protection challenge, and Eighth Amendment challenge to hundred-to-one ratio, thereby effectively ignoring assertions that 97% of those charged with crack offenses in Western District of Missouri in 1988-89 were black), *cert. denied*, 113 S. Ct. 632 (1992); *United States v. Hechavarria*, 960 F.2d 736, 738 (8th Cir. 1992) (*per curiam*) (noting that prior cases already rejected defendant's argument that imposing harsher sentences for use or distribution of crack violated defendant's right to equal protection); *United States v. McDile*, 946 F.2d 1330, 1331 (8th Cir. 1991) (noting previous holding that crack statute did not violate equal protection rights); *United States v. Johnson*, 944 F.2d 396, 408-09 (8th Cir.) (rejecting Eighth Amendment challenge to crack statute), *cert. denied*, 112 S. Ct. 646 (1991); *United States v. House*, 939 F.2d 659, 664 (8th Cir. 1991) (holding that hundred-to-one ratio did not violate equal protection or Eighth Amendment's prohibition on cruel and usual punishment); *United States v. Winfrey*, 900 F.2d 1225, 1227 (8th Cir. 1990) (rejecting substantive due process and Eighth Amendment proportionality challenges); *United States v. Reed*, 897 F.2d 351, 352-53 (8th Cir. 1990) (*per curiam*) (upholding constitutional validity of hundred-to-one ratio against equal protection challenge on authority of previous case rejecting substantive due process challenge); *United States v. Buckner*, 894 F.2d 975, 978-81 (8th Cir. 1990) (rejecting substantive due process and Eighth Amendment attacks on hundred-to-one ratio and holding that crack penalties are rationally related to legitimate congressional objective of protecting public against highly potent and addictive nature of crack).

Other courts have viewed the issue differently. *See, e.g.*, *United States v. Shepherd*, 857 F. Supp. 105, 111-12 (D.D.C. 1994) (refusing to impose mandatory minimum where defendant was prepared to sell powder cocaine to undercover officer but, upon officer's insistence that she first convert powder to crack, defendant instead sold crack after "cooking" powder in microwave); *United States v. Walls*, 841 F. Supp. 24, 31-33 (D.D.C. 1994) (holding that enhanced penalties for crack offenses, as applied to two defendants who were drug addicts employed by other defendants for minimal compensation to convert powder cocaine to crack, constituted cruel and unusual punishment in violation of Eighth Amendment); *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (holding Minnesota crack statute to be unconstitutional under state equal protection challenge in which court applied rational basis test as articulated by Minnesota law).  
126. 998 F.2d 634 (8th Cir. 1993).

127. *United States v. Marshall*, 998 F.2d 634, 635 n.2 (8th Cir. 1993) ("With so much at stake . . . we are reluctant to say that full exploration of the issues is unwarranted, . . . in connection with the crack cocaine punishments, which continue to perplex many sentencing judges. We do not invite mere repetition of prior rejected arguments, without new facts or legal analysis.").

128. *United States v. Clary*, 846 F. Supp. 768, 771 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

129. *See id.* at 779 ("When counsel first argued that overt racism was really the basis for the discriminatory crack penalties, this Court rejected that approach out-of-hand . . . . But upon reflection, the Court recognizes that while intentional discrimination is unlikely today, unconscious feelings of difference and superiority still live on even in well-intentioned minds.").

130. *See infra* Part IV (discussing unconscious racism); *supra* note 129 (citing language in *Clary* describing unconscious racism).

131. *See supra* notes 64-69 and accompanying text (discussing rules guiding inquiry into role of invidious discrimination in passage of statute).

tionate numbers would . . . violate the spirit and letter of equal protection."<sup>132</sup>

The court stated that "the root of racism has been implanted in our collective unconscious and has biased the ideas that Americans accept about the significance of race."<sup>133</sup> After beginning its analysis with a description of the history of racism in criminal punishment,<sup>134</sup> the court went on to outline the events leading up to the passage of the crack statute.<sup>135</sup> The court acknowledged numerous media accounts associating crack with blacks.<sup>136</sup> Moreover, the court showed that Congress exploited these media accounts to support enactment of the crack statute.<sup>137</sup>

The court also pointed to departures from normal procedures in approving the crack sentencing provisions.<sup>138</sup> For example, the House held few hearings on the enhanced penalty provisions for crack offenders,<sup>139</sup> and the Senate only conducted a single morning hearing on the matter.<sup>140</sup> In addition, although Congress originally called for a fifty-to-one ratio in the penalties, it later doubled them for no other reason than to symbolize "redoubled Congressional seriousness."<sup>141</sup>

The court also acknowledged the adverse racial impact of the crack statute and the degree to which Congress should have foreseen these consequences.<sup>142</sup> The court stated that, based on the "legions" of media reports depicting heavy involvement by blacks in crack cocaine, it was foreseeable that the harsh penalties would disproportionately affect blacks.<sup>143</sup> Moreover, the court found undisputed evidence that blacks, in fact, constituted 98.2% of persons convicted of crack cocaine charges in the Eastern District of Missouri between the years 1988 and 1992.<sup>144</sup> The court observed that nationally, blacks made

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132. *Clary*, 846 F. Supp. at 782.

133. *Id.* at 778-79.

134. *Id.* at 774-76.

135. *See id.* at 776-78 (discussing racism from 1860s onward and impact of 1980s on black community).

136. *Id.* at 783-84.

137. *See id.* at 783-84 ("Legislators used these media accounts as informational support for the enactment of the crack statute . . . Members of Congress also introduced into the record media reports containing language that was either overtly or subtly racist, and which exacerbated white fears that the 'crack problem' would spill out of the ghettos.").

138. *Id.* at 784-85.

139. *Id.* at 784.

140. *Id.* at 784-85 ("Tossing caution to the wind, the Senate conducted a single hearing between 9:40 a.m. and 1:15 p.m., including recesses. Attendance was intermittent.").

141. *Id.* at 784.

142. *Id.* at 785-87.

143. *Id.* at 785.

144. *Id.* at 786.

up 92.6% of those convicted of crack cocaine charges in 1992.<sup>145</sup> Accordingly, the court concluded that “[o]bjective evidence supports the belief that racial animus was a motivating factor in enacting the crack statute.”<sup>146</sup>

Having thus found race rather than conduct to be the target of the enhanced penalties for crack offenses, the district court applied strict scrutiny to review the crack statute.<sup>147</sup> The court failed to find a compelling governmental interest, questioning several of Congress’ conclusions: that crack was one hundred times more potent than powder cocaine,<sup>148</sup> that it was more addictive,<sup>149</sup> that it was more affordable,<sup>150</sup> and that it was more prevalent.<sup>151</sup> The court then determined that even if Congress had compelling interests, Congress failed to draft the crack statute in narrow terms to accomplish those interests.<sup>152</sup> The court stressed that “[c]ocaine is cocaine.”<sup>153</sup> Accordingly, the district court held 21 U.S.C. § 841(b)(1)(A)(iii) to be unconstitutional in the face of Clary’s equal protection challenge.<sup>154</sup> The government appealed this decision to the Eighth Circuit.<sup>155</sup>

### B. Eighth Circuit Decision

The Eighth Circuit, stating that past decisions had repeatedly decided this issue,<sup>156</sup> found no equal protection violation and

145. *Id.*

146. *Id.* at 787; see also *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (stating that challenged action need not rest solely on racially discriminatory purpose as long as proof exists that discriminatory purpose has been motivating factor).

147. See *Clary*, 846 F. Supp. at 791 (explaining that “[a] law which burdens blacks disproportionately and whose influence has been traced to racial considerations, even if unconscious, warrants the most rigorous scrutiny”). A law with such disproportionate impact will survive strict scrutiny “only if the classification which is suspect is narrowly tailored to further a compelling governmental interest.” *Id.*

148. See *id.* (stating that “Congress had no hard evidence before it to support the contentions that crack was 100 times more potent or dangerous than powder cocaine”).

149. See *id.* at 792 (finding that Congress had “no reliable evidence . . . that crack cocaine was more addictive or dangerous than powder cocaine”).

150. See *id.* (claiming that “[c]rack is no cheaper than cocaine powder because cocaine is the essential product of crack”).

151. See *id.* (stating that “[a]ll forms of cocaine are available today in greater quantity and at lower prices than a few years ago”).

152. *Id.* at 793.

153. *Id.*

154. *Id.* at 797.

155. *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994), cert. denied, 115 S. Ct. 1172 (1995).

156. See *supra* note 125 (listing Eighth Circuit cases rejecting constitutional challenges to crack statute). The Eighth Circuit looked primarily to three past decisions in finding that there was no equal protection violation. *Clary*, 34 F.3d at 712-13. The court noted that, in *United States v. Lattimore*, it had previously “concluded that there was no evidence that Congress or the Sentencing Commission had a racially discriminatory motive when it crafted the Guidelines with extended sentences for crack cocaine.” *Clary*, 34 F.3d at 712 (citing *United States v. Lattimore*,

reversed the district court's decision.<sup>157</sup> The Eighth Circuit noted that the district court's "painstakingly-crafted" opinion "undoubtedly presents the most complete record on this issue."<sup>158</sup> Nevertheless, the court concluded that a review of the record and the lower court's findings failed to demonstrate a congressional intent to act with a discriminatory purpose when passing the crack statute, or that Congress chose this type of action "at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group."<sup>159</sup>

The Eighth Circuit began its analysis by questioning the district court's reliance on unconscious racism and its conclusion that the media-created stereotypes of blacks as crack dealers "undoubtedly" influenced Congress' racial perceptions.<sup>160</sup> Unconscious racism, the Eighth Circuit flatly concluded, "simply does not address the question whether Congress acted with a discriminatory purpose."<sup>161</sup> Additionally, while recognizing that the media-created stereotypes might have affected some members of Congress, the Eighth Circuit felt that influencing some legislators "hardly demonstrate[s]" that Congress enacted the crack statute "because of its adverse effect on African American males, instead of its stated purpose of responding to the serious impact of a rapidly-developing and particularly-dangerous form of drug use."<sup>162</sup>

The Eighth Circuit also countered the district court's proof of invidious discriminatory purpose under the *Arlington Heights* factors.<sup>163</sup> The court accounted for Congress' haste in approving the crack sentencing provisions by noting the seriousness of the perceived problem.<sup>164</sup> The court also declared that objective evidence revealing the disproportionate racial impact of the crack statute is not enough to establish invidious intent "because the Equal Protection Clause is violated 'only if that impact can be traced to a discriminato-

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974 F.2d 971, 975 (8th Cir. 1992), cert. denied, 113 S. Ct. 1819 (1993)). In *United States v. Buckner*, the Eighth Circuit "held that requiring more severe penalties for crack than cocaine powder was not arbitrary or irrational." *Clary*, 34 F.3d at 712 (citing *United States v. Buckner*, 894 F.2d 975, 980 (8th Cir. 1990)). In *United States v. Maxwell*, it "rejected a strict scrutiny argument that was based on the continued enforcement of the statute rather than its enactment." *Clary*, 34 F.3d at 713 (citing *United States v. Maxwell*, 25 F.3d 1389, 1396-97 (8th Cir.), cert. denied, 115 S. Ct. 610 (1994)).

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

158. *Id.*

159. *Id.* (citing *Lattimore*, 974 F.2d at 975 (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979))).

160. *Id.*

161. *Id.*

162. *Id.*

163. See *supra* text accompanying note 68 (listing *Arlington Heights* factors).

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

ry purpose."<sup>165</sup> Failing to find proof of racial animus,<sup>166</sup> the Eighth Circuit applied rational basis review and upheld the crack statute as constitutional.<sup>167</sup>

#### IV. UNCONSCIOUS RACISM

Acceptance of unconscious racial animus distinguished the district court's opinion from that of the Eighth Circuit. The former recognized that a current equal protection analysis must consider the unconscious predisposition of legislators.<sup>168</sup> The latter rejected that theory, finding that it failed to address the central issue of whether Congress acted with a discriminatory purpose.<sup>169</sup> An exploration of unconscious racism is therefore required to determine whether it should be considered in an equal protection challenge to the crack statute.

##### A. *Unconscious Racism Explained*

According to Professor Charles Lawrence, racism is a disease that infects almost everyone, yet most of us remain unaware that we take race into account in our decisionmaking.<sup>170</sup> Racism, according to Lawrence, "is a set of beliefs whereby we irrationally attach significance to something called race."<sup>171</sup> Racism infects most Americans because we "share a common historical and cultural heritage in which racism has played and still plays a dominant role."<sup>172</sup> At the same time, even though most of us do not consciously engage in overt discrimination,<sup>173</sup> we often are unaware of the ways in which our

165. *Id.* (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979)).

166. *Clary*, 34 F.3d at 713. The Eighth Circuit looked to the testimony of Eric E. Sterling, Counsel to the Subcommittee of Criminal Justice of the House of Representatives at the time Congress passed the crack statute, and attempted to distinguish "racial animus" from "racial consciousness," i.e., "an awareness that the problem in the inner cities . . . was about to explode into the white part of the country." *Id.* at 714. The Eighth Circuit felt that although Congress recognized that primarily minorities used crack, the crack statute was constitutional because Congress wanted the penalties to apply wherever dealers sold crack. *Id.*

167. *See id.* at 712-13 (noting previous holdings finding rational motives for heavier penalties for crack).

168. *United States v. Clary*, 846 F. Supp. 768, 782 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

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

170. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321-22 (1987) (outlining basic theory of unconscious racism).

171. *Id.* at 330.

172. *Id.* at 322.

173. Overt discrimination against blacks has become increasingly unacceptable and, in some instances, illegal. *See Brown v. Board of Educ.*, 347 U.S. 483, 493, 495 (1954) (holding that *de jure* school segregation based on race, "even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational

common experience influences our beliefs about race or when those beliefs affect our actions.<sup>174</sup> Consequently, Lawrence argues, unconscious racial motivation influences much of the behavior that produces racial discrimination.<sup>175</sup>

Lawrence offers two explanations for unconscious racism, the Freudian theory and the cognitive theory. The Freudian theory holds that the "mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right."<sup>176</sup> Even though American society has recently rejected racism as immoral, our common historical experience makes it a part of our culture.<sup>177</sup> Freudian theorists argue that when a person's racist ideas conflict with a society that condemns those ideas, the mind excludes racism from the consciousness,<sup>178</sup> forcing it into the unconscious mind.<sup>179</sup>

Alternatively, the cognitive theory states that our culture transmits certain beliefs and preferences through, among others, family, peers, and the media.<sup>180</sup> These beliefs are so much a part of the culture that, according to Lawrence, we internalize them without explicit knowledge.<sup>181</sup> Instead, he argues, these beliefs are "part of the individual's rational ordering of her perceptions of the world."<sup>182</sup> Cognitive theorists argue that perceiving blacks as dangerous or

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opportunities"). Although the Supreme Court limited its holding in *Brown* to school segregation, *Brown* marked the beginning of the end of the entire system of separate but equal. In a series of per curiam decisions, the Court extended its ruling in *Brown* to other public facilities, such as parks, *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam), *aff'g* 252 F.2d 122 (5th Cir.), public transportation, *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam), *aff'g* 142 F. Supp. 707 (M.D. Ala.), golf courses, *Holmes v. Atlanta*, 350 U.S. 879 (1955), *rev'g* 223 F.2d 93 (5th Cir.), and bath houses and beaches, *Mayor & City Council v. Dawson*, 350 U.S. 877 (1955), *aff'g* 220 F.2d 386 (4th Cir.).

174. Lawrence, *supra* note 170, at 322. For examples of unconscious racism in everyday life, see *id.* at 339 (noting that Howard Cosell (white sportscaster) referred to Alvin Garrett (black athlete) as "little monkey"); *id.* at 340 (noting how former First Lady Nancy Reagan told Ronald Reagan's supporters she wished he were there to "see all these beautiful white people"); *id.* at 341 (discussing how some white people express their acceptance of individual blacks by stating that they "do not think of them as black").

175. Lawrence, *supra* note 170, at 322.

176. Lawrence, *supra* note 170, at 322.

177. See Lawrence, *supra* note 170, at 322-23 (discussing integral part racism has played in American history, despite recent conclusion that racism is immoral).

178. Lawrence, *supra* note 170, at 323 (contrasting dichotomy of racism as socially unacceptable today with reality of past racism).

179. See *United States v. Clary*, 846 F. Supp. 768, 780-81 (E.D. Mo.) (discussing Freudian theory and its relation to covert racism in form of subconscious stereotyping), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

180. Lawrence, *supra* note 170, at 323.

181. See Lawrence, *supra* note 170, at 323 (discussing embedded cultural beliefs).

182. Lawrence, *supra* note 170, at 323.

inferior is learned and internalized completely outside the consciousness, and is reinforced by media-generated stereotypes of blacks.<sup>183</sup>

Regardless of the theory, however, the result is that we take race into account even though we often are not cognizant that we are doing so or without considering why we place so much emphasis on race in the first place.<sup>184</sup>

### B. *Unconscious Racism and Equal Protection*

Requiring proof of a conscious or intentional discriminatory purpose in an equal protection challenge, Lawrence argues, ignores not only much of what we understand about the workings of the human mind, but also the history of race in our society.<sup>185</sup> Lawrence states:

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.<sup>186</sup>

Acknowledging unconscious racism in an equal protection analysis, however, helps to eliminate governmental decisions that consider race without substantial justification.<sup>187</sup> Unconscious racism, in other words, helps to correct the wrong we seek to address in applying heightened scrutiny to racial classifications.<sup>188</sup>

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183. See *Clary*, 846 F. Supp. at 780.

184. Lawrence, *supra* note 170, at 330. The district court in *Clary* recognized that "while intentional discrimination is unlikely today, unconscious feelings of difference and superiority still live on even in well-intentioned minds." 846 F. Supp. at 779. For example, the white community might mask a decision which disproportionately affects blacks by arguing that it is for the "greater good" of society. *Id.* Or police might argue that they are protecting black neighborhoods and black citizens by "using harsh 'get tough' laws to arrest crack dealers." *Id.*

185. Lawrence, *supra* note 170, at 323.

186. Lawrence, *supra* note 170, at 322 (citations omitted).

187. See Lawrence, *supra* note 170, at 323.

188. See Lawrence, *supra* note 170, at 344 (explaining why unconscious racism is relevant to equal protection analysis). Lawrence states:

What is the wrong that the equal protection clause seeks to address? More specifically, what wrong do we seek to address in applying heightened scrutiny to racial classifications? If we can determine the nature of this wrong, we can determine whether identifying the existence of unconscious racial motivation is important to its prevention or remediation.

### 1. *Justification for the suspect classification doctrine*

Two theories justify the suspect classification doctrine.<sup>189</sup> The first, the "process defect" theory, asserts that judicial intervention seeks to prevent or remedy "the systematic exclusion of a group from the normal workings of the political process."<sup>190</sup> To state it differently, courts should protect those who have not been able to protect themselves through the democratic process.<sup>191</sup> The process defect theory applies strict scrutiny to uncover unconstitutional  *motive*  by questioning those classifications that disadvantage "discrete and insular" minorities.<sup>192</sup>

The second, the "stigma" theory, holds that judicial intervention seeks to prevent or remedy racially stigmatizing actions.<sup>193</sup> The stigma theory applies strict scrutiny to racial classifications when "they operate to shame and degrade a class of persons by labeling them as inferior."<sup>194</sup> This theory looks to the  *impact*  of a particular governmental action on a minority and presumes that the harm flows from the "governmental action taken with intent to stigmatize."<sup>195</sup> The stigma theory recognizes that whites historically have used stigmatizing labels against blacks and have developed a proscribed method of legal

189. Lawrence, *supra* note 170, at 344.

190. Lawrence, *supra* note 170, at 344-45. John Hart Ely is the main proponent of the process defect theory. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135-79 (1980) (outlining process defect theory).

191. Lawrence, *supra* note 170, at 345. This theory has its origins in the famous footnote 4 in *United States v. Carolene Prods. Co.*, in which Justice Stone suggested that there should be additional protection for "discrete and insular" minorities. 304 U.S. 144, 153 n.4 (1938).

192. See Lawrence, *supra* note 170, at 349 (stating that "[t]he process defect theory sees suspect classification doctrine as a roundabout way of uncovering unconstitutional motive by suspecting those classifications that disadvantage groups we know to be the object of widespread vilification").

193. Lawrence, *supra* note 170, at 349-50. Lawrence defines "stigmatization" as "the process by which the dominant group in society differentiates itself from others by setting them apart, treating them as less than fully human, denying them acceptance by the organized community, and excluding them from participating in that community as equals." *Id.* at 350.

194. Lawrence, *supra* note 170, at 350 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 361-62 (1978) (Brennan, J., concurring in part and dissenting in part)). Justice Harlan, in his dissent in *Plessy v. Ferguson*, gave rise to this theory when he referred to the segregation of railway passengers as a "badge of servitude" which proceeded "on the ground that colored citizens are . . . inferior and degraded." 163 U.S. 537, 560, 562 (1896) (Harlan, J., dissenting); see also *Brown v. Board of Educ.*, 347 U.S. 483, 560 (1954) (finding segregated educational facilities violate equal protection); *Board of Educ. v. Dowell*, 498 U.S. 237, 257 (1991) (Marshall, J., dissenting) ("Our pointed focus in [*Brown v. Board of Educ.*] upon the stigmatic injury caused by segregated schools explains our unflinching insistence that formerly *de jure* segregated school districts extinguish all vestiges of school segregation.").

195. Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease*, 78 CORNELL L. REV. 4, 51 (1992) (discussing application of stigmatic theory to school desegregation cases).

and cultural practices that treat blacks as inferior when compared with treatment of whites.<sup>196</sup>

Governmental motive and disproportionate impact in cases alleging racial discrimination, however, are not mutually exclusive.<sup>197</sup> In order to carry out the goals behind the process defect theory, courts cannot stop at only those laws that discriminate on their face or are the result of overt racism.<sup>198</sup> "Unconscious aversion to a group that has historically been vilified distorts the political process no less than a conscious decision to place race hatred before politically legitimate goals."<sup>199</sup> Because process distortion exists where racial prejudice has influenced the decision, it is irrelevant that legislators' motives lie outside their awareness.<sup>200</sup>

Similarly, a law does not stigmatize blacks merely because it disproportionately affects blacks; instead, the stigma must stem from society's predisposition to exclude blacks.<sup>201</sup> "If stigmatizing actions injure by virtue of the meaning society gives them, then it should be apparent that the evil intent of their authors, while perhaps sufficient, is not necessary to the infliction of the injury."<sup>202</sup> Stigma can occur, therefore, even if those who participate in the stigmatizing action have seemingly benign motives.<sup>203</sup>

196. Lawrence, *supra* note 170, at 350; see Brown, *supra* note 195, at 66 (claiming that constitutional harm of segregation is not racial imbalance per se, but meaning attached to it); Charles R. Lawrence III, *Segregation "Misunderstood": The Milliken Decision Revisited*, 12 U.S.F. L. REV. 15, 26 (1977) (asserting that *de jure* segregation is "public symbol of the inferior position" of African-Americans).

197. See Lawrence, *supra* note 170, at 321-22 (discussing reasons for unconscious racism in relation to governmental motive and disproportionate impact).

198. See Lawrence, *supra* note 170, at 349 (arguing that courts must assess subtleties of legislation to determine whether law may have racist implications not apparent in plain meaning).

199. Lawrence, *supra* note 170, at 349.

200. Lawrence, *supra* note 170, at 347; see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1519 (2d ed. 1988) (discussing effect of covert racism on minority groups). Tribe states:

If government is barred from enacting laws with an eye to invidious discrimination against a particular group, it should not be free to visit the same wrong whenever it happens to be looking the other way. If a state may not club minorities with its fist, surely it may not indifferently inflict the same wound with the back of its hand.

*Id.*

201. See Lawrence, *supra* note 170, at 354 (pointing out that due to their lower net incomes, blacks are disproportionately affected by bridge tolls, sales tax, and filing fees, which do not necessarily racially stigmatize blacks).

202. Lawrence, *supra* note 170, at 352. Lawrence argues that "when the city of Jackson, Mississippi, closed its public pools after a federal court ordered it to integrate them, [the act] stigmatized blacks regardless of whether the [motive was] racial or economic." *Id.* at 352-53 (discussing *Palmer v. Thompson*, 403 U.S. 217 (1971)).

203. See Lawrence, *supra* note 170, at 354.

## 2. *Cultural meaning test*

Lawrence has proposed a "cultural meaning" test for recognizing racial discrimination.<sup>204</sup> This test suggests a connection between unconscious racism and the existence of cultural symbols to which society attaches racial meaning.<sup>205</sup> In applying the cultural meaning test, courts would consider evidence of the social and historical context in which legislators made the alleged discriminatory decision.<sup>206</sup>

The equal protection analysis evaluates governmental action "to see if it conveys a symbolic message to which the culture attaches racial significance."<sup>207</sup> If the court determines that the society views the governmental action in terms of race, then, according to Lawrence, it must also find racial considerations in the beliefs and motivations of the legislators.<sup>208</sup> Lawrence reasons that "[t]he actors are themselves part of the culture and presumably could not have acted without being influenced by racial considerations, even if they are unaware of their racist beliefs."<sup>209</sup> Accordingly, if the court determines that the actions were race-based, it applies strict scrutiny.<sup>210</sup>

Lawrence illustrates his cultural meaning test by looking at *Memphis v. Greene*<sup>211</sup> and other well-known discrimination cases.<sup>212</sup> In *Greene*, the city of Memphis closed a street between black and white neighborhoods at the request of the citizens of Hein Park, a white residential community.<sup>213</sup> The Supreme Court, while noting that the adverse impact on blacks was greater than on whites because the street was primarily used by blacks, failed to find proof of racial discrimination.<sup>214</sup> Consequently, the Court found no constitutional

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204. Lawrence, *supra* note 170, at 355-58.

205. Lawrence, *supra* note 170, at 324.

206. Lawrence, *supra* note 170, at 356.

207. Lawrence, *supra* note 170, at 356.

208. See Lawrence, *supra* note 170, at 356 (arguing that if court determines that society "thinks of governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers").

209. Lawrence, *supra* note 170, at 324.

210. Lawrence, *supra* note 170, at 356 (proposing that "[t]he court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated").

211. 451 U.S. 100 (1981).

212. See Lawrence, *supra* note 170, at 357-58, 363-64 (applying cultural meaning test to *Memphis v. Greene*, 451 U.S. 100 (1981)); see also *id.* at 362-76 (applying cultural meaning test to *Brown v. Board of Educ.*, *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, and *Washington v. Davis*).

213. *Memphis v. Greene*, 451 U.S. 100, 102-03 (1981).

214. See *id.* at 113-16, 119 (reasoning that city's decision to close street was motivated by its interest in protecting safety and tranquility of residential neighborhood).

violation.<sup>215</sup> Lawrence, however, argues that the construction of the barrier between the neighborhoods has cultural meaning because it reflects "a long history of whites' desire to separate themselves from blacks as a symbol of their superiority."<sup>216</sup> Presumably, in weighing the social and historical context in which the chosen course of action was taken, a court would find purposeful discrimination on the part of the decisionmakers and would apply strict scrutiny.<sup>217</sup>

Similarly, in *Arlington Heights*, a nonprofit development corporation planned to develop racially integrated low- and moderate-income federally subsidized housing in a predominantly white Chicago suburb.<sup>218</sup> The proposed site, however, was zoned for single family dwellings.<sup>219</sup> The development corporation, therefore, petitioned the village to rezone the property for multiple family use.<sup>220</sup> The village board of trustees denied the rezoning request and the developer, along with three prospective black tenants, brought suit alleging that the denial was racially discriminatory.<sup>221</sup> The Supreme Court held that the plaintiffs failed to prove that the village acted with discriminatory purpose.<sup>222</sup>

Lawrence reasons that the plaintiffs should have been able to present evidence to illustrate that denying the rezoning request conveys a cultural message that denigrates blacks.<sup>223</sup> This evidence includes "the history of statutorily mandated housing segregation as well as the use of restrictive covenants among private parties that aim to prevent blacks from purchasing property in white neighbor-

215. See *id.* at 126 (finding no racially discriminatory motive on part of legislature, Court concluded that disparate impact on black citizens "could not . . . be fairly characterized as a badge or incident of slavery"); see also *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (finding that preclusion of blacks from public accommodations did not violate Thirteenth Amendment and was not "badge and incident of slavery").

216. Lawrence, *supra* note 170, at 357. Lawrence asks:

What does it mean to construct a barrier between all-white and all-black sections of Memphis? In a city where just twenty years ago such barriers were built down the middle of rest rooms and restaurants with signs on them that read "white" and "colored," won't there be considerable consensus as to whether the barrier speaks in racial terms? Won't there be a cultural memory that gives the barrier the same meaning even in the absence of the now-outlawed signs? Is it possible that a council member in this city would not have remembered the message conveyed by those earlier barriers when he voted to construct the present one? I think it is impossible.

*Id.* at 364 (citations omitted).

217. See Lawrence, *supra* note 170, at 356 (noting that court would apply strict scrutiny upon finding that significant portion of society thinks of governmental action in racial terms).

218. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 252 (1977).

219. *Id.* at 255.

220. *Id.* at 257.

221. *Id.* at 258.

222. *Id.* at 270.

223. Lawrence, *supra* note 170, at 366.

hoods.”<sup>224</sup> Lawrence recognizes that we have rarely come to live in segregated neighborhoods because of mutual choice; rather, we live in segregated communities because whites believe in their own superiority, and living in close proximity to blacks “lowers their own status.”<sup>225</sup> Lawrence concludes that the available evidence highlights our society’s frequent attachment of racial meaning to segregated housing and is “more than sufficient to establish the cultural meaning of the Arlington Heights city officials’ action.”<sup>226</sup>

Racial meaning is given to governmental action, however, only when society as a whole, including both whites and blacks, attaches racial significance to the action.<sup>227</sup> An increase in sales tax may disproportionately impact blacks because blacks as a group have a lower net income than whites.<sup>228</sup> But our culture does not associate a decision to raise taxes in racial terms.<sup>229</sup> We think of a tax increase as an economic decision.<sup>230</sup> “Where the culture as a whole does not think of an action in racial terms, it is also unlikely that unconscious attitudes about race influenced the governmental decisionmaker.”<sup>231</sup> Simply put, the racial meaning behind these decisions is not widely understood within the predominant culture.<sup>232</sup> In these cases, therefore, the court would presume that the actions were not race-based and would apply the rational basis standard.<sup>233</sup>

Lawrence asserts that his cultural meaning test for recognizing racial discrimination is “relatively modest.”<sup>234</sup> It does not, he argues, preclude the search for unconstitutional motives or suggest that all governmental action resulting in discriminatory impact be subject to strict scrutiny.<sup>235</sup> Instead, it requires courts to understand “the

224. Lawrence, *supra* note 170, at 366.

225. Lawrence, *supra* note 170, at 367.

226. Lawrence, *supra* note 170, at 367.

227. See Lawrence, *supra* note 170, at 379 (arguing that because United States does not have homogenous culture, courts generally should recognize racial meaning only when racial meaning is widely recognized throughout predominant culture).

228. See Lawrence, *supra* note 170, at 364 (recognizing that blacks are disproportionately represented among poor).

229. Lawrence, *supra* note 170, at 365.

230. Lawrence, *supra* note 170, at 365.

231. Lawrence, *supra* note 170, at 365.

232. See Lawrence, *supra* note 170, at 379 (stating that racial meaning must be shared by society as a whole).

233. See Lawrence, *supra* note 170, at 324 (noting that court would apply strict scrutiny only where it finds evidence of invidious purpose).

234. Lawrence, *supra* note 170, at 324.

235. Lawrence, *supra* note 170, at 324.

nature of human motivation."<sup>236</sup> While the focus remains on individual responsibility, Lawrence's test emphasizes individual responsibility in the broader historical and social context.<sup>237</sup> Supreme Court justices and lower federal court judges agree that unconscious racism plays a part in decisionmaking and have used Lawrence's theory in their analyses of equal protection challenges.<sup>238</sup> As such, the Eighth Circuit erred in refusing to consider unconscious racism in its examination of the crack statute under Clary's equal protection challenge.<sup>239</sup>

### C. *Unconscious Racism and the Crack Statute*

Under Lawrence's unconscious racism theory, evidence of the cultural meaning of Congress' action in enacting the crack statute must be considered in light of the historical use of related actions and the contemporaneous meaning of such actions to our culture.<sup>240</sup> As in *Arlington Heights*, in which Lawrence suggests the plaintiffs should have been able to present evidence of the historical and contemporaneous meaning of residential segregation, a plaintiff challenging the crack statute should be able to present evidence of our society's frequent attachment of racial meaning to crime and drug abuse.<sup>241</sup> Such an analysis begins with the issue of whether our country has a

236. Lawrence, *supra* note 170, at 324. Lawrence recognizes that some legal scholars question the utility of social science and the ability of courts to interpret the meaning of human behavior. *Id.* at 358. He distinguishes, however, between causal and interpretive judgments in determining the meaning behind a particular action. *Id.* at 361. He states that "causal judgments assert a causal connection between two independently specifiable social phenomena. An interpretive judgment, on the other hand, locates a particular phenomenon within a category of phenomena by specifying its meaning in the society within which it occurs." *Id.* Lawrence continues:

To say that we don't need evidence for the proposition that segregation is an insult to the black community is not to say that we don't need to know it or that there is nothing to know. "There is a fact of the matter, namely that segregation is an insult, but we need no evidence for that fact—we just know it. It's an interpretive fact."

*Id.* (quoting Ronald Dworkin, *Social Sciences and Constitutional Rights: The Consequences of Uncertainty*, 6 J.L. & EDUC. 3, 5 (1977)). It is this type of interpretive judgment on which *Brown v. Board of Educ.* rested. *Id.* at 361. Lawrence claims that the cultural meaning test also requires this type of interpretive judgment. *Id.*

237. Lawrence, *supra* note 170, at 324.

238. See *infra* notes 443-44 and accompanying text (noting cases in which unconscious racism has been used in equal protection challenges).

239. See *infra* notes 443-50 and accompanying text (discussing reasons why courts should consider unconscious racism).

240. See Lawrence, *supra* note 170, at 356 ("The court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated.").

241. See *supra* notes 223-26 and accompanying text (discussing historical and contemporary relevance of racial meaning in *Arlington Heights*).

history of associating crime with race.<sup>242</sup> Next, the question becomes whether our country has a history of attaching racial significance to certain drugs.<sup>243</sup> Finally, the analysis asks whether there was widespread public association of crack with race at the time Congress provided the enhanced penalty provisions for crack cocaine.<sup>244</sup> If there is a historical use of such actions and if the culture thinks of the governmental action in racial terms, then, according to Lawrence's theory, we must also find racial considerations in the beliefs and motivations of the legislators.<sup>245</sup>

### 1. *History of associating crime with race*

The relationship between crime and race has existed since America was first settled.<sup>246</sup> By the end of the seventeenth century, whites had provided enhanced penalties for blacks convicted of certain crimes, and criminalized certain noncriminal activity when blacks were involved.<sup>247</sup> The criminalization of race continued throughout the colonial and antebellum periods, through Reconstruction, and into the twentieth century.<sup>248</sup> As late as 1967, in fact, the Supreme Court struck down as unconstitutional a law that criminalized conduct based solely on the race of the defendants.<sup>249</sup>

#### a. *Colonial and antebellum periods*

The first Africans arrived in Virginia in 1619.<sup>250</sup> While the status

242. See *infra* notes 246-350 and accompanying text (analyzing our country's frequent association of crime and race); see also Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2064 (1993) (arguing that "[t]o understand the modern relationship between race and criminal law one must study the historic connection between defining crime, criminal law, and race").

243. See *infra* notes 351-85 and accompanying text (considering racial connotations of certain drugs).

244. See *infra* notes 386-433 and accompanying text (discussing racial meaning given to crack cocaine by predominant culture).

245. See Lawrence, *supra* note 170, at 356 (arguing that once court is satisfied that substantial part of population thinks of governmental decision in racial terms, court should "presume that socially shared, unconscious racial attitudes" affected decision).

246. Finkelman, *supra* note 242, at 2067.

247. See Finkelman, *supra* note 242, at 2068. Finkelman's thesis is that during the colonial and antebellum periods, race could create a presumption of a certain status (that is, being a slave) which, in essence, made one a criminal; race could create a crime out of normally noncriminal activity; and race could affect punishment, usually to the detriment of blacks. *Id.* at 2067-70. This Note concentrates only on the latter two "crimes of color."

248. See Finkelman, *supra* note 242, at 2064.

249. Finkelman, *supra* note 242, at 2064. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court reversed the conviction of the Lovings, an interracial couple, and overturned the law prohibiting interracial marriages. *Id.* at 12.

250. Finkelman, *supra* note 242, at 2070-71 (noting how John Rolfe, secretary and recorder for Virginia Company of London, documented arrival of first blacks, "20. and odd Negroes," in 1619). To provide a narrower focus to this section, this Note cites primarily to statutes and cases from Virginia. For a discussion of why Virginia is an appropriate state on which to concentrate,

of these first blacks is debated,<sup>251</sup> whites began treating blacks differently by the middle of the century.<sup>252</sup> The case of *In re Negro John Punch* (1640) demonstrates how whites early in American history gave enhanced penalties for blacks committing the same acts as whites.<sup>253</sup> In this case, three servants, two white and one black, received sentences for attempting to run away together.<sup>254</sup> All three were whipped.<sup>255</sup> The court also imposed additional time of service onto each person's indenture.<sup>256</sup> The two white servants received an additional four years while John Punch, a black man, was sentenced to lifetime slavery.<sup>257</sup> Race, in this case, affected punishment. The court gave the black defendant a sentence of lifetime slavery, but it gave the white defendants only four years for committing the same crime.<sup>258</sup>

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see A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather Than the Free": *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 20 (1991) [hereinafter Higginbotham & Bosworth, "Rather Than the Free"]. Higginbotham & Bosworth write:

Virginians played a major role in leading the American Revolution and in shaping the destiny of the new nation after 1776. Yet, tragically, Virginia was also a leader in the debasement of blacks by pioneering a legal process that perpetuated racial injustice. Just as they emulated other aspects of Virginia's policies, many colonies followed Virginia's leadership in slavery law.

*Id.*

This Note suggests that the ideas expressed and conclusions reached in this section are not limited to Virginia, but are ones of general applicability to the South and some Northern states as well. See generally Finkelman, *supra* note 242, at 2093 (noting that most British mainland colonies followed Virginia's lead in associating race with criminal behavior).

251. See KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 39 (1989) (stating that before 1660, status of blacks "apparently equaled that of white indentured servants"); Finkelman, *supra* note 242, at 2071 (explaining that status of first blacks is unknown, but historians generally agree that they were treated as indentured servants).

252. See Finkelman, *supra* note 242, at 2071 (noting that Virginians gradually made distinctions between Europeans and Africans). Virginia first recognized slave status in 1662 when it declared:

WHEREAS some doubts have arisen whether children got by any Englishman upon a negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly*, that all children borne in this country shall be held bond or free only according to the condition of the mother.

*Negro Women's Children to Serve According to the Condition of the Mother*, in 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 170, 170 (enacted 1662) (William Waller Hening ed. 1823) [hereinafter HENING'S STATUTES AT LARGE]. Virginia did not enact its first statute on the legality of enslavement, however, until 1670. A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1973 (1989) [hereinafter Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*].

253. See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 28-29 (1978) [hereinafter HIGGINBOTHAM, IN THE MATTER OF COLOR] (discussing *In re Negro John Punch*).

254. *Id.* at 28.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

In colonial and antebellum Virginia, slaves could receive the death penalty for sixty-eight offenses, while whites could be put to death for only one, first-degree murder.<sup>259</sup> Slaves throughout the South could receive the death penalty for murder, attempted murder, manslaughter, rape and attempted rape of a white woman, rebellion and attempted rebellion, poisoning, robbery, arson, and, in some instances, assault and battery on a white person.<sup>260</sup> In Virginia, slaves could be executed for any crime that, if committed by a white person, called for a prison sentence of not less than three years.<sup>261</sup>

Disparities in punishment did not necessarily depend on slave status, however. Free blacks also received enhanced penalties for committing the same crimes as whites.<sup>262</sup> In 1705, for example, the Virginia legislature enacted a law requiring disparate treatment for stealing hogs. The act declared:

[I]f any person or persons shall, from and after the publication of this act, steal any hog, shoat, or pig, every person so offending, shall, for the first offence, receive on his or her bare back, twenty-five lashes, or pay down ten pounds current money of Virginia; and if a negro, mulatto, or Indian, thirty-nine lashes well laid on . . . .<sup>263</sup>

Thus, under this law, whites received twenty-five lashes on a bare back or a ten pound fine. Blacks, both slave and free, however, received thirty-nine lashes with no chance of paying the fine to avoid the whipping.<sup>264</sup>

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259. A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1022 (1992) [hereinafter Higginbotham & Jacobs, *The "Law Only As an Enemy"*]. Men of all races committing the crime of rape faced the death sentence in colonial Virginia. *Id.* at 1057. By 1848, however, whites could not be sentenced to death for rape, but blacks could. *Id.* at 1059.

260. Kenneth M. Stampp, *Chattels Personal*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 203, 209 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

261. Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1022.

262. Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1023. In addition to enhanced penalties, free blacks could be enslaved as a form of punishment whereas whites could not. *Id.* In 1823, the Virginia legislature declared:

Henceforth, when any free Negro shall be convicted of an offense, now by law punished by imprisonment for more than two years, such person instead of confinement shall be punished by stripes at the discretion of the jury, and shall moreover be adjudged to be sold as a slave and banished beyond the limits of the United States.

*Id.* (citing Act of Feb. 21, 1823, ch. 32 § 3, 1822-23 Va. Acts 35, 35-36).

263. *An Act Against Stealing Hogs*, in 3 HENING'S STATUTES AT LARGE, *supra* note 252, at 276, 276 (enacted 1705).

264. See Finkelman, *supra* note 242, at 2089 (discussing 1705 law against stealing hogs).

In 1705, the Virginia legislature also imposed a special penalty of thirty lashes on a bare back for any "negro, mulatto, or Indian, bond or free" who "lift[ed] his or her hand, in opposition against any christian, not being negro, mulatto, or Indian."<sup>265</sup> A white person raising his or her hand against a free black person or another white, however, was punished under the normal laws of battery.<sup>266</sup> Assault of a slave was not even a criminal offense in the eighteenth century.<sup>267</sup> In fact, the Virginia legislature enacted laws in 1669<sup>268</sup> and 1705<sup>269</sup> relieving any slaveholder who killed his slave of all criminal liability.<sup>270</sup> It was not until 1723 that the Virginia legislature began to punish whites for killing slaves, but only extreme forms of slave torture resulting in death warranted a penalty.<sup>271</sup> If a slave killed a white person, however, intent to murder was presumed and, if found guilty, the slave was put to death.<sup>272</sup>

265. *An Act Concerning Servants and Slaves*, in 3 HENING'S STATUTES AT LARGE, *supra* note 252, at 447, 459 (enacted 1705).

266. See Finkelman, *supra* note 242, at 2091.

267. Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1044-45.

268. *An Act About the Casual Killing of Slaves*, in 2 HENING'S STATUTES AT LARGE, *supra* note 252, at 270, 270 (enacted 1669). The act declared:

[I]f any slave resist his master (or other by his master's order correcting him) and by the extremity of the correction should chance to die, that his death *shall not be accounted felony*, but the master (or that other person appointed by the master to punish him) be acquit from molestation, since it cannot be presumed that prepensed malice (which alone makes murder felony) should induce any man to destroy his owne estate.

*Id.* (emphasis added).

269. *An Act Concerning Servants and Slaves*, in 3 HENING'S STATUTES AT LARGE, *supra* note 252, at 447, 459 (enacted 1705). The act read:

And if any slave resist his master, or owner, or other person, by his or her order, correcting such slave, and shall happen to be killed in such correction, it *shall not be accounted felony*; but the master, owner, and every such other person so giving correction, shall be free and acquit of all punishment and accusation for the same, as *if such accident had never happened*.

*Id.* (emphasis added).

270. See also Stamp, *supra* note 260, at 212 (noting that killing slave also was not felony in Georgia prior to 1770, and in North Carolina prior to 1775).

271. See Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1030 (discussing 1723 law under which white person in Virginia could be prosecuted for willful, malicious, or designed killing of slave). After the American Revolution, most Southern states began to define malicious killing of a slave as a felony. Stamp, *supra* note 260, at 212. These laws, however, were subject to significant qualifications. A person did not commit homicide, for instance, where he caused the death of a slave while administering "moderate correction." *Id.* A person also was entitled to the defense of "justifiable homicide" when he killed a slave who was in the act of rebelling or resisting legal arrest. *Id.* Moreover, Stamp claims that even whites who, by a reasonable interpretation of the law, were guilty of feloniously killing slaves usually escaped conviction because blacks could not testify against whites, white witnesses rarely testified against white offenders, and white juries rarely convicted white defendants in such matters. *Id.* at 213-14. In this instance, "race did not create criminality, but it did allow for criminality to go unpunished." Finkelman, *supra* note 242, at 2089.

272. Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1027.

Moreover, Virginians did not recognize the right of self-defense for any blacks until 1792.<sup>273</sup> Chief Justice Thomas Ruffin of the North Carolina Supreme Court lent his insight into why the defense of self-defense was a risky proposition, at least for slaves. He posited that if slaves could decide when they were entitled to resist white men, they may be encouraged "to [denounce] the injustice of slavery itself, and, upon that pretext, band together to throw off their common bondage entirely."<sup>274</sup> At the same time, the slightest provocation by a black person toward a white person was criminal. By law in 1848, the Virginia legislature declared: "[s]laves or free Negroes using provoking or menacing language or gestures to a white person . . . are punishable by stripes, not exceeding thirty-nine."<sup>275</sup> The racial significance of these laws cannot be ignored.

For much of the colonial era, both black and white men faced the death penalty for the rape of a white woman in Virginia.<sup>276</sup> As the years progressed, however, the legislature continually imposed lesser punishments on whites for rape and attempted rape and greater penalties on blacks. In 1769, the Virginia legislature determined that castration was too severe a penalty for whites convicted of attempted rape of a white woman, but permitted such a penalty for blacks.<sup>277</sup> By 1823, the legislature decided that slaves or free blacks found guilty of attempted rape of a white woman were to "suffer death by hanging by the neck."<sup>278</sup> In 1848, although slaves continued to receive the death penalty, free blacks convicted of raping a white woman or of abducting a female with intent to defile were subject to the death penalty, or, "at the discretion of the jury confinement of five to twenty years."<sup>279</sup> Whites, by this time, could not be executed for rape and

273. Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1029. Higginbotham & Jacobs refer to the limited right of self-defense as a "right without a remedy" because blacks were still unable to testify against whites. *Id.*

274. MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 120 (1981) (quoting *State v. Caesar*, 31 N.C. (9 Ired.) 391 (1849) (Ruffin, C.J., dissenting)); see also Stamp, *supra* note 260, at 213 (citing Tennessee Supreme Court which stated that if master exercised his right to punish, "with or without cause, [and] the slave resist and slay him, it is murder . . . because the law cannot recognize the violence of the master as a legitimate cause of provocation").

275. Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1029 (citing Act of 1848, ch. XII, § 6, 1847-48 Va. Acts 125, 125).

276. Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1056.

277. See Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1058 (discussing penalties for attempted rape of white woman under 1769 statute).

278. Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1058 (citing Act of 1823, ch. 34, § 1, 1822-23 Va. Acts 36, 36).

279. Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1059 (citing Act of 1848, ch. XIII, 1847-48 Va. Acts 126, 126).

were subject to ten to twenty years for rape of a white woman and three to ten years for intent to defile.<sup>280</sup>

While the disparate treatment of black men and white men found guilty of rape or attempted rape of white women was frightening,<sup>281</sup> the plight of black women may have been worse.<sup>282</sup> Rape of a black woman was punishable by death in the colonial period,<sup>283</sup> but there is not one reported case in which a white person was prosecuted for the sexual assault of a black woman, slave or free, in either colonial or antebellum Virginia.<sup>284</sup> The disparities in the treatment of blacks and whites demonstrate one way in which whites criminalized race.

Another method by which whites associated crime with race was to create a crime out of normally noncriminal activity merely because a black person was involved.<sup>285</sup> Every slave state had a slave code, and these codes were much alike.<sup>286</sup> These codes restricted slaves' movements, their communication with others, and their right to assemble.<sup>287</sup> Slaves could not possess firearms or alcohol, beat drums, or blow horns.<sup>288</sup> They could not hire themselves out without permission or otherwise conduct themselves like free people.<sup>289</sup> They could not buy or sell goods, or enter into contracts.<sup>290</sup> These criminal laws exemplify ways in which whites

280. See Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1059 (discussing penalty provisions under 1848 law).

281. See Finkelman, *supra* note 242, at 2100-01 (citing *The Law About Trying and Punishing Negroes*, in 1 STATUTES AT LARGE OF PENNSYLVANIA IN THE TIME OF WILLIAM PENN 225 (Gail McKnight Beckman ed., 1887)). In 1697, Pennsylvania sentenced black men to death for raping white women and castrated them for attempted rape. *Id.* Whites convicted of the same offense, however, were fined, whipped or imprisoned for one year. *Id.* at 2101. In 1700 and again in 1706, Pennsylvania provided a death sentence for any black convicted of rape of a white woman, murder, buggery, or burglary. *Id.* (citing *An Act for the Trial of Negroes, 1700 and Act for the Trial of Negroes, 1706*, in 2 STATUTES AT LARGE OF PENNSYLVANIA FROM 1672-1801 77, 233 (James T. Mitchell & Henry Flanders eds., 1896)). Rape, buggery, and burglary, however, did not carry the death sentence for whites. *Id.*

282. See EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 419 (1974) (stating that no modern historian denies that white slaveholders impregnated their female slaves, taking some as mistresses, forcing those who resisted).

283. See Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1055-56 (noting that Virginia rape statute prescribing death upon conviction spoke of "woman" in neutral terms, suggesting that rape of free black woman was punishable offense).

284. Higginbotham & Jacobs, *The "Law Only As an Enemy," supra* note 259, at 1056.

285. Finkelman, *supra* note 242, at 2068.

286. Stamp, *supra* note 260, at 207; see also JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM 114 (6th ed. 1988) (discussing uniformity of slave codes from state to state).

287. FRANKLIN & MOSS, *supra* note 286, at 114-15.

288. FRANKLIN & MOSS, *supra* note 286, at 114-15.

289. FRANKLIN & MOSS, *supra* note 286, at 114.

290. FRANKLIN & MOSS, *supra* note 286, at 114.

stripped slaves of their basic rights in order to maintain their domination and control.<sup>291</sup>

Whites also criminalized the normally noncriminal activity of free blacks. Like slaves, free blacks were denied the right to possess weapons, and limits were placed on their freedom of association.<sup>292</sup> Virginia prohibited free blacks from entering a number of occupations, including preaching, teaching, and small business ownership.<sup>293</sup> In 1705, Virginia made it a crime for any white convicted of a crime or any black, slave or free, to "bear any office, ecclesiastical, civil or military, or be in any place of public trust or power."<sup>294</sup> Here, by equating blacks to convicted criminals, the legislature effectively advanced "the notion that race and crime were synonymous."<sup>295</sup> Virginia also had restricted free blacks' educational opportunities by 1831 when the legislature officially banned gatherings of free blacks for the purpose of learning to read and write.<sup>296</sup>

The true "crime of color," however, according to Professor Paul Finkelman, involved interracial sex and marriage.<sup>297</sup> Virginia was one of the first colonies to enact antimiscegenation statutes.<sup>298</sup> Antimiscegenation statutes subjected interracial couples to special criminal treatment when they were not married and made the common act of marriage criminal if the couple chose to legitimize their relationship.<sup>299</sup> In 1662, the Virginia legislature passed its first statute dealing with interracial sex.<sup>300</sup> The act declared "that if any christian shall committ fornication with a negro man or woman, hee or shee soe offending shall pay double the ffines imposed by the

291. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856) ("[A]t the time of the Declaration of Independence and when the Constitution of the United States was framed and adopted . . . [blacks were] so far inferior that they had no rights which the white man was bound to respect.").

292. Higginbotham & Bosworth, "Rather Than the Free," *supra* note 250, at 27-33.

293. Higginbotham & Bosworth, "Rather Than the Free," *supra* note 250, at 42-46.

294. *An Act Declaring Who Shall Not Bear Office in This Country*, in 3 HENING'S STATUTES AT LARGE, *supra* note 252, at 250, 250-51 (enacted 1705).

295. Finkelman, *supra* note 242, at 2088.

296. See Higginbotham & Bosworth, "Rather Than the Free," *supra* note 250, at 57 (discussing attempts by Virginia legislature to curtail education of blacks). Despite laws to prevent blacks from receiving an education, many learned how to read and write. See FRANKLIN & MOSS, *supra* note 286, at 125 (claiming that laws against educating blacks were often circumvented). Frederick Douglass is one of the better known examples of a slave being taught to read by his owner. *Id.*

297. Finkelman, *supra* note 242, at 2081-87.

298. Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*, *supra* note 252, at 1967.

299. See *infra* notes 300-07 and accompanying text (discussing two early Virginia statutes prohibiting miscegenous sex and marriage).

300. Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*, *supra* note 252, at 1967 n.5.

former act."<sup>301</sup> The former act referred to in the 1662 statute set the fine for fornication at 500 pounds of tobacco.<sup>302</sup> Thus, under this law, whites faced a special penalty of 1000 pounds of tobacco for fornicating with a black person.

In 1691, the Virginia legislature enacted its first act against interracial marriage.<sup>303</sup> The statute stated:

[F]or the prevention of that abominable mixture and spurious issue . . . by negroes, mulattoes, and Indians intermarrying with English, or other white women . . . *it is hereby enacted* . . . whatsoever English or other white man or woman being free shall intermarry with a negroe, mulatto, or Indian man or woman bond or free shall within three months after such marriage be banished and removed from this dominion forever.<sup>304</sup>

The enactment of the 1691 law suggests that the former 1662 statute was not enough to discourage whites (particularly white women) from entering into sexual relations with blacks.<sup>305</sup> The legislature realized that the punishment for interracial fornication failed to deter white women from producing mixed-race (or "mulatto") children, "that abominable mixture and spurious issue."<sup>306</sup> The legislature, therefore, imposed the harsh penalty of banishment on any white person if he or she chose to marry his or her black partner.<sup>307</sup>

In addition to imposing punishment for interracial marriage, the 1691 act singled out white women for punishment if they gave birth to a mulatto child outside of marriage. The statute read:

301. *Negro Womens Children to Serve According to the Condition of the Mother*, in 2 HENING'S STATUTES AT LARGE, *supra* note 252, at 170, 170 (enacted 1662). This same act created the rule of inheritance of slave status, see *supra* note 252 (citing portion of 1662 law setting forth rule of inheritance of status).

302. Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*, *supra* note 252, at 1993.

303. Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191 (1966).

304. *An Act for Suppressing Outlying Slaves*, in 3 HENING'S STATUTES AT LARGE, *supra* note 252, at 86, 86-87 (enacted 1691).

305. See GENOVESE, *supra* note 282, at 415 (claiming that too often we assume that rape of slave women by their masters led to most mixed-race children in this country). Genovese suggests that miscegenation "primarily occurred outside the plantation heartland" in the towns and cities. *Id.* Genovese argues that white men slept with black women and, though less often, black men slept with white women. *Id.* at 418. "[A]nd much more often than they were supposed to, those who began by seeking casual pleasure ended by caring." *Id.* at 418-19. No doubt some of these couples felt unduly punished by the 1662 law and sought to legitimize their relationship through marriage.

306. See *supra* text accompanying note 304 (quoting 1691 statute).

307. See HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 253, at 46 (noting that in 1705, Virginia changed punishment for white partner to six months in prison). The 1705 law also imposed a fine of 10,000 pounds of tobacco on the minister performing the marriage. *Id.* It was not until 1932 that the Virginia legislature imposed a prison term on both blacks and whites. *Id.*

*And be it further enacted . . . That if any English woman being free shall have a bastard child by any negro or mulatto, she shall pay the sume of fifteen pounds sterling . . . to the Church wardens . . . and in default of such payment she shall be taken into possession of the said Church wardens and disposed of for five yeares . . . and that such bastard child be bound out as a servant by the said Church wardens untill he or she shall attaine the age of thirty yeares.*<sup>308</sup>

This particular clause of the 1691 statute only subjected white women and their children to punishment. Interestingly, the legislature chose not to punish white men for producing bastard children with black women.<sup>309</sup>

As Finkelman notes, “[i]n both the 1662 and 1691 laws race became the key to the legal infraction.”<sup>310</sup> Having sexual intercourse and giving birth to a child outside of marriage was already a violation of the law, but the Virginia legislature singled out interracial couples for special treatment.<sup>311</sup> Moreover, the 1691 law criminalized the common act of marriage when one of the parties was white and the other was black.<sup>312</sup> The legislature, furthermore, made the child, innocent of any wrongdoing, “guilty of the crime of being mulatto” and sentenced him or her to servitude for thirty years.<sup>313</sup> Like Virginia, many states prohibited interracial marriages and provided severe punishments for interracial fornication.<sup>314</sup>

308. *An Act for Suppressing Outlying Slaves*, in 3 HENING'S STATUTES AT LARGE, *supra* note 252, at 86, 87 (enacted 1691).

309. See Eva Saks, *Representing Miscegenation Law*, 8 RARITAN 39, 43 (1988) (commenting that statutes prohibiting interracial sex and marriage “did not (arguably, nor were they meant to) deter white men from engaging in sex with black women, especially with their slaves”). The rule of inheritance of slave status, in fact, provided slave owners with a positive incentive to use their slave women as breeders. See *supra* note 252 (quoting 1662 act setting forth rule of inheritance of status); Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*, *supra* note 252, at 2006 (discussing effects of rule of inheritance of slave status). David Bryon Davis points out that while white planter society officially condemned miscegenation, abundant evidence suggests that many slaveowners, sons of slaveowners, and overseers raped black slave women or took black mistresses, presumably without punishment. 1 BENARD BAILY ET AL., *THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE* 465 (1992); see also GENOVESE, *supra* note 282, at 419 (claiming that “many slaveholders and their growing sons took slave mistresses or forced reluctant women and fathered mulatto children”). As W.E.B. Du Bois has so aptly stated, “The colored slave woman became the medium through which two great races were united.” GENOVESE, *supra* note 282, at 413 (quoting W.E.B. DU BOIS, *GIFT OF BLACK FOLK* 144, 146).

310. Finkelman, *supra* note 242, at 2085.

311. See Finkelman, *supra* note 242, at 2085-87 (describing effects of 1662 and 1691 statutes).

312. See Finkelman, *supra* note 242, at 2085 (discussing 1691 antimiscegenation statute).

313. Finkelman, *supra* note 242, at 2086.

314. See, e.g., Finkelman, *supra* note 242, at 2095, 2104 (discussing antimiscegenation laws in Maryland and Massachusetts). In 1717, for example, Maryland law criminalized interracial marriages and sentenced free blacks and mulattoes to be slaves for life and their white spouses to be indentured servants for seven years. *Id.* at 2095. In 1705, Massachusetts prohibited interracial marriages and subjected persons convicted of interracial fornication to whipping. *Id.* at 2104. Blacks involved in these relationships were sold out of Massachusetts and jailed

During the colonial and antebellum periods, race played a key role in the definition of criminal behavior, and it was an important factor in punishing crime. Similarly, during Reconstruction and into the twentieth century, whites associated crime with race.<sup>315</sup> One of the primary ways in which whites did so was through the "black codes" and the system of involuntary servitude.

*b. Black codes and involuntary servitude*

During the period of Presidential Reconstruction, the reorganized legislatures in the South criminalized previously noncriminal activity and punished blacks more severely than whites for the same act.<sup>316</sup> The "black codes," enacted during the winter of 1865-1866, resembled the colonial and antebellum slave codes in their attempt to regulate the conduct of newly freed blacks.<sup>317</sup> They achieved this goal by, among other things, imposing a system of involuntary servitude.<sup>318</sup> William Cohen describes this system in detail, tracing its roots in the black codes and following it through the mid-1900s.<sup>319</sup> Cohen argues that the system of involuntary servitude fluctuated between free and forced labor, depending on the needs of the southern labor market and on the supply of the laborers.<sup>320</sup> In this way, Cohen accounts for the apparent paradox of widespread involuntary

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pending the sale. *Id.*

315. See Finkelman, *supra* note 242, at 2064 (noting how race affected criminal law "[w]ell into the twentieth century").

316. See 2 ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 328 (7th ed. 1991) (noting that penal sections in black codes included enhanced penalty provisions for blacks).

317. BAILYN ET AL., *supra* note 309, at 674. The black codes differed throughout the states, but they typically prohibited freed blacks from voting, attending integrated schools, holding all but the most menial jobs unless they obtained a rarely granted license, quitting their jobs before expiration, (and forfeiting their wages if they quit), and keeping arms. See generally *id.* (stating that black codes "specified that blacks might not purchase or carry firearms, that they might not assemble after sunset, and that those who were idle or unemployed should 'be liable to imprisonment, and to hard labor, one or both'"); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 199 (1988) (describing how Mississippi required that "[l]aborers leaving their jobs before the contract expired would forfeit wages already earned, and, as under slavery, be subject to arrest by any white citizen"); KELLY ET AL., *supra* note 316, at 328 (noting that black codes "contained harsh vagrancy and apprenticeship provisions whose apparent purpose was to bind the ex-slaves to the soil and strip them of all the practical attributes of freedom," and "called for racial segregation in schools and other public facilities").

318. William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 317 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

319. See *id.* (noting that system of involuntary servitude was "contained in embryo in the Black Codes and [gained] increasing strength in the years immediately after Reconstruction"). In his article, Cohen surveys the laws of involuntary servitude as they existed at the end of the nineteenth and beginning of the twentieth centuries. To illustrate some of his points, this section supplements the discussion with the Black Code of Mississippi.

320. *Id.* at 318.

servitude and large-scale black migration. He argues that employers had the legal tools to force labor from blacks, but such measures were not always required.<sup>321</sup> When labor was scarce, whites enforced the system of involuntary servitude. When labor was abundant, “Draconian” measures were unnecessary.<sup>322</sup>

Cohen explains that “[t]he laws of involuntary servitude facilitated both the recruitment and the retention of black labor.”<sup>323</sup> Some of these laws focused on white behavior, including enticement laws and emigrant-agent laws.<sup>324</sup> Enticement statutes cemented employers’ proprietary claims to “their” black laborers by making it criminal to hire blacks who were under contract to other employers.<sup>325</sup> The Black Code of Mississippi contained such a statute. It provided:

If any person shall persuade or attempt to persuade, entice or cause any freedman, free negro or mulatto, to desert from the legal employment of any person, before the expiration of his or her term of service, . . . he or she shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than twenty-five dollars and not more than two hundred dollars and the costs, and if said fine and costs shall not be immediately paid, the court shall sentence said convict to not exceeding two months imprisonment in the county jail, and he or she shall moreover be liable to the party injured in damages.<sup>326</sup>

Furthermore, emigrant-agent statutes imposed prohibitive license fees on whites who moved labor from one state to another.<sup>327</sup>

Other statutes focused directly on regulating the behavior of blacks.<sup>328</sup> Contract-enforcement statutes made it a criminal offense for a black person, but not a white person, to break a labor contract.<sup>329</sup> The Black Code of Mississippi declared:

All contracts for labor made with freedmen, free negroes and mulattoes, for a longer period than one month shall be in writing . . . and if the laborer shall quit the service of the employer, before expiration of his term of service, without good cause, he shall forfeit his wages for that year, up to the time of quitting. Every civil

321. *Id.*

322. *Id.*

323. *Id.*

324. *See id.* at 319-20 (discussing enticement laws and emigrant-agent laws).

325. *Id.* at 318.

326. *An Act to Confer Civil Rights on Freed Men, and for Other Purposes*, ch. 4, § 9, 1865 Miss. Laws 85 (current version at MISS. CODE ANN. § 97-23-29 (1994)) [hereinafter *An Act to Confer Civil Rights*].

327. Cohen, *supra* note 318, at 318.

328. *See* Cohen, *supra* note 318, at 318 (describing statutes focusing on regulation of blacks, including contract-enforcement laws and vagrancy laws).

329. *See* Cohen, *supra* note 318, at 318.

officer shall, and every person may arrest and carry back to his or her legal employer any freedman, free negro or mulatto, who shall have quit the service of his or her employer before the expiration of his or her employer before the expiration of his or her term of service without good cause.<sup>330</sup>

Broad vagrancy statutes, likewise, permitted police to round up blacks in times of labor shortage by criminalizing the act of being black and unemployed.<sup>331</sup> The Black Code of Mississippi provided:

[A]ll freedmen, free negroes and mulattoes in this State, over the age of eighteen years, found on the second Monday in January, 1866, or thereafter, with no lawful employment or business, or found unlawfully assembling themselves together . . . shall be deemed vagrants, and on conviction thereof, shall be fined in the sum of not exceeding . . . fifty dollars . . . and imprisoned at the discretion of the court . . . not exceeding ten days.<sup>332</sup>

The same act provided criminal punishment for whites associating or "usually associating" with blacks.<sup>333</sup>

Criminal-surety statutes and convict-labor statutes further enforced the system of involuntary servitude by forcing those blacks jailed on charges of vagrancy (or any other petty crime) to work either for any white willing to post bond or for the chain gangs.<sup>334</sup> Cohen suggests that it was not uncommon for prisoners to choose a surety agreement in lieu of a jail sentence, despite the fact that the surety contract was longer than the jail sentence.<sup>335</sup> The chain gangs, he points out, brought back the many evils of slavery, as convict lessees used shackles, dogs, whips, and guns to create a "living hell" for prisoners.<sup>336</sup> The mortality rates on the chain gang were astonishing. For instance, 44.9% of the convicts sent to build a railroad in South Carolina between the years 1877-1880 died.<sup>337</sup> These involuntary servitude statutes illustrate how state legislatures created a crime out

330. *An Act to Confer Civil Rights*, *supra* note 326, §§ 6, 7.

331. Cohen, *supra* note 318, at 324.

332. *An Act to Amend the Vagrant Laws of the State*, ch. 6, § 2, 1865 Miss. Laws, *microformed on Session Laws of American States and Colonies*, Fiche 134 (Redgrave Info. Resources Group).

333. *See id.* (stating that whites "assembling" with blacks, or "usually associating" with them "on terms of equality, or living in adultery or fornication" with black woman shall be subject to fine not exceeding \$200 and imprisonment not exceeding six months).

334. *See* Cohen, *supra* note 318, at 318 (describing how criminal-surety statutes gave blacks jailed on charges of vagrancy "opportunity" to sign voluntary labor contract with their former employer or any other white person willing to post bond). If a black person chose not to sign a labor contract, under the convict-labor statutes he or she often wound up on a chain gang, which is essentially a state-sponsored form of involuntary servitude. *Id.*

335. Cohen, *supra* note 318, at 327.

336. Cohen, *supra* note 318, at 328.

337. Cohen, *supra* note 318, at 328.

of a normally noncriminal activity and subjected blacks to more severe punishments than whites.<sup>338</sup>

While Congress voided most black code legislation during the decade following the Civil War,<sup>339</sup> former confederate states re-established the labor controls first enacted in 1865-1866 after the Redeemers took power in the mid-1870s.<sup>340</sup> Although these new laws made no mention of race, Southerners knew that the laws were meant to strengthen white's control over the labor system, and Southern authorities implemented them accordingly.<sup>341</sup> This system of involuntary servitude remained in effect well into the twentieth century.<sup>342</sup>

### c. Conclusions

Thus, our country has a history of associating crime with blacks.<sup>343</sup> American society has recognized and continues to accept the idea that a person's race can increase penalties for a crime or can create a crime out of normally noncriminal activity.<sup>344</sup> Fear of black men raping white women extended beyond the colonial and antebellum

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338. See KELLY ET AL., *supra* note 316, at 328 (noting that "the penal sections [of black codes] provided for more severe and arbitrary punishment for [blacks] than for whites").

339. See Cohen, *supra* note 318, at 319 ("Reconstruction voided most Black Code legislation."); see also KELLY ET AL., *supra* note 316, at 329-30 (discussing Civil Rights Act of 1866, passed in response to black codes). 42 U.S.C. §§ 1981 and 1982 embody the present language of the Civil Rights Act of 1866. 42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (1988 & Supp. V 1993). 42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

*Id.* (1988).

340. See Cohen, *supra* note 318, at 319 (describing post-Reconstruction efforts in former confederate states to legislate blacks back onto farms); see also BAILYN ET AL., *supra* note 309, at 716 (describing process by which Redeemers used economic pressure to keep blacks from becoming politically active).

341. Cohen, *supra* note 318, at 318; see also FONER, *supra* note 317, at 201 (commenting that it was well understood that vagrancy laws applied to blacks).

342. See Cohen, *supra* note 318, at 319 (surveying involuntary servitude laws and ways in which courts applied them to create system of involuntary servitude).

343. See Finkelman, *supra* note 242, at 2063-64 (noting that to understand "modern relationship between race and criminal law one must study the historical connection between defining crime, criminal law, and race").

344. See Finkelman, *supra* note 242, at 2064 (finding roots of contemporary, pervasive association between color and crime in colonial and early national past).

periods.<sup>345</sup> Every man put to death for rape in Virginia between 1908 and 1962 was black.<sup>346</sup> Antimiscegenation laws, moreover, survived the Constitution of 1787, the Civil War Amendments of the 1860s and 1870s, and the *Brown* decision of 1954.<sup>347</sup> As late as 1967, when the Supreme Court finally struck down laws prohibiting interracial marriages as unconstitutional,<sup>348</sup> sixteen states still criminalized marriages based on the race of the participants.<sup>349</sup> Color itself, in those states, was a sign of criminality.<sup>350</sup> Accordingly, having satisfied the first prong of Lawrence's cultural meaning test, the analysis now addresses the significance of race and drugs.

## 2. *History of attaching racial significance to certain drugs*

Fear of a particular drug's effects on a specific minority garnishes the most emphatic support for the legal prohibition of narcotics.<sup>351</sup> When the majority popularizes a certain drug, such as alcohol, tobacco, or coffee, the majority often places few restrictions on that drug's purchase or use.<sup>352</sup> As the use of the drug declines or becomes associated with a disempowered segment of society, restrictive legislation expands.<sup>353</sup>

345. See Higginbotham & Jacobs, *The "Law Only as an Enemy," supra* note 259, at 1059 (discussing emergence of lynching as one method to dominate black sexuality at turn of twentieth century).

346. Higginbotham & Jacobs, *The "Law Only as an Enemy," supra* note 259, at 1060. In 1977, the Supreme Court, in *Coker v. Georgia*, 433 U.S. 584 (1977), held it unconstitutional to sentence a man to death for the rape of an adult woman. *Id.* at 592.

347. See Finkelman, *supra* note 242, at 2087 (tracking survival of Virginia antimiscegenation laws).

348. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (overturning law prohibiting interracial marriage).

349. See *id.* at 6 n.5 (noting that in addition to Virginia, 15 states outlawed interracial marriage: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia).

350. See Finkelman, *supra* note 242, at 2064 ("Well into the twentieth century American law recognized and accepted the notion that race could . . . create a crime out of a normally noncriminal activity.").

351. See MUSTO, *supra* note 75, at 244-45 (noting how white majority associated certain drugs with identifiable and threatening minority groups). For example, the white majority felt that cocaine enabled blacks to withstand bullets and stimulated them to commit sexual assault, opium facilitated sexual contact between Chinese and whites, marijuana incited Hispanics to violence, and heroin contributed to "crime wave" following World War I and was part of a Communist conspiracy against United States in 1950s. *Id.*

352. See Lowney, *supra* note 84, at 136 (arguing that drug will not be prohibited when "denial of a drug's destructive effect is politically comfortable"). Lowney points out that there are 100 Americans using alcohol for every one person regularly using cocaine, and, Lowney maintains, alcohol and tobacco are arguably more dangerous than cocaine, cannabis, or opiates. *Id.* at 136-37; see also MUSTO, *supra* note 75, at 1-3, 6-7 (discussing one-time popularity and accessibility of opium, its derivatives, and cocaine—drugs later made illegal).

353. See MUSTO, *supra* note 75, at 245 (noting that legal prohibition of cocaine, opium, marijuana, and heroin all came at time of social crisis between drug-linked group and rest of American society); Tonry, *supra* note 74, at 39 ("[I]n periods of high intolerance of drug use,

Cocaine (and its derivative, crack, it will later be argued) is no exception. Cocaine was first isolated in its pure form from the coca leaf in 1860.<sup>354</sup> Cocaine use did not become widespread, however, until the 1880s when doctors began to recognize its beneficial effects, particularly its ability to suppress fatigue.<sup>355</sup> In the United States, cocaine became popular during the end of the nineteenth century as a general tonic and as a cure for opium, morphine, and alcohol addictions.<sup>356</sup> Cocaine also became popular for non-medical purposes.<sup>357</sup> Companies catered to their customers by placing cocaine in Coca-Cola, wines, and cigarettes.<sup>358</sup> In addition, bars often put a pinch of cocaine in a shot of whiskey.<sup>359</sup> Employers also distributed cocaine to construction and mine workers to increase their productivity.<sup>360</sup>

By the turn of the century, however, many prominent newspapers, physicians, pharmacists, and legislators began to warn of the dangers of cocaine.<sup>361</sup> The American Medical Association, for example, argued that cocaine had no value except as medicine.<sup>362</sup> David Musto suggests that other influential whites feared the effects of cocaine use among blacks.<sup>363</sup> Whites began to dread cocaine because they felt it threatened to spread into the “higher social ranks of the country”<sup>364</sup> and it undermined essential social restrictions which kept blacks under control.<sup>365</sup> Whites imagined that blacks on cocaine had superhuman strength, were almost unaffected by bullets,

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minority group stereotypes have been associated with deviant drug use.”).

354. See Inciardi, *supra* note 78, at 462.

355. See Inciardi, *supra* note 78, at 462 (noting that in 1883, Dr. Theodor Aschenbrandt issued cocaine to Bavarian soldiers to suppress fatigue); see also MUSTO, *supra* note 75, at 7 (explaining that Sigmund Freud was famous advocate of cocaine for medical purposes).

356. See MUSTO, *supra* note 75, at 7 (detailing medicinal uses of cocaine). In fact, former army surgeon general William Hammond was “proud to announce” that cocaine was the official remedy of the Hay Fever Association. *Id.*

357. See MUSTO, *supra* note 75, at 7-8.

358. See MUSTO, *supra* note 75, at 7 (relating many ways in which manufacturers took advantage of cocaine’s “exhilarating properties”).

359. See MUSTO, *supra* note 75, at 8 (describing how cocaine could replace or enhance alcohol, especially in dry states).

360. MUSTO, *supra* note 75, at 8. According to Musto, cocaine was reportedly given to construction and mine workers to make them productive on little food. *Id.*

361. See MUSTO, *supra* note 75, at 65 (discussing increasing unpopularity of cocaine because influential Americans believed cocaine predisposed drug users toward insanity and crime).

362. MUSTO, *supra* note 75, at 64.

363. See MUSTO, *supra* note 75, at 7 (stating that southern whites feared “cocainized” blacks because cocaine would spur violence against whites).

364. See MUSTO, *supra* note 75, at 42-43 (discussing Dr. Hamilton Wright’s report, which was submitted in support of drug-trafficking bill, and identified threat of cocaine use moving into higher social ranks).

365. See MUSTO, *supra* note 75, at 6 (“The South feared that Negro cocaine users might become oblivious of their prescribed bounds and attack white society”).

and had improved pistol marksmanship.<sup>366</sup> Perhaps most frightening to the leaders of the drive against cocaine was their belief that, as Dr. Christopher Koch stated in 1914, “[m]ost of the attacks upon white women of the South are the direct result of a cocaine-crazed Negro brain.”<sup>367</sup> As Musto argues, these beliefs characterized white fear, not the reality of cocaine’s effects, and gave whites yet another reason to repress blacks.<sup>368</sup>

The widespread association of cocaine with race, whether legitimate or not,<sup>369</sup> eased the way for legislative movements attempting to prohibit the drug.<sup>370</sup> The Harrison Act of 1914<sup>371</sup> was the first federal law to prohibit distribution of cocaine and heroin.<sup>372</sup> Representative Francis Burton Harrison, the sponsor of the Act,<sup>373</sup> moved to include coca leaves<sup>374</sup> into the precursor to the Harrison Act, the Foster bill.<sup>375</sup> As a motive for doing so, Harrison exclaimed that the leaves were used in “Coca-Cola and Pepsi-Cola and all those things that are sold to Negroes all over the South.”<sup>376</sup> Dr. Hamilton Wright, referred to as “the father of American narcotic laws,”<sup>377</sup> similarly submitted a report to Congress in which he stressed cocaine’s identification with blacks.<sup>378</sup> Dr. Wright warned of

366. See MUSTO, *supra* note 75, at 7. Musto notes that one myth, that .32 caliber bullets had almost no effect on blacks on cocaine, apparently caused southern police departments to switch to .38 caliber revolvers. *Id.*

367. See MUSTO, *supra* note 75, at 6 n.15 (crediting Dr. Koch with quotation) (citation omitted).

368. See MUSTO, *supra* note 75, at 7.

369. See MUSTO, *supra* note 75, at 8 (questioning accuracy of newspaper reports of “cocainomania” among blacks). Despite claims of widespread use, the use of cocaine among blacks seems to have been much lower than society perceived it to be. See *United States v. Clary*, 846 F. Supp. 768, 775 (E.D. Mo.) (stating that “[t]rue or not, the black addict became a stereotype not synonymous with most black men”), *rev’d*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995); MUSTO, *supra* note 75, at 8 (noting that of 2100 black admissions to Georgia asylum between 1909 and 1914, only two were cocaine users).

370. See MUSTO, *supra* note 75, at 6 n.15 (arguing that society began associating cocaine problem with blacks in 1900 and by 1910 it was easy to pass legislation almost totally prohibiting drug); see also *Clary*, 846 F. Supp. at 775 (“The images of narcotics and a black rebellion in the South and images of black addicts involved with white women were central to the hysteria that motivated legislative enactments.”).

371. Pub. L. No. 223, 38 Stat. 785 (1914).

372. *Clary*, 846 F. Supp. at 775.

373. *Id.*

374. See MUSTO, *supra* note 75, at 46.

375. See MUSTO, *supra* note 75, at 41 (stating that Foster bill was direct antecedent of Harrison Act). For elements of the Foster bill, see *id.* at 41-42, and for elements of the Harrison Act, see *id.* at 59-65.

376. MUSTO, *supra* note 75, at 46 (quoting *Importation and Use of Opium: Hearings Before the House Comm. on Ways and Means*, 61st Cong., 3d Sess. (1911)) [hereinafter *Opium Hearings*] (statement of Dr. Hamilton Wright).

377. MUSTO, *supra* note 75, at 31.

378. MUSTO, *supra* note 75, at 43 (stating that Wright thought identification of blacks with cocaine had not been sufficiently publicized).

cocaine's "encouragement . . . among the humbler ranks of the Negro population in the South"<sup>379</sup> and concluded 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."<sup>380</sup> Thus, social and racial biases predominated over objective factors such as cocaine's pharmacological effects, in the legislators' consideration of the Harrison Act.<sup>381</sup>

As the enactment of the Harrison Act illustrates, the United States has a history of attaching racial significance to certain drugs.<sup>382</sup> Under Lawrence's cultural meaning test,<sup>383</sup> however, courts must consider more than historical evidence in determining whether racial animus motivated Congress to enact the crack statute.<sup>384</sup> Courts must also consider the contemporary meaning given to crack cocaine by American culture.<sup>385</sup> Therefore, we must consider the third prong in the cultural meaning analysis, that is, whether there was a widespread public association of crack with race at the time Congress provided the enhanced penalty provisions for crack cocaine.

### 3. *Widespread public association of crack cocaine with race*

The use of cocaine did not entirely disappear after passage of the Harrison Act.<sup>386</sup> However, the drug did move underground where it remained for nearly half a century.<sup>387</sup> There, cocaine became popular with musicians, poets, artists and writers, prostitutes and criminals, "beatniks," and Hollywood entertainers.<sup>388</sup> The association of powder cocaine with such exotic groups led to its reputation as "the rich man's drug."<sup>389</sup>

379. MUSTO, *supra* note 75, at 43 (quoting *Opium Hearings*, *supra* note 376 (statement of Dr. Hamilton Wright)).

380. MUSTO, *supra* note 75, at 43-44 (quoting S. DOC. NO. 377, 61st Cong., 2d Sess. (1910)).

381. *Cf.* Lowney, *supra* note 84, at 135-37 (arguing that arbitrary judgments based on media-provoked hysteria, rather than reliance on objective criteria, such as drug's pharmacological effects are paramount in establishing national drug policies).

382. *See supra* note 351 and accompanying text (noting how white majority associated other drugs with identifiable and threatening minority group).

383. *See* Lawrence, *supra* note 170, at 355-58 (discussing cultural meaning test).

384. *See* Lawrence, *supra* note 170, at 356 (noting that cultural meaning test requires inquiry into historical and social context in which decision was made).

385. *See* Lawrence, *supra* note 170, at 366 (stating that, in addition to historical meaning of residential segregation, plaintiffs in *Arlington Heights* could present evidence of contemporary meaning).

386. *See* Inciardi, *supra* note 78, at 463 (explaining that cocaine use persisted during early years of twentieth century).

387. *See* Inciardi, *supra* note 78, at 463 (noting that cocaine slipped into underground culture for approximately 40 years after passage of Harrison Act).

388. *See* Inciardi, *supra* note 78, at 463-64 (describing and characterizing major users of cocaine in underground culture).

389. Inciardi, *supra* note 78, at 464.

Powder cocaine moved from the underground to mainstream society in the 1960s and 1970s, and became "the drug" of the early 1980s.<sup>390</sup> In 1982, the National Institute on Drug Abuse (NIDA) estimated that between twenty and twenty-four million Americans had tried cocaine at least once in their lives, between eleven and thirteen million had used cocaine during the previous year, and between three and five million had used cocaine during the past month.<sup>391</sup> NIDA also reported that cocaine use among all income and class groups was high.<sup>392</sup> Even as cocaine grew in popularity and use, however, the public continued to associate cocaine with the rich and glamorous.<sup>393</sup>

Despite the growing use of cocaine, Congress passed no new drug laws during the early years of the war on drugs to further criminalize or penalize cocaine possession.<sup>394</sup> Moreover, law enforcement officials did not aggressively enforce the drug policy.<sup>395</sup> The district court in *Clary* noted that in the early years of the drug war, few people paid attention to the escalating violence among inner city gangs involved in the drug trade.<sup>396</sup> The media, for example, rarely

390. See *United States v. Clary*, 846 F. Supp. 768, 775 (E.D. Mo.) (tracing trail of cocaine), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995); *Crack Cocaine Hearing*, *supra* note 10, at 25 (testimony of Robert Byck, M.D., Professor of Psychiatry and Pharmacology, Yale University School of Medicine) (noting that use of cocaine increased in 1970s and reached peak of epidemic in early 1980s); Inciardi, *supra* note 78, at 464 (explaining that cocaine use began to move from underground to mainstream society in 1960s and early 1970s). Inciardi attributes cocaine's move into the mainstream to a combination of events in Washington, D.C. *Id.* He notes first that the federal government sponsored legislation to reduce the legal production of amphetamine-type drugs in the United States and to place strict controls on Quaaludes and other abused sedatives. *Id.* Second, the World Bank allocated funds for the construction of the Pan American Highway through the jungles of Peru. *Id.* In combination, Inciardi argues, these two factors ushered in the modern cocaine era. *Id.*

391. Avraham Forman & Susan B. Lachter, *The National Institute on Drug Abuse Cocaine Prevention Campaign*, in COMMUNICATION CAMPAIGNS ABOUT DRUGS 13, 13-14 (Pamela J. Shoemaker ed., 1989).

392. See *id.* at 14 (presenting results from survey by NIDA which showed, despite public perception of cocaine as drug only for wealthy, that cocaine use was high among people of all incomes and classes).

393. *Id.* at 14; see Morganthau et al., *supra* note 11, at 58 (claiming that most Americans in 1986 associated cocaine with "jet-setters . . . movie moguls, rock stars and professional athletes"), *reprinted in* 132 CONG. REC. 4418 (1986). Despite its reputation as "the rich man's drug," cocaine was available at affordable prices in the 1980s. See *Crack Cocaine Hearing*, *supra* note 10, at 42 (testimony of former employee of crack house) (noting that price of one gram of cocaine went from \$200 to \$100 from 1981 to 1986, leading him to conclude that cocaine was no longer rich man's drug); *id.* at 15 (statement of Charles R. Schuster, Ph.D., Director, NIDA) (testifying that dealers sold cocaine in lots of at least one gram for about \$100).

394. See *Clary*, 846 F. Supp. at 775 (revealing that legislators fought war on drugs with respect to powder cocaine by concentrating on impeding international import of drug and targeting large scale financiers).

395. See *id.* at 775-76 ("The social history is clear that so long as cocaine powder was a popular amusement among young, white professionals, law enforcement policy prohibiting cocaine was weakly enforced.").

396. *Id.* at 777.

did more than mention a victim's name.<sup>397</sup> According to the district court in *Clary*, the government responded only when suburbanites and European tourists became the targets of drug-related crimes.<sup>398</sup> Even then, much of law enforcement concentrated on "controlling crime" by keeping it boxed up in inner city ghettos.<sup>399</sup>

By the end of 1985, crack cocaine emerged as "a new form of cocaine"<sup>400</sup> and immediately captivated the media's attention.<sup>401</sup> The media first mentioned crack on November 17, 1985.<sup>402</sup> In less than eleven months, *The New York Times*, *The Washington Post*, *The Los Angeles Times*, the wire services, *Time*, *Newsweek*, and *U.S. News & World Report* published more than one thousand crack-related stories.<sup>403</sup> In response, television networks broadcasted over four hundred reports of crack-related news.<sup>404</sup> Many of these stories on crack bore a frightening resemblance to statements made in support of the Harrison Act of 1914 in that they: (1) associated crack cocaine with blacks and (2) generated public panic regarding crack.<sup>405</sup>

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397. *Id.*

398. *Id.*

399. *Id.*

400. John E. Merriam, *National Media Coverage of Drug Issues, 1983-1987*, in COMMUNICATION CAMPAIGNS ABOUT DRUGS 21, 24 (Pamela J. Shoemaker ed., 1989) (discussing increased media coverage of crack cocaine during 1985 and 1986 compared to coverage in previous years). *But see* Inciardi, *supra* note 78, at 468 (noting that crack has been around since early 1970s).

401. *Clary*, 846 F. Supp. at 783; *see* Stephen D. Reese & Lucig H. Danielian, *Intermedia Influence and the Drug Issue: Converging on Cocaine*, in COMMUNICATION CAMPAIGNS ABOUT DRUGS, *supra* note 400, at 29, 30 (referring to media coverage of drug issue during summer of 1986 as "cocaine summer").

402. Inciardi, *supra* note 78, at 481. In the article, *Program for Cocaine-Abuse under Way*, journalist Donna Boundy credited the head of a school-based drug abuse prevention and counseling service with stating: "[t]hree teenagers have sought treatment already this year . . . for cocaine dependence resulting from the use of a new form of the drug called 'crack,' or rock-like pieces of prepared 'freebase' (concentrated) cocaine." Donna Boundy, *Program for Cocaine-Abuse Under Way*, N.Y. TIMES, Nov. 17, 1985, at § 22, 12.

403. *See* Inciardi, *supra* note 78, at 481 (discussing crack cocaine's sudden and increasing appearance in mass media during late 1985 and throughout 1986); *see, e.g.*, Peter Kerr, *Growth in Heroin Use Ending as City Users Turn to Crack*, N.Y. TIMES, Sept. 13, 1986, at A1; Lamar, *supra* note 11, at 16; Tom Morganthau et al., *Crack and Crime*, NEWSWEEK, June 16, 1986, at 16, *reprinted in* 132 CONG. REC. 13,027 (1986).

404. Inciardi, *supra* note 78, at 481-82. High profile coverage of crack cocaine reached millions of television viewers. CBS, for example, capped off its reporting with "48 Hours on Crack Street" which reached 15 million viewers and became one of the highest rated documentaries ever. *Id.* at 82. Shortly thereafter, NBC also aired "Cocaine Country." *Id.*

405. *See Clary*, 846 F. Supp. at 781 (discussing media's role in construction of national image) The court noted that "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." *Id.* (citations omitted); *see also* Pamela J. Shoemaker, *Introduction*, in COMMUNICATION CAMPAIGNS ABOUT DRUGS, *supra* note 400, at 1, 2 (explaining that some studies look at agenda-setting as process through which media may influence degree of importance placed on various issues by public).

The media branded a stereotype of black crack users and dealers into the public's mind<sup>406</sup> despite the fact that the vast majority of blacks are not involved with drugs or the drug trade.<sup>407</sup> Studies do indicate that a higher percentage of black cocaine users than white cocaine users ingest crack.<sup>408</sup> It is also true that the majority of the street-corner sellers of crack are black.<sup>409</sup> Raw numbers reveal, however, that whites constitute the majority of crack users<sup>410</sup> and cocaine traffickers.<sup>411</sup> Even former federal drug czar William Bennett admitted that "[t]he typical cocaine user is white, male, a high school graduate employed full time and living in a small metropolitan area or suburb."<sup>412</sup>

Despite this evidence, the media chose to associate crack with blacks. For instance, *Time* declared that crack was most popular in inner cities and that more than half of the crack users were black.<sup>413</sup> Another journalist announced: "[m]ost of the dealers, as with past

406. See Powell & Hershenov, *supra* note 2, at 611 (explaining how media and opportunistic politicians used disproportionate focus on black narcotic offenders to place inaccurate portrait of blacks in public mind). The coverage of crack-related news stories etched into the public mind a portrait of

"gun-toting black teenage gangs, ghetto crack houses where unspeakable horrors take place, and depraved black women who prostitute themselves to raise money for their crack, and who give birth to tiny, drug addicted babies whose pictures are plastered all over our subway cars in extravagantly graphic public service messages warning of the dangers of drugs."

*Id.* (quoting L. Siegel, *The Criminalization of Pregnancy: A Paradigm of America's "Harm Maximization" Approach to Drug Use* (memorandum prepared for ACLU and on file with U.C. Davis Law Review)).

407. See Powell & Hershenov, *supra* note 2, at 609 (arguing that despite alarming statistics of minority youth involvement in drugs and violence "vast majority of minority youth are *not* involved with drugs") (emphasis added).

408. See Lowney, *supra* note 84, at 146-47 (noting correlation between preference for crack or powder cocaine and ethnicity). NIDA found that in 1990 slightly over 9% of whites and 31% of blacks who had used cocaine had tried crack. *Id.* at 147 (citing NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: MAIN FINDINGS 59, tbl. 4.8 (1990)).

409. See Harris, *supra* note 9, at A26.

410. See *United States v. Clary*, 846 F. Supp. 768, 787 n.68 (E.D. Mo.) (noting that National Household Survey revealed that over 2.4 million whites have used crack, as opposed to 990,000 blacks (citing NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 38-39 (1992))), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995). In other words, of all the people having used crack, 64.4% were white and 26.2% were black. *Id.* Moreover, the same study revealed that nearly 8.7 million whites had used an illicit drug within the past month, compared with 1.6 million blacks, Meddis, *supra* note 4, at A2, and that blacks constitute 12% of the nation's drug users, Powell & Hershenov, *supra* note 2, at 610 (quoting Harris, *supra* note 9, at A1); cf. Ismail Reed, *Turning Out Network Bias*, N.Y. TIMES, Apr. 9, 1991, at A25 (citing *USA Today* poll which showed that blacks made up 15% of drug users and whites constituted 70%).

411. See Meddis, *supra* note 4, at A2 (acknowledging that, according to Drug Enforcement Administrator Chief Robert Bonner, majority of drug traffickers are white); Harris, *supra* note 9, at A1 (noting that whites sell most of nation's cocaine).

412. Harris, *supra* note 9, at A1.

413. Lamar, *supra* note 11, at 16-17.

drug trends, are black or Hispanic. . . . Whites rarely sell the cocaine rocks."<sup>414</sup> The media also warned of an "infestation" of crack houses in the ghettos.<sup>415</sup> "Street sales of cocaine rocks," one journalist determined, "have occurred in the same neighborhoods where other drugs were sold in the past: run-down, black neighborhoods."<sup>416</sup> The media rarely covered stories of young blacks avoiding drugs<sup>417</sup> or associated crack with whites as a racial group.<sup>418</sup>

By 1986, the media had labeled crack the most dangerous drug and had decried the outbreak of a national "crack epidemic."<sup>419</sup> The media exacerbated white fears by warning of the potential for crack to seep out of the inner city and into their neighborhoods,<sup>420</sup> thereby spreading into the "higher social ranks of the country."<sup>421</sup> "Crack has captured the ghetto," *Newsweek* declared, "and is inching its way into the suburbs."<sup>422</sup> In addition, the media often portrayed whites hooked on crack as victims,<sup>423</sup> succumbing to a drug forced on them by unrelenting black dealers.<sup>424</sup> Furthermore, if the

414. 132 CONG. REC. 8292 (1986) (citing Blythe, *supra* note 12); see Morganthau et al., *supra* note 403, at 16 (stating that dealers "organize small cells of pushers, couriers and lookouts from the ghetto's legion of unemployed teenagers" thereby suggesting blacks deal in crack), *reprinted in* 132 CONG. REC. 13027 (1986).

415. See Morganthau et al., *supra* note 11, at 60 (declaring that "big city ghettos" were "infested" with crack houses and were "centers for the new cocaine trade"), *reprinted in* 132 CONG. REC. 4419 (1986).

416. 132 CONG. REC. 8292 (1986) (citing Blythe, *supra* note 12).

417. Reed, *supra* note 410, at A25 (expressing dismay at media's relentlessly negative news coverage of African Americans and Hispanic Americans); see Cal Thomas, *Media Overlooking Black Success Stories*, ST. LOUIS POST DISPATCH, Aug. 31, 1993, at B7 (lamenting fact that media largely ignores positive images of blacks, such as Black Expo USA, event honoring black entrepreneurs).

418. See Reed, *supra* note 410, at A25 (noting that according to *Black Entertainment News*, drug stories focus on blacks 50% of time and whites only 32% of time).

419. See *supra* note 11 (noting, *inter alia*, that *Newsweek* announced crack to be biggest story since Vietnam and fall of Nixon presidency and compared spread of crack with plagues of medieval Europe). *Newsweek* solemnly proclaimed in June 1986, that "crack should be a leading target for the nation's policymakers . . . and a prime concern for *Newsweek's* readers." *The Drug Crisis: Crack and Crime*, *Newsweek*, June 16, 1986, at 3.

420. See Morganthau et al., *supra* note 11, at 59 (noting that "[c]rack is not widely used in many areas of the country—but that may only be a matter of time. It is already creating social havoc in the ghettos of . . . large cities, and it is rapidly spreading into the suburbs."), *reprinted in* 132 CONG. REC. 4418 (1986).

421. MUSTO, *supra* note 75, at 43 (discussing underlying reason for congressional bill in 1914 that placed restrictions on cocaine).

422. Morganthau et al., *supra* note 403, at 16, *reprinted in* 132 CONG. REC. 13,027 (1986).

423. See 132 CONG. REC. 8291, 8293-94 (1986) (citing Paul Blythe et al., *Police Fast Being Educated About Drug*, PALM BEACH POST & EVENING TIMES) (describing one white crack addict as Jack, 37, one-time successful financial advisor with master's degree in psychology; another white addict as "pretty young girl with dirty-blond hair, deep blue eyes and a model's figure"; and third white addict as Joe, two-time winner of his troop's Boy Scout of Year Award, tall, wiry blond).

424. See 132 CONG. REC. 8292 (1986) ("Less than a block from where unsuspecting white retirees play tennis, bands of young black men push their rocks on passing motorists.") (quoting Blythe, *supra* note 12).

prospect of crack coming to them was not bad enough, the media warned of the horrors befalling whites who actually had to go into black neighborhoods to purchase crack: "For the growing number of the white middle class who have become hooked on cocaine rock, buying the drug can be like stepping into a foreign culture."<sup>425</sup>

The media thus presented the distorted image to the public that young black men were solely responsible for the crack cocaine crisis in America.<sup>426</sup> This negative portrayal was undoubtedly a part of this nation's perception of young black America.<sup>427</sup> Most (if not all) Americans, then, attached racial significance to crack cocaine at the time Congress provided the enhanced penalty provisions for crack.<sup>428</sup> Members of Congress did so also.<sup>429</sup>

Throughout American history, our culture has frequently attached racial meaning to crime and drugs. This Note presented evidence of a history of associating crime with race, a history of attaching racial connotations to certain drugs, and a widespread public association of crack cocaine with race. This evidence supports the district court's conclusion that "racial animus was a motivating factor in enacting the

425. 132 CONG. REC. 8294 (1986) (quoting Paul Blythe, *Rock Sellers Neither Shy nor Unavailable*, PALM BEACH POST & EVENING TIMES).

426. *United States v. Clary*, 846 F. Supp. 768, 783 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995); see Harris, *supra* note 9, at A26 (commenting that media images of drug violence have contributed to erroneous notion that cocaine crisis is rooted in black America).

427. See *Clary*, 846 F. Supp. at 781 (noting that most whites are not introduced to image of blacks as criminal through direct experience, but through media's promotion of these racial caricatures). One commentator writes:

Each night in most major cities, local TV news flashes pictures of young black males who have committed criminal acts or are the victims of crime. Handcuffed with head down, or shot dead in the gutter or in body bags, this negative image of young black America is tragically a part of the nation's consciousness.

Thomas, *supra* note 417, at B7. Steven Belton, a black attorney in Minneapolis, notes that this negative image plays out in police enforcement. Meddis, *supra* note 4, at A2. He is quoted as stating, "I guarantee you I can get arrested this weekend driving in certain neighborhoods in this city at certain times of the day. . . . [The police are] not stopping expensive foreign cars with white male drivers over 40." *Id.*

428. See *Clary*, 846 F. Supp. at 784 (concluding that stereotypical images of crack dealers as young blacks "undoubtedly served as the touchstone that influenced racial perceptions held by legislators and the public as related to the 'crack epidemic'"); see also Pamela J. Shoemaker, *Drug Coverage and Public Opinion, 1972-1986*, in COMMUNICATION CAMPAIGNS ABOUT DRUGS, *supra* note 400, at 67, 72-77 (studying Gallup polls and concluding that as media emphasized drug problems, public increasingly listed drugs as most important problem facing America).

429. See Lawrence, *supra* note 170, at 356 (stating that when society "thinks of governmental action in racial terms," presumably "the socially shared, unconscious racial attitudes made evidence by the action's meaning . . . influenced the decisionmakers"); see also *State v. Russell*, 477 N.W.2d 886, 892 (Minn. 1991) (Yetka, J., concurring specially) ("Since all parties to this lawsuit appear to agree that blacks constitute the largest percentage of crack users while whites are the largest users of powder cocaine . . . the legislature must be presumed to be aware of these facts as well.").

crack statute."<sup>430</sup> According to the district court, the threat of "black crack" creeping into the white suburbs caused Congress to disproportionately punish crack users and dealers more than their white counterparts who used and dealt in powder cocaine.<sup>431</sup> Consequently, Congress enacted the crack statute with its "Draconian" punishment<sup>432</sup> "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>433</sup> The district court's conclusion was correct under an equal protection analysis.

## V. EQUAL PROTECTION AND THE CRACK STATUTE

The equal protection analysis begins with a look at the enactment of the crack statute under the *Washington v. Davis* requirements for proving racial discrimination.<sup>434</sup> Under *Davis*, if intent to discriminate can be shown, courts will apply the strict scrutiny standard, upholding the crack statute only if the government can show that the classification is necessary to further a compelling government interest.<sup>435</sup> This Note concludes that the Eighth Circuit erred in failing to find proof of discrimination. The district court, instead, correctly applied the highest level of judicial scrutiny and properly found the crack statute to be unconstitutional.

### A. Proof of Racial Discrimination

As noted previously, the Eighth Circuit rejected the district court's findings that race was a motivating factor in enacting the crack statute,<sup>436</sup> concluding that unconscious racism<sup>437</sup> "simply does not address the question whether Congress acted with a discriminatory

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430. *Clary*, 846 F. Supp. at 787.

431. *See id.* at 784 (finding that legislators' public perceptions of "crack epidemic" in black areas and threat of "black crack" moving into white suburbs caused legislators to act).

432. *Id.* (stating that public perceptions of crack epidemic were partly responsible for drafting of draconian crack statute).

433. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (citations omitted).

434. *See supra* Part I.B (discussing proof of racial discrimination under *Washington v. Davis*, 426 U.S. 229, 238-48 (1976)).

435. *See supra* notes 51-54 and accompanying text (discussing strict scrutiny standard); *see also Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (holding that despite application of strict scrutiny standard of review, internment of Japanese-Americans during World War II was "justified" due to national security concerns). Ironically, *Korematsu* was the first, and thus far, the last time the Supreme Court applied strict scrutiny to constitutionally uphold disparate treatment of a "racial group." LOCKHART ET AL., *CONSTITUTIONAL LAW; CASES-COMMENTS-QUESTIONS* 1225 (7th ed. 1991).

436. *See United States v. Clary*, 34 F.3d 709, 713 (8th Cir. 1994) (concluding that district court findings and record do not show discriminatory intent by Congress), *cert. denied*, 115 S. Ct. 1172 (1995).

437. *See Lawrence, supra* note 170, at 322 (explaining that unconscious racism occurs when Americans discriminate on basis of race as result of common cultural experience without conscious awareness or racist motivation).

purpose."<sup>438</sup> Thus, the Eighth Circuit found that unconscious racism did not show that the legislature "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."<sup>439</sup> The Eighth Circuit proceeded to dismiss the other *Arlington Heights* factors as insufficient to establish proof of racial discrimination.<sup>440</sup> The Eighth Circuit erred, however, in rejecting unconscious racism as an appropriate method of proving discrimination.<sup>441</sup> The unconscious racial beliefs of the legislators, when considered along with other *Arlington Heights* factors, including departures from normal procedures, foreseeability of disparate impact, and adverse racial impact, show that an invidious discriminatory purpose was a motivating factor in the enactment of the crack statute.

### 1. *Unconscious racism*

The law rarely considers the unconscious.<sup>442</sup> In at least three instances, however, Supreme Court Justices have recognized unconscious racism in their analyses of equal protection challenges.<sup>443</sup> Several lower federal courts have also adopted this theory in equal protection cases.<sup>444</sup> Moreover, scholars and practitioners have

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

439. *Id.* (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)).

440. *Id.* (rejecting inevitability or foreseeability of consequence of law, departures from normal procedure sequence, and adverse racial impact claims).

441. See *supra* notes 234-39 and accompanying text (justifying relevance of unconscious racism to equal protection analysis); *infra* notes 443-50 and accompanying text (discussing reasons why courts should consider unconscious racism).

442. See Lawrence, *supra* note 170, at 329 (noting that law considers unconscious in limited circumstances, such as when medical testimony illuminates mental state of criminal defendant or mental pathology produced by alleged tort, neglectful parent, or deprivation of civil right).

443. See *Georgia v. McCollum*, 112 S. Ct. 2348, 2364 (1992) (O'Connor, J., dissenting) (recognizing unconscious racism in equal protection challenge to prevent criminal defendant from engaging in purposeful racial discrimination in exercise of peremptory challenges); *McCleskey v. Kemp*, 481 U.S. 279, 328-35 (1987) (Brennan, J., dissenting) (relying on unconscious racism, together with statistics showing racial disparity, in imposition of death sentence in Georgia to argue that death penalty, as applied to McCleskey, who was black, was unconstitutional); *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (invoking unconscious racism where prosecutor challenged potential jurors through peremptory challenges solely on basis of race).

444. See *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1450 (9th Cir. 1994) (recognizing that Border Patrol officers unconsciously might use race as proxy for illegal conduct because "racial stereotypes often infect our decision making processes only subconsciously"); *United States v. Bishop*, 959 F.2d 820, 825-28 (9th Cir. 1992) (acknowledging that racism often affects decision-making only unconsciously); *Brown v. Board of Educ.*, 892 F.2d 851, 863 (10th Cir. 1989) (stating that presumption of causal relationship between current racial and prior segregation "ensures that subconscious racial discrimination does not perpetuate the denial of equal protection to our nation's school children"), *cert. denied*, 113 S. Ct. 2994 (1993); *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1515 ("Black Americans are regularly faced with negative racial attitudes, many unconsciously held and acted upon, which are the natural consequences of a society ingrained with cultural stereotypes and race-based beliefs and

acknowledged unconscious discrimination in various contexts.<sup>445</sup> While not yet recognized in a majority opinion of the Supreme Court,<sup>446</sup> unconscious racism should be accepted as a factor in proving racial discrimination because it addresses "subtle and deeply buried forms of racism" not reachable under a traditional focus on conscious intent.<sup>447</sup> Furthermore, unconscious racism comports with the Supreme Court's instruction to look into whatever "circumstantial and direct evidence of intent as may be available."<sup>448</sup> The district court in *Clary* reached the same conclusion.<sup>449</sup> It argued that unconscious racism is an appropriate factor in determining whether a racially discriminatory motive exists.<sup>450</sup>

Although intent per se may not have entered into the minds of Congress in the enactment of the crack statute, failure to consider Congress' unconscious racial perceptions in determining whether it acted with an invidious purpose would violate "the spirit and letter of equal protection."<sup>451</sup> This Note explored the historical and social context in which Congress made the allegedly discriminatory decision<sup>452</sup> and concluded that the crack statute conveys a symbolic message to which our culture attaches racial significance.<sup>453</sup> Telling-

preferences."), *vacated in part*, 765 F. Supp. 1529 (D. Me. 1991).

445. See, e.g., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 4-5 (1987) (recognizing validity of Lawrence's unconscious racism theory); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1017-25 (1988) (recognizing unconscious racism in criminal procedure context); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1355-56 (1991) (acknowledging unconscious racism in area of speech evaluation, noting unconscious bias against "low-status accents"). But see Lloyd Cohen, *A Different Black Voice in Legal Scholarship*, 37 N.Y.L. SCH. L. REV. 301, 316-21 (1992) (dismissing Lawrence's personal experiences with unconscious racism as misinterpretations of motives and beliefs of actors).

446. See *United States v. Jackson*, 856 F. Supp. 176, 178 (S.D.N.Y. 1994) (noting that Supreme Court has not recognized use of unconscious racism as proxy for showing discriminatory purpose), *aff'd*, 59 F.3d 1421 (2d Cir. 1995).

447. *United States v. Clary*, 846 F. Supp. 769, 781 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995). The Supreme Court acknowledged in 1909 that "[racial] [b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence." *Id.* (quoting *Crawford v. United States*, 212 U.S. 183, 196 (1909)).

448. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

449. See *Clary*, 846 F. Supp. at 782 ("A current equal protection analysis must . . . take into account the unconscious predispositions of people, including legislators, who may sincerely believe that they are not making decisions on the basis of race.").

450. See *id.* (arguing that racial influences unconsciously affecting legislative decisionmaking are no less injurious, reprehensible, or unconstitutional than conscious decisions); see also Johnson, *supra* note 445, at 1034 (arguing that list of factors announced in *Arlington Heights* should be revised to include "empirically verified indicia of unconscious racism, such as slips of the tongue, microaggressions against the minority race litigant, avoidance of face-to-face interactions with minorities, and the adoption of defensive rationalizations").

451. *Clary*, 846 F. Supp. at 782.

452. See *supra* Part IV.C.1-3 (exploring unconscious racism and crack cocaine).

453. See *supra* Part IV.C.3 (presenting society's correlation between crack cocaine and race).

ly, members of Congress submitted into the *Congressional Record* numerous media accounts that associated blacks with crack cocaine and generated a public panic regarding crack.<sup>454</sup> Congress relied on these submissions as support for enactment of the crack statute.<sup>455</sup> As the district court noted, virtually "every newspaper account featured a black male either using crack, selling crack, involved in police contact due to crack, or behind bars because of crack."<sup>456</sup> Therefore, racial influences, at least unconsciously, constituted a motivating factor in promulgating the enhanced penalty provisions for possession and distribution of crack cocaine.<sup>457</sup>

## 2. *Departures from normal procedure sequence*

The district court in *Clary* bolstered its conclusion that race and not conduct was the determining factor in enacting the enhanced penalty provisions with circumstantial evidentiary sources.<sup>458</sup> For example, the district court considered departures from the normal legislative process in the enactment of the crack statute.<sup>459</sup> The district court explained that media accounts associating blacks with crack caused Congress to react "irrationally and arbitrarily."<sup>460</sup>

454. See, e.g., 132 CONG. REC. 13,026-29 (1986) (reprinting article indicating America is losing war on drugs); *id.* at 8291-99 (compiling articles detailing crack epidemic in West Palm Beach County, Florida); *id.* at 4412-20 (including media account which details neighborhood ice-cream man selling crack to children). For a smattering of quotes from the *Congressional Record*, see *supra* Introduction and Part IV.C.3.

455. See *Clary*, 846 F. Supp. at 783 (noting number of news articles associating crack with blacks reproduced in *Congressional Record* and concluding that members of Congress used these stories to support enactment of crack statute). Senator Chiles pointed to media reports as proof of a crack epidemic in the congressional debates. He stated: "[W]e are saying that it is an epidemic, you have your *Newsweek* story, you have *Time* magazine, *The New York Times*, you have everybody in the world saying that we have an epidemic." *Crack Cocaine Hearing*, *supra* note 10, at 29.

456. *Clary*, 846 F. Supp. at 785. In discussing the foreseeability of disparate impact, the district court noted:

Media pictures and stories emphasized that the "crack problem" was a "black problem" that needed to be isolated and prevented from "spreading" to white suburban areas. The intent to contain the crack problem and prevent it from entering the "mainstream" or the "suburbs" is evident from the articles cited in the *Congressional Record*. To keep crack out of suburbia meant to keep crack users and dealers out of suburban neighborhoods.

*Id.*

457. *Id.* at 787 (concluding that media-generated racial imagery formed partial basis for Congress' enactment of crack statute).

458. See *supra* text accompanying note 68 (listing factors to be considered in determining whether invidious discriminatory purpose motivated decision or action).

459. See *Clary*, 846 F. Supp. at 784-85 (noting evidence of "significant departures from prior substantive and procedural sequences"); see also *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (noting that departures from normal procedure provide evidence that improper purposes are afoot).

460. See *Clary*, 846 F. Supp. at 784 (detailing "'frenzied' state of Congress" during crack debates).

Eric E. Sterling, counsel to the House Subcommittee on Crime during the crack debate, described the development of the sentencing provisions in the crack statute as "extraordinary" in that Congress set aside their careful deliberative practices.<sup>461</sup> Sterling stated, "I drafted the mandatory minimum sentences; they came out of my word processor. . . . And I know how quickly they were written and that they were not well thought out."<sup>462</sup> Sterling compared the debates in Congress to the floor of the Stock Exchange during a rush to sell or buy a commodity.<sup>463</sup> "It was sheer panic," he said, "[e]veryone felt that the spotlight for solving the drug crisis was on them. And if it wasn't, they wanted it to be on them."<sup>464</sup>

This climate led some to characterize Congress as "frenzied" during the crack debates.<sup>465</sup> The House held few hearings on the penalty provisions,<sup>466</sup> and the Senate conducted only a single hearing between 9:40 a.m. and 1:15 p.m.<sup>467</sup> Moreover, although the penalties were originally set at a fifty-to-one ratio, Congress later arbitrarily doubled this ratio, apparently to "symbolize redoubled Congressional

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461. *See id.* (citing Eric E. Sterling regarding "extraordinarily hasty and truncated legislative process" preceding 1986 Controlled Substances Act into which crack statute was written). The court credits Sterling with summarizing the typical legislative process and noted how the sentencing provisions to the crack statute deviated from this procedure:

The development of [the 1986 Controlled Substances Act] was extraordinary. Typically Members introduce bills which are referred to a subcommittee, and hearings are held on the bills. Comment is invited from the Administration, the Judicial Conference, and organizations that have expertise on the issue. A markup is held on a bill, and amendments are offered to it. For [the 1986 Controlled Substances Act] much of this procedure was dispensed with. *The careful deliberative practices of the Congress were set aside for the drug bill.*

*Id.*

462. *See Roman, supra* note 8, at A8.

463. *See Howard Manly, Harsh Line Drawn on Crack Cocaine: Tough Penalties Found to Affect Blacks Most, BOSTON GLOBE, July 24, 1994, at 1, 14.*

464. Manly, *supra* note 463, at 14. Former House Speaker Thomas P. O'Neill, Jr. returned from his district, Boston, after the July 4th recess particularly energized. *Id.* Constituents had bombarded O'Neill with horror and outrage over the cocaine overdose death of NCAA basketball star and Boston Celtic draft pick Len Bias. *Id.* The Speaker told his colleagues to conclude all committee work on the comprehensive crime bill within five weeks. *Id.* Sterling stated:

In some sense, legislators viewed the crack epidemic the same way the Germans saw the Jews. If only they could get rid of those people using crack, then we would have a better society. All of our other problems would go away. The crime bill was the distillation of every fear, anger and resentment that members of Congress felt about their impotence to solve the scary things in life.

*Id.*

465. *See Clary, 846 F. Supp. at 784* (attributing departure from normal procedures to "frenzied" state of Congress).

466. *See id.* (noting House's abbreviated consideration of bill).

467. *See id.* at 785 (addressing Senate's similarly cursory review of bill); *Crack Cocaine Hearing, supra* note 10, at 1, 67 (recording time at beginning and at conclusion of hearing).

seriousness."<sup>468</sup> As the district court in *Clary* concluded, this evidence of departures from prior procedural sequences points toward an invidious discriminatory purpose.<sup>469</sup>

### 3. *Inevitability or foreseeability of the consequences of the law*

The district court next considered the inevitability or foreseeability of the consequences of the crack statute as a method of proving discriminatory intent.<sup>470</sup> The Supreme Court in *Personnel Administrator v. Feeney* stated that a court can reasonably draw a "strong inference" that the adverse effects were desired when the law's adverse consequences on an identifiable group are inevitable.<sup>471</sup> The district court reasoned that what cannot be clearly gleaned from the discussions among members of Congress can be inferred from the media reports introduced into the *Congressional Record* depicting "heavy involvement by blacks in crack cocaine."<sup>472</sup> Given the fact that these news articles associated crack with blacks, it was foreseeable that the enhanced penalties for possession and distribution of crack cocaine would affect blacks disproportionately.<sup>473</sup>

### 4. *Adverse racial impact*

Finally, circumstantial evidence of invidious discriminatory purpose may include proof of disparate impact.<sup>474</sup> The district court in *Clary* noted undisputed evidence that the crack statute's impact "bears more heavily" on blacks than whites.<sup>475</sup> On a national level, 92.6% of those convicted of federal crack cocaine violations in 1992 were black, while only 4.7% were white.<sup>476</sup> At the same time, 45.2% of those sentenced for powder cocaine violations were white, while 20.7% were

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

469. *See id.* (concluding that Congress acted on unconscious racial animus in departing from normal procedures).

470. *See id.* at 785.

471. *See Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 n.25 (1979) (discussing inevitability or foreseeability of consequences of neutral law on issue of existence of discriminatory intent). The Court emphasized that an inference from foreseeability of disparate impact is "a working tool, not a synonym for proof." *Id.*; *see also* *Columbus Bd. of Educ. v. Penick*, 442 U.S. 449, 464 (1979) (noting that actions performed with full knowledge of "foreseeable and disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose") (citations omitted).

472. *Clary*, 846 F. Supp. at 785.

473. *See id.* (finding that "it was foreseeable that the harsh penalties imposed upon blacks would be clearly disproportional to the far more lenient sentences given whites for use of the same drug—cocaine").

474. *See Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (stating that proof of intent can include proof of disproportionate impact on one race over another (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976))).

475. *Clary*, 846 F. Supp. at 786.

476. *Id.*

black.<sup>477</sup> Moreover, of the defendants sentenced for simple possession of crack, all were black.<sup>478</sup> In the Eastern District of Missouri, where Edward Clary was prosecuted, 98.2% of the defendants convicted for crack violations between the years 1988 and 1992 were black.<sup>479</sup> In 1993, 88.3% of those convicted in federal court of selling crack were black, while only 4.1% were white.<sup>480</sup> In that same year, only 27.4% of those convicted of selling powder cocaine were black, and 32% were white.<sup>481</sup> These striking disparities also appear in state prosecutions.<sup>482</sup>

One reason for the disproportionate conviction rates is that there is a disproportionate number of drug arrests in the black community,<sup>483</sup> even though the majority of drug users and traffickers are white.<sup>484</sup> A recent *USA Today* report, cited by the district court in *Clary*,<sup>485</sup> revealed that although blacks constitute 12% of the total population and comprise approximately 12% of the illegal drug users in the country, they accounted for almost 40% of those arrested on drug charges in 1988 and 42% in 1991.<sup>486</sup> Last year, blacks made up 13% of the drug users, but accounted for 35% of drug arrests, 55% of convictions, and 74% of those sentenced to prison terms for drug offenses.<sup>487</sup> A black person in America is four times as likely to be arrested on drug charges as a white person,<sup>488</sup> and a black person is at least ten times as likely to be arrested for drugs as a white person in at least thirty major cities.<sup>489</sup>

Thus, overwhelming statistical evidence shows that blacks are prosecuted and convicted much more frequently for crack violations than whites.<sup>490</sup> Consequently, blacks are more likely than whites to

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477. *Id.*

478. *Id.*

479. *Id.* Between 1988 and 1990, of the 57 convictions for crack in the Eastern District of Missouri, 56 were black and 1 was listed as white/Hispanic. *Id.* at 786 n.53.

480. *Cocaine: Crack and Powder*, *supra* note 21, at A20.

481. *Cocaine: Crack and Powder*, *supra* note 21, at A20.

482. *See State v. Russell*, 477 N.W.2d 886, 887 n.1 (Minn. 1991) (acknowledging that 92.6% of all persons charged with possession of crack in 1988 in Minnesota were black while 79.6% of all persons charged with possession of powder cocaine were white).

483. *See Powell & Hershenov*, *supra* note 2, at 610 (noting that black males figure in 80-90% of drug arrests nationally).

484. *See supra* notes 408-11 (looking at race of drug users and dealers).

485. *Clary*, 846 F. Supp. at 786 (citing *Meddis*, *supra* note 4, at A1).

486. *Meddis*, *supra* note 4, at A2; *see also supra* note 410 (collecting statistics on racial composition of drug users).

487. *Thomas*, *supra* note 6, at A4.

488. *Meddis*, *supra* note 4, at A1.

489. *Meddis*, *supra* note 4, at A2.

490. *See United States v. McMurray*, 833 F. Supp. 1454, 1460-61 (D. Neb. 1993) (noting among other statistics, that in fiscal year 1991, 92.3% of defendants in Nebraska and 90.7% of defendants nationally who were charged with federal crack violations were black), *aff'd*, 34 F.3d

be given the harsh ten-year mandatory minimum sentence under the crack statute.<sup>491</sup> As a direct result of the frequent prosecutions and high conviction rates under the mandatory minimum sentences for drug offenses, the prison population incarcerated for drug offenses in the Federal Bureau of Prisons has increased 90% in the last several years.<sup>492</sup> As of July 1993, 60.4% of the inmates in federal prisons were incarcerated for drug related offenses.<sup>493</sup> Young black men between the ages of twenty and twenty-nine, who comprise 4% of the country's population, make up 50% of the total prison population.<sup>494</sup>

The district court in *Clary* found that the overwhelming evidence of disproportionate, disparate treatment resulting from crack cocaine sentences provided compelling proof of discrimination.<sup>495</sup> It even suggested that these statistics alone may be enough to prove an equal protection violation.<sup>496</sup> With some trepidation, the district court declared that "if young white males were being incarcerated at the same rate as young black males, the [crack] statute would have been amended long ago."<sup>497</sup> Others, too, have wondered whether constituents would be pressuring the President and members of Congress to amend the crack statute if whites were being jailed at the same rate as blacks.<sup>498</sup>

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1405 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1164 (1995).

491. *See id.* (noting that more frequent prosecution increases likelihood of blacks receiving harsh minimum sentence).

492. *See* United States v. Clary, 846 F. Supp. 769, 786, 786 n.62 (E.D. Mo.) (noting increase in percentages of prison population incarcerated for drug offenses: 1970: 16.3%; 1980: 24.9%; 1985: 34.3%; 1990: 52.3%; 1992: 60.4%), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

493. *See id.* at 786 (presenting proportion of inmates in federal prison for drug-related offenses).

494. *See* Powell & Hershenov, *supra* note 2, at 610 (citing gross disparities between young black men calculated as percentage of general population and of prison population). In some states, the figures are even more striking. Blacks and Latinos comprise 82% of the prison population in New York state prisons. *Id.* at 610-11. In addition, minorities make up 95% of the population in New York city jails. *Id.* at 611; *see also* Thomas, *supra* note 6, at A1 (reporting that in 1994, 32% of black men between ages 20-29 were either in prison, in jail, on probation, or on parole on any given day, while figure for white males was only 6.7%).

495. *See Clary*, 846 F. Supp. at 787 (concluding that "stark" statistics form persuasive proof of discrimination).

496. *See id.* (comparing this equal protection challenge to *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), one of first Supreme Court cases ruling that law's effect may be so harsh or adverse to particular race that intent to discriminate becomes not only permissible inference, but necessary one).

497. *Id.* at 792.

498. *See* Harris, *supra* note 9, at A26 (suggesting that political pressure would force amendment if whites were jailed at same rate as blacks (citing Atlanta Police Chief Eldrin Bell)); Thomas, *supra* note 6, at A4 (crediting Marc Maver, Assistant Director of Sentencing Project, as stating, "If one in three white men were under criminal justice supervision, the nation would declare a national emergency.").

### 5. *Racial discrimination established*

Accordingly, based on unconscious racism and other *Arlington Heights* factors,<sup>499</sup> the Eighth Circuit erred in failing to find proof of racial discrimination.<sup>500</sup> Instead, the district court correctly concluded from the evidence “that racial animus was a motivating factor in enacting the crack statute.”<sup>501</sup> An unconscious fear of “black crack” spreading into white suburbs led Congress to punish black crack violators more severely than their white counterparts who used the same drug, powder cocaine.<sup>502</sup> Congress departed from its normal procedural patterns and reacted to the crack crisis in a “‘frenzy’ initiated by the media and emotionally charged constituents.”<sup>503</sup> Finally, the fruition of an overwhelmingly disparate impact in the few years following the enactment of the crack statute was inevitable and foreseeable.<sup>504</sup> Under the Supreme Court’s instruction in *Arlington Heights* to make a “sensitive inquiry into such circumstantial and direct evidence of intent as may be available,”<sup>505</sup> these factors show that Congress enacted the crack statute “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>506</sup>

### B. *Level of Judicial Scrutiny*

Having established proof of racial discrimination, a court must apply strict scrutiny.<sup>507</sup> The district court in *Clary* recognized that the power of judicial review demands deference to the careful considerations of the legislative branch.<sup>508</sup> Once proof of discrimination is established, however, “judicial deference is no longer justi-

499. See *supra* text accompanying note 68 (listing categories of circumstantial evidence germane to showing discriminatory purpose).

500. See *United States v. Clary*, 34 F.3d 709, 713-15 (8th Cir. 1994) (rejecting lower court’s reliance on unconscious racism and disparate impact), *cert. denied*, 115 S. Ct. 1172 (1995).

501. *Clary*, 846 F. Supp. at 787.

502. *Id.* at 784.

503. *Id.* at 787.

504. See *id.* at 785-87 (describing evidence of disparate impact such as increase in prison population and disproportionality of crack convictions for blacks).

505. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

506. *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979); see also *Clary*, 846 F. Supp. at 791 (finding that “racial discriminatory influences, at least unconsciously, played an appreciable role in promulgating the enhanced statutory scheme for possession and distribution of crack”).

507. See *Miller v. Johnson*, 115 S. Ct. 2475, 2487 (1995) (recognizing that “statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object”).

508. *Clary*, 846 F. Supp. at 791.

fied.<sup>509</sup> Consequently, the crack statute can survive an equal protection analysis under the strict scrutiny standard only if the government can show that the classification is necessary to further a compelling government interest.<sup>510</sup> Under this standard, the crack statute is unconstitutional.<sup>511</sup>

### 1. *Compelling government interest?*

Congress enacted the crack statute based on its belief that crack was more dangerous than powder cocaine.<sup>512</sup> The government specifically pointed to evidence that members of Congress thought crack posed a greater danger because of its potency, addictiveness, lower cost, and growing prevalence.<sup>513</sup> Although not proffered as additional evidence of crack's alleged dangerousness in *Clary*,<sup>514</sup> the Senate hearings also reveal that members of Congress felt that crime would significantly increase as a result of crack usage.<sup>515</sup> As the district court in *Clary* noted, however, many of the legislators' beliefs were not based on any evidence presented during the hearing.<sup>516</sup>

Members of Congress failed to present factual or statistical evidence showing that crack was more potent than powder cocaine.<sup>517</sup> Cocaine, in its various forms, can be ingested in several ways: chewing

509. *Arlington Heights*, 429 U.S. at 265-66.

510. See *supra* notes 51-54 and accompanying text (discussing strict scrutiny standard).

511. See *Clary*, 846 F. Supp. at 797 (holding crack statute to be unconstitutional in face of *Clary*'s equal protection challenge).

512. See *supra* notes 94-115 and accompanying text (discussing Congress' concerns underlying enactment of crack statute).

513. *Clary*, 846 F. Supp. at 791; see also *supra* notes 94-112 and accompanying text (discussing why Congress considered crack to be more dangerous than powder cocaine).

514. See *Clary*, 846 F. Supp. at 791 (responding to defense argument that statute was violative of Equal Protection Clause based on race, government presented evidence that harsher penalties for crack were based on congressional impression that crack is "more dangerous because of its potency, its highly addictive nature, and increasing prevalence").

515. See *supra* notes 113-15 and accompanying text (noting that Congress associated crack with high levels of criminal activity).

516. See *Clary*, 846 F. Supp. at 791 (explaining that there was no medical evidence in crack hearing testimony). All testimony consisted of generalizations regarding the differences in danger levels between crack and powder cocaine. *Id.* The Eighth Circuit recognized that several medical witnesses testifying before the district court contested the claim that crack is more dangerous than powder cocaine. *United States v. Clary*, 34 F.3d 709, 714 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995). Apparently, the Eighth Circuit believed that this evidence contradicting the claim that crack is more dangerous was not available to members of Congress at the time of the crack hearing. See *id.* (stating that "[s]cientific disagreement with testimony in congressional hearings, offered at a later time and after additional research, simply does not establish . . . a lack of scientific support for Congress' action" (emphasis added)). Much of the medical evidence, however, was not only available to Congress at the time of the crack hearing in a variety of sources, but experts testified in the actual crack hearing that crack is not more dangerous than powder cocaine. See *infra* notes 551-54 and accompanying text (refuting claim that crack is more dangerous than powder cocaine).

517. *Clary*, 846 F. Supp. at 791.

the coca leaves; inhaling or smoking vapors from cocaine base; snorting the powdered form; and injecting the liquid form intravenously.<sup>518</sup> The pharmacological reactions to cocaine, regardless of how ingested, “include euphoria, increased energy, enhanced alertness and sensory experience, and elevated feelings of self-esteem and self-confidence.”<sup>519</sup> Dr. Charles R. Schuster testified before the Senate that smoking crack (or freebase) cocaine or taking cocaine intravenously will cause a person’s plasma levels in the brain to go up faster than taking the drug intranasally, where it is absorbed into the body more slowly.<sup>520</sup> Consequently, smoking cocaine or taking cocaine intravenously will produce a more euphoric reaction,<sup>521</sup> or more intense “high” than snorting cocaine.<sup>522</sup>

Although use of crack and powder cocaine will result in varying physical and psychological reactions, as detailed above, there is no pharmacological evidence proving crack is a greater danger than powder cocaine.<sup>523</sup> It is the means of ingestion, rather than anything inherent in the crack cocaine substance, that makes crack potentially more dangerous.<sup>524</sup> “[T]he cocaine molecule is the same

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518. See generally Inciardi, *supra* note 78, at 461-68 (detailing different means of ingestion).

519. See WALLACE, *supra* note 15, at 10 (discussing pharmacology of cocaine and its addictive nature).

520. *Crack Cocaine Hearing*, *supra* note 10, at 16 (testimony of Dr. Schuster); see also *id.* at 9 (prepared statement of Sen. Chiles) (stating that cocaine, when smoked, will reach brain in under 10 seconds, while snort of powder cocaine can take up to eight minutes). For a discussion of how different methods of ingesting cocaine influence the brain, see Lowney, *supra* note 84, at 150-51. Lowney notes that, when comparing effects of different methods of ingestion by looking at level of cocaine which reaches brain (called “mean cocaine plasma level”), cocaine taken intravenously results in highest mean cocaine plasma level at fastest rate; smoking cocaine leads plasma level to peak sooner than snorting it, but snorting gradually causes cocaine plasma level to rise higher. *Id.*

521. *Crack Cocaine Hearing*, *supra* note 10, at 16 (testimony of Dr. Schuster).

522. See Lowney, *supra* note 84, at 150-51 (explaining how intravenously ingesting cocaine produces high of greater intensity than smoking, that both highs peak within few minutes of taking drug, and that highs are limited in duration). In contrast, snorting cocaine results in a high that is half as strong as smoking, does not peak until about 20 minutes after consumption, but whose effects last for more than two hours. *Id.*

523. Lowney, *supra* note 84, at 151. Lowney notes that the effect of smoking crack on the cardiovascular system is comparable to snorting cocaine or taking it intravenously. See *id.* (describing mean heart rate increase and time to maximum increase for cocaine users (citing Reese T. Jones, *The Pharmacology of Cocaine Smoking in Humans*, in NATIONAL INSTITUTE ON DRUG ABUSE RESEARCH MONOGRAPH NO. 99: RESEARCH FINDINGS ON SMOKING OF ABUSED SUBSTANCES 35-36 (C. Nora Chiang & Richard L. Hawks eds., 1990))). These rates are: 46 Beats Per Minute (BPM) after 10 minutes for intravenous users; 32 BPM after 2 minutes for smokers; and 26 BPM after 40 minutes for snorters. *Id.* In addition, there is no evidence that use of crack, as opposed to powder cocaine, renders the user physiologically or psychologically more inclined to perform violent or other antisocial acts. *Clary*, 846 F. Supp. at 792. Furthermore, researchers conclude that the “short-term and long-term effects of crack and powder cocaine are identical.” *Id.*

524. See *Crack Cocaine Hearing*, *supra* note 10, at 20 (testimony of Robert Byck, M.D., Professor of Psychiatry and Pharmacology, Yale University School of Medicine). Dr. Byck asserted:

You can pack your nose [with powder cocaine] only so far, but you can keep breathing [cocaine base, of which crack is one form] for a long time. As long as you can keep

whether the drug being used is in powder form or in crack form, and is not inherently more dangerous in crack form."<sup>525</sup> Additionally, crack is not, despite legislators' claims to the contrary<sup>526</sup> purified cocaine.<sup>527</sup> It simply does not make sense, therefore, to single out smoking crack cocaine for enhanced punishments, especially when other forms of ingestion, specifically intravenous use, produce substantially the same effect.<sup>528</sup> As one court concluded, "[d]isparate treatment of crack and powder cocaine users is not justified on the basis of crack's greater dangerousness when there is evidence that powder cocaine could readily produce the effects purported to justify a harsher penalty for possession of crack."<sup>529</sup>

Likewise, crack is not more addictive than powder cocaine.<sup>530</sup> Despite media reports claiming almost instantaneous addiction,<sup>531</sup> Dr. Byck and Dr. Schuster testified before the Senate that they had no

breathing cocaine vapor, you can get more of a dosage into yourself. That is the reason why crack, or cocaine free-base, is so dangerous.

*Id.*; see also *State v. Russell*, 477 N.W.2d 886, 890 (Minn. 1991) (noting that "evidence as to the degree of dangerousness between crack and cocaine powder is based on testimony as to effects resulting from different methods of ingestion, rather than on an inherent difference between the forms of the drug").

525. *United States v. Majied*, No. 8:91-00038(02), 1993 WL 315987, at \*5 (D. Neb. July 29, 1993) (declining to follow sentencing guidelines for crack violation because crack and cocaine are equivalent in terms of danger and because disparate impact on African Americans from these penalties was not contemplated); see also *Russell*, 477 N.W.2d at 890 (noting that "the mood altering ingredient in both powder and base was the same—cocaine").

526. See *supra* notes 98-101 and accompanying text (discussing members of Congress' belief that crack is purified cocaine).

527. See *Inciardi*, *supra* note 78, at 469 (explaining method by which crack is processed and concluding that it is not purified cocaine). *Inciardi* also explains that "crack generally contains much of the filler and impurities found in the original cocaine hydrochloride, along with some of the baking soda from the processing." *Id.*

528. See *supra* notes 520-27 and accompanying text (noting similarity between smoking crack and taking cocaine intravenously); see also *Crack Cocaine Hearing*, *supra* note 10, at 30 (statement of Dr. Schuster) ("It is comparable to intravenous cocaine."). But see *id.* at 30 (statement of Sen. Chiles) ("Cocaine is dangerous, but if you compare cocaine snorting to crack, it is like comparing a kitty to a skunk as far as the severity of the problem.").

529. *Russell*, 477 N.W.2d at 890.

530. *United States v. Clary*, 846 F. Supp. 768, 792 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

531. See 132 CONG. REC. 4412 (1986) (citing Arnold Washton, specialist at Fair Oaks Hospital). Mr. Washton stated that "[c]rack is almost instantaneous addiction . . . . It is the most addictive drug known to man right now." *Id.*; see also 132 CONG. REC. 8292 (1986) (citing Blythe, *supra* note 12) (reporting that crack appears to cause addiction quicker than other forms of cocaine, estimating dependency on crack within five to six weeks compared to four or five years with powder cocaine); Kerr, *supra* note 11, at A18 (claiming that crack sometimes causes addiction within days or weeks); Lamar, *supra* note 11, at 16 (claiming that crack is highly addictive form of cocaine); Morganthau et al., *supra* note 11, at 58 (declaring that crack is much more addictive than powder cocaine), *reprinted in* 132 CONG. REC. 4418 (1986); Smith, *supra* note 11, at 15 (stating that crack is "newest, purest and most addictive commodity now on the market").

evidence showing the rate of addictiveness of crack.<sup>532</sup> Independent field studies, conducted by Dr. Inciardi on hard-core drug-using delinquents in Miami in 1986, led Dr. Inciardi to conclude that, “although there is no question as to the seductive nature of both cocaine *and* crack . . . [there was] hardly an indication of compulsive and uncontrollable use.”<sup>533</sup> In fact, Inciardi’s study revealed that the “drug of choice” for most crack users was not crack, but powder cocaine and marijuana.<sup>534</sup> Thus, objective evidence contradicts Congress’ claim that the drug classifications in the crack statute were appropriately based on crack’s pharmacological effects.<sup>535</sup>

Supporters of the crack statute were correct in asserting that crack was available in small packets at a low unit price.<sup>536</sup> In 1986, the user could purchase a single dose of crack for around ten dollars while the smallest unit of powder cocaine typically available at the retail level—one gram—cost about one hundred dollars.<sup>537</sup> Thus, a single dose of crack was easier to afford than powder cocaine.<sup>538</sup> But this was because of the packaging—one dose versus one gram—not anything inherent in the retail value of the drugs. In fact, the street price per gram of the two substances is frequently equal, and crack is sometimes more expensive than powder cocaine.<sup>539</sup> As the district court in *Clary* explained, because cocaine is the primary

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532. See *Crack Cocaine Hearing*, *supra* note 10, at 19 (testimony of Dr. Byck) (“How likely is it, if someone smokes some crack today, that they will be addicted 5 weeks from now. We don’t know the answers to a simple question like that . . . .”); *id.* at 28 (statement of Sen. Chiles) (“At what frequency level of crack use does one become physically dependent on the drug?” Dr. Byck: “I don’t know the answer to that question.” Mr. Schuster: “No, I don’t think that we have the answer to that question.”).

533. Inciardi, *supra* note 78, at 484. Inciardi’s study revealed that approximately 92.5% of the subjects used crack during the three month period prior to the interview, and of these nearly two-thirds were not daily users. *Id.*

534. See Inciardi, *supra* note 78, at 485 (noting that interviews with drug users suggested that cocaine and marijuana were preferred, and that crack was just “a cheap, quick high”); see also Weisman, *supra* note 15, at 16 (noting that 54% of high school seniors have tried marijuana and that marijuana remains America’s most popular illegal drug).

535. See *supra* notes 518-27 and accompanying text (discussing evidence which proves pharmacological effects of crack are comparable to other forms of cocaine).

536. See *Crack Cocaine Hearing*, *supra* note 10, at 15 (testimony of Dr. Schuster) (testifying that crack is packaged and marketed in small vials containing one dose and sold for around \$10).

537. See *Crack Cocaine Hearing*, *supra* note 10, at 15 (testimony of Dr. Schuster) (noting that packaging of crack in small containers lowers price barrier, thus allowing ease of purchase by younger or less affluent persons); Inciardi, *supra* note 78, at 485 (noting that “smallest unit of cocaine available at retail level was one gram at \$75, a costlier purchase than a \$5 or \$10 hit of crack”); cf. OFFICE OF NAT’L DRUG CONTROL POLICY, *supra* note 5, at 7 (stating that in 1994 prices for crack varied from \$2 or \$3 in some states to \$10 to \$30 in others, and prices for cocaine varied from \$50 to \$100 per gram).

538. Inciardi, *supra* note 78, at 485.

539. Lowney, *supra* note 84, at 153.

product of crack, crack is not less expensive than powder cocaine.<sup>540</sup> Furthermore, as Senator Chiles recognized, repeated use of crack could potentially cost hundreds of dollars per week.<sup>541</sup>

Evidence revealed that although the media declared a crack epidemic and contended that crack presented the number one drug problem facing the nation,<sup>542</sup> crack has not led to an increase in cocaine use.<sup>543</sup> Rather than a national epidemic, researchers have found crack to be a problem unique to inner cities of not less than a dozen urban areas.<sup>544</sup> The Drug Enforcement Administration, in fact, concluded that crack represented only a "secondary problem" in the overall drug issue facing the country.<sup>545</sup> Yet Congress and the media chose to ignore this evidence, instead continuing to hype crack as the wave of the future.<sup>546</sup> At most, one could safely argue, as the court in *Clary* did, that "all forms of cocaine are available today in greater quantities and at lower prices than a few years ago."<sup>547</sup> But

540. *United States v. Clary*, 846 F. Supp. 768, 792 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

541. *Crack Cocaine Hearing*, *supra* note 10, at 9 (prepared statement of Sen. Chiles).

542. *See supra* note 11 (noting, for example, that *Newsweek* announced crack to be biggest story since Vietnam and fall of Nixon presidency and compared spread of crack with plagues of medieval Europe); *cf. Weisman*, *supra* note 15, at 17 (crediting Bill Gregory, spokesman for National Institute on Alcohol Abuse, with stating that "[a]lcohol is our nation's No. 1 drug abuse problem").

543. *See Crack Cocaine Hearing*, *supra* note 10, at 26 (statement of Dr. Schuster) (according to Dr. Schuster, growth in cocaine abuse occurred between 1979 and early 1980s, but since that time number of users has remained relatively constant); *see also Weisman*, *supra* note 15, at 15 (presenting NIDA figures revealing that percentage of high school seniors admitting to using cocaine at least once remained stable at 17% in 1981, 16% in 1982-84, and 17% in 1985).

544. Inciardi, *supra* note 78, at 482. Senator Chiles probed Dr. Schuster on how statistical evidence could show that cocaine use was stable on a national level when everyone spoke in terms of a crack epidemic. *Crack Cocaine Hearing*, *supra* note 10, at 28 (statement of Dr. Schuster). Dr. Schuster responded that "[t]here can be large changes in specific locales, without that necessarily producing a major change in the national statistics." *Id.*

545. *See Inciardi*, *supra* note 78, at 482 (citing 1986 DEA report determinations). The report stated:

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 multikilogram 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 primary problem in most areas.

*Id.* (citing Drug Enforcement Administration, *Special Report: The Crack Situation in the United States* (unpublished release from the Strategic Intelligence Section, Drug Enforcement Administration, Washington, D.C., Aug. 22, 1986)).

546. Jane Gross, *A New, Purified Form of Cocaine Causes Alarm as Abuse Increases*, N.Y. TIMES, Nov. 29, 1985, at A1. Upset at Dr. Schuster for testifying that national statistics illustrated that cocaine use had levelled off, Senator Chiles argued that using these statistics was a "great disservice to what is happening out there." *Crack Cocaine Hearing*, *supra* note 10, at 29. As proof of a crack epidemic, Senator Chiles pointed to media reports. *See id.* ("[W]e are saying that it is an epidemic, you have your *Newsweek* story, you have *Time* magazine, *The New York Times*, you have everybody in the world saying that we have an epidemic.").

547. *United States v. Clary*, 846 F. Supp. 768, 792 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

evidence contradicts the claim that crack has permeated the drug culture.<sup>548</sup>

Finally, although not proffered as evidence tending to show crack's dangerousness in *Clary*, the media and Congress promoted the idea that crack use led to an increase in crime.<sup>549</sup> While crime accompanies drugs generally,<sup>550</sup> there is simply no evidence to support the assertion that crack specifically leads to an increase in property crimes or crimes against persons.<sup>551</sup> Nor is there support for the argument that crack dealers are somehow more evil than powder cocaine dealers because cocaine dealers sell the cocaine to make crack.<sup>552</sup> As such, equating culpability to power in the drug trade suggests that cocaine dealers are more culpable than crack users or small scale crack dealers.<sup>553</sup>

Thus, as Senator Hawkins stated during the introduction of the amendment to the Controlled Substance Act, "the dividing line between crack and powder cocaine is indistinct and arbitrary."<sup>554</sup> The lack of objective evidence supporting the drug classifications and punishment decisions in the crack statute is apparent.<sup>555</sup> While recognizing the pressures on Congress to respond to the arrival of crack cocaine, the district court in *Clary* found that "the frenzied, irrational response to criminalize crack at 100 times greater than powder cocaine, in a manner that would disproportionately affect

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548. See *supra* note 545 (noting DEA's conclusion about prevalence of crack within drug community).

549. See *supra* notes 113-15 (noting that Senator Nunn warned of possibility of more crime accompanying crack); see also 132 CONG. REC. 8292 (1986) (citing Blythe, *supra* note 12) (noting that although police admit there is insufficient evidence linking increase in cocaine use to increase in crime, they believe crack's addictive character will lead to increase in property crimes because sometimes stolen goods are found where crack is sold); Peter Kerr, *Growth in Heroin Use Ending as City Users Turn to Crack*, N.Y. TIMES, Sept. 13, 1986, at A1 (claiming that transition from heroin to crack may lead to increase in violent crimes); Lamar, *supra* note 11, at 17 (noting that "police have attributed a rash of brutal crimes to young addicts virtually deranged [by crack]").

550. See Powell & Hershonov, *supra* note 2, at 608 (commenting that growth in violent crimes is result of profit in illicit drug trade and of turf wars between drug dealers).

551. See *Clary*, 846 F. Supp. at 792 (noting that there is no evidence that use of crack, as opposed to powder cocaine, renders user physiologically or psychologically more inclined to perform violent or other antisocial acts).

552. See Lowney, *supra* note 84, at 152 (discussing fact that all sales of crack depend on sale from cocaine dealer first, and that cocaine dealers may therefore be more powerful in drug distribution chain).

553. Lowney, *supra* note 84, at 153; see *Clary*, 846 F. Supp. at 788 (noting that amount of crack cocaine for 56 of 57 defendants in Eastern District of Missouri between 1988 and 1992 totaled under 4000 grams). The court also asserted that "the removal of this small quantity of drugs would hardly reduce the supply of crack cocaine in St. Louis or impede its flow." *Id.*

554. 132 CONG. REC. 17,918 (1986) (statement of Sen. Hawkins) (arguing that focus of law enforcement efforts should be on cocaine generally, not its various forms).

555. See Lowney, *supra* note 84, at 137 (noting that "lack of objective criteria guiding legislators in determining drug classification and penalty determination allows social and racial biases to shape drug policies").

blacks, is unjustified."<sup>556</sup> Accordingly, it properly held that the government failed to show a compelling government interest in the enhanced penalty provisions for possession and distribution of crack cocaine.<sup>557</sup>

## 2. *Necessary means?*

Even assuming Congress' interests were compelling, it failed to draft the crack statute in terms narrowly tailored to achieve those interests.<sup>558</sup> The district court in *Clary* reasoned that it is illogical to mandate a harsher penalty on a derivative source of an illicit drug, while the original form of the drug is afforded greater tolerance.<sup>559</sup> The district court emphasized that "[c]ocaine is cocaine,"<sup>560</sup> and that legislators should punish the possession and distribution of powder cocaine with equal severity as crack cocaine.<sup>561</sup> As one court noted, if society seeks to eliminate cocaine use, then it ought to impose harsh penalties not just for the possession, use and distribution of crack, but also of cocaine in all other forms.<sup>562</sup> Those penalties, the court stated, should be "equally and uniformly applied."<sup>563</sup> Thus, the district court in *Clary* properly held that the enhanced penalty provisions for crack cocaine were not necessary to further a compelling government interest.<sup>564</sup> Accordingly, the crack statute<sup>565</sup> violates the equal protection component of the Fifth Amendment Due Process Clause.<sup>566</sup>

## CONCLUSION

Few will dispute that this country has a drug problem,<sup>567</sup> and nobody, least of all legislators, will defend drug abuse in America. It should come as no surprise, therefore, that Congress reacted quickly and decisively to the media exploitation of the drug issue.<sup>568</sup> With

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556. *Clary*, 846 F. Supp. at 792-93.

557. *Id.* at 793.

558. *See id.* (concluding that crack statute was not narrowly drawn).

559. *See id.* (arguing that if source (cocaine) dries up, derivative (crack) must necessarily dry up also).

560. *Id.*

561. *Id.*

562. *State v. Russell*, 477 N.W.2d 886, 893 (Minn. 1991) (Yetka, J., concurring specially).

563. *Id.* (Yetka, J., concurring specially).

564. *Clary*, 846 F. Supp. at 793.

565. 21 U.S.C. § 841(b)(1)(A)(iii) (1994).

566. *See Clary*, 846 F. Supp. at 797 (holding crack statute to be unconstitutional).

567. *powell & Hershenov*, *supra* note 2, at 559.

568. *See Reese & Danielian*, *supra* note 401, at 32 (admitting that drug issue is "big story that may have been blown out of proportion by the media"); *Weisman*, *supra* note 15, at 15 (rejecting notion that America was in midst of crack epidemic).

their constituents demanding action, any legislator failing to respond risked being labeled "soft on crime" and faced almost certain defeat in the next election.<sup>569</sup>

Congress is not set, by and large, on discriminating against black people or furthering the vestiges of racism.<sup>570</sup> But men and women who would not overtly discriminate against someone because of race can, because of this country's racist past (and present), unconsciously take race into account in their decisionmaking.<sup>571</sup> The unconscious racial beliefs of members of Congress entered into the promulgation of the enhanced penalty provisions found in the crack statute. These beliefs, considered along with the *Arlington Heights* factors, show that racial animus constituted a motivating factor behind the enactment of the crack statute. Therefore, because the crack statute fails to pass strict scrutiny, it violates the equal protection rights of black Americans. Cocaine, really, is cocaine.<sup>572</sup>

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569. See *Clary*, 846 F. Supp. at 794 (recognizing pressure on members of Congress to confront drug issue).

570. *Id.*

571. Lawrence, *supra* note 170, at 321-22 (outlining basic theory of unconscious racism).

572. See *Clary*, 846 F. Supp. at 793 (emphasizing that "co'caine is cocaine" and therefore punishment for crack and powder cocaine should be equal).

