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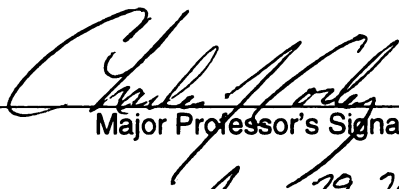
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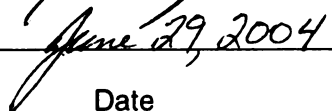
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**THE CRACK VERSUS COCAINE SENTENCING DISPARITY:  
A SOCIAL HISTORICAL ANALYSIS OF RACE-BASED  
LAWS WITHIN THE UNITED STATES**

By

Ronald Oreadis Craig

**A DISSERTATION**

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## ABSTRACT

### THE CRACK VERSUS COCAINE SENTENCING DISPARITY: A SOCIAL HISTORICAL ANALYSIS OF RACE-BASED LAWS WITHIN THE UNITED STATES

By

Ronald Oreadis Craig

This dissertation explores the legal sentencing disparity when using race as a variable regarding crack versus cocaine laws. Several studies have established that African Americans are found in possession and convicted of having the crack 'rock cocaine' drug. While more whites are found in possession and convicted of having raw powder cocaine. According to federal law, a lesser amount of crack equals mandatory minimum of five years in prison. Yet, possession of raw cocaine equals five years of probation. In order to adequately address the sentencing disparity dilemma, one has to review the impact of crack on the community, its lethal potency, and the social and historical aspects of the development of laws concerning it in the United States.

History and sociology will provide the means to cultivate a social historical perspective on the transition of African-Americans (Blacks) in the United States. History provides a way to explore the advancement of the plight of African-Americans and the impact that legislation has on this group. In this approach, the student contends that both sociology and history are intertwined in the development race based laws. A content analysis is implemented in order to bring comprehension to this disparity.

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2004

**This dissertation is dedicated to my loving wife Juanita and children Makare' and Jabari**

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## INTRODUCTION

### Purpose of the Present Research

Criminal deviant behavior is often disproportionately associated with African-Americans, and Black males in particular. During the early 1980s, crack rock cocaine exploded into the Black communities throughout the country. As a result, gang violence escalated, which resulted in law enforcement using tactics including state-sanctioned, drug-dealer profiling. For instance, it was determined in this profiling that Black males between the ages of 15-25 dressed in upscale sweat suits, layered with gold jewelry around their necks, and driving expensive cars that were beyond their financial means, were potential dealers (Lusane, 1991). Outcomes of this profiling included a rise in gang activity and an explosion in the Black prison population.

In addition, state and federal governments enacted harsh penalties for drug trafficking. Gang membership skyrocketed during this period because of a lack of jobs and economic resources. Therefore, because it is inexpensive to make crack rock cocaine, poor Black communities became the ideal marketplace for unemployed youth street gang members to sell this product (Lusane, 1991). At a minimum, income generated from the sale of crack rock cocaine provided money for the basic quality-of-life needs such as rent, food, clothing, and utilities. The drug economy became an employment agency used by the existing gang network, comprised primarily of Black males, who ran the drug houses and sell drugs on street corners (Anderson, 1990).



In response to this growing crime of making, distributing, and selling crack rock cocaine, the United States Congress made a distinction regarding crack cocaine. They set mandatory minimum sentences for the possession of powder cocaine and other drugs. This was the only federally mandated penalty for a first-time offense of possession of a controlled substance. The new law provided that possession of more than five grams of crack cocaine would bring a minimum prison sentence of five years. This is in contrast to the law that provides that possession of any quantity of other illegal substances by a first-time offender—including powder cocaine—is a misdemeanor offense and punishable by a maximum of one year in prison (Chitwood, Rivers, & Inciardi, 1996; Cockburn & St. Clair, 1998; Conaboy, 1995; Gray, 2001; Jacobs, 1999; Mauer, 1999b; Reinerman & Levine, 1997). The statute presented a 100:1 quantity ratio of powder to crack cocaine and so subsequently it takes 100 times the quantity of powder cocaine, as compared to crack rock cocaine, to bring mandatory minimum penalties (Appleby, Hunt, & Jacob, 1994; Chitwood et al., 1996; Cockburn et al., 1998; Conaboy, 1995; Gray, 2001; Jacobs, 1999; Mauer, 1999b; Reinerman et al., 1997). In essence, the mandatory minimum guidelines differentiation means that for any given quantity of cocaine, sentences for offenses involving crack cocaine are much more severe than similar offenses involving powder cocaine.

Key in this sentencing disparity debate is that drug traffickers of *crack* cocaine are much more likely to be Black, while traffickers of *powder* cocaine are more likely to be White (Lusane, 1991; Mauer, 1999b). However, it is true that both forms of cocaine are a derivative of the same substance. In fact, the Commission defined

powder cocaine and crack cocaine as two forms of the same drug, both containing the same active ingredient – the cocaine alkaloid (Conaboy, 1995). Simply put, you get crack rock cocaine when water is added to it and the temperature of this substance lowered until it becomes hardened, thus creating “ice.”

This dissertation examines the origins and impact of the aforementioned drug laws on the African American community. It is the main thesis of this dissertation that the escalation of arrests among African Americans and the subsequent increase in incarceration rates are attributed directly to the implementation of mandatory minimum drug laws.

### Significance of the Problem

This dissertation explores the legal sentencing disparity when using race as a variable regarding crack versus cocaine laws. Research by the United States Sentencing Commission (USSC) indicates that more African Americans are arrested and convicted for possession of the crack drug (O'Bryant & Seghetti, 2002; U.S.S.C., 2001). While according to the Commission's report more Whites were convicted for possession of raw powder cocaine, approximately 83% of the federally sentenced crack cocaine offenders were African American (U.S.S.C., 2001). According to federal law, 5 grams of crack equals a mandatory minimum sentence of five years in prison. Yet, possession of raw cocaine for the same amount equates to a probation sentence.

In order to adequately address the sentencing disparity dilemma, one has to review the impact of crack on the community, its lethal potency, and the social and

historical aspects of the development of laws concerning it in the United States. In this dissertation history and sociology will provide the means to cultivate a social historical perspective on the transition of African-Americans (Blacks) in the United States in both the antebellum and post-bellum periods. History provides a way to explore the advancement of the plight of African-Americans and the impact that legislation has on this group.

The literature review section provides two specific aspects. First, it gives specific examples of research that examine the creation of laws pursuant to the social status of ethnic/minority groups. Secondly, it looks at the theoretical framework using conflict theory with a social historical description of the origins of the crack cocaine law in relationship to the evolving social status of African-Americans.

### The Addictive Potency of Crack

Given that the focus of this dissertation is on crack and cocaine it would be helpful to discuss the addictive nature of crack. The reason for this is that some may argue that there may be a major factor in the sentencing disparity, a view that I reject. Crack cocaine is a solid form of freebased powder cocaine hydrochloride mixed with baking soda or sometimes ammonia. The cocaine powder mix is heated until it hardens, and then broken into small pieces referred to as rocks. This methodological process increases the potency of crack, rendering it much stronger than when sniffing cocaine. Crack is packaged in small vials, sold, and then smoked in small pipes. Upon heating and inhaling the vapors, crack travels through the lungs, into the bloodstream, and reaches the brain within eight to ten seconds (Crack Cocaine - Crack

Cocaine Addiction, 2004). The effect is a 'high' of euphoric proportions comparable to a mental orgasm that is far more intense than achieved by snorting cocaine. The high is nearly immediate and produces a rapid heartbeat and lasts 15 to 20 minutes, followed by a depressing crash (coming off the high). Often only one use will entice an individual into being an addict.

The physical effects of crack addiction include nausea, anxiety, insomnia, and loss of appetite, damage to nasal cavities, convulsions, possible heart attack, and violent behavior. Habitual use may lead to cocaine psychosis, causing paranoia, hallucinations, and a condition known as formication, in which insects or snakes are perceived to be crawling under the skin (Crack Cocaine - Crack Cocaine Addiction, 2004). Ultimately crack impacts the automatic nervous system that controls the sympathetic system. The sympathetic system speeds up the heart and breathing, while the automatic nervous system, which controls the parasympathetic system, slows things down. Smoking crack causes the brain to release high levels of dopamine all at once. This is the chemical the brain releases when feeling pleasure. For example, laughter causes the brain's neurotransmitters to release a small amount of dopamine.

Lawmakers have argued that crack is more dangerous than cocaine and therefore it is justifiable to have a more punitive sentence. However, in May 2002 the Sentencing Commission submitted a comprehensive report Congress entitled "Cocaine and Federal Sentencing Policy." The Commission found:

Current penalties exaggerate the relative harmfulness of crack cocaine. The negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure and are significantly less severe than previously believed. In fact, the negative effects from prenatal cocaine exposure are similar to those associated with prenatal tobacco exposure and

less severe than the negative effects of prenatal alcohol exposure (H.R. 4026, The Powder-Crack Cocaine Penalty Equalization Act of 2002, 2004).

A study published in the *Journal of the American Medical Association* by Dorothy K. Hatsukami, University of Minnesota, and Marian W. Fischman, Columbia University, shows that the physiological and psychoactive effects of the two different forms of cocaine are so similar that the 100:1 sentencing disparity is "excessive" (Hatsukami & Fischman, 1996). The study also shows that the "route" of the cocaine use, not the form of the cocaine, determines the rate of onset and the intensity and duration of the drug's effect. "The more immediate and greater the magnitude of effect, the greater likelihood that the drug will be abused. Intravenous and smoked cocaine achieve maximal concentration and effect most rapidly," according to the authors (Hatsukami et al., 1996). However, the authors concede, "to some extent, form dictates route (i.e., crack cocaine can only be smoked)." The authors propose a new ratio of as little as 3:1 or 2:1, stating that some disparity in sentencing might be justified due to evidence showing "a greater abuse liability, greater propensity for dependence, and more severe consequences when cocaine is smoked" (Hatsukami et al., 1996). The researchers conclude that crack is more dangerous because it is more available, easier to use, and less expensive than powder cocaine. Concluding their study, Drs. Fischman and Hatsukami argue that, to a greater extent, although crack cocaine has been linked with more crime than cocaine hydrochloride, many of these crimes are associated with addiction to cocaine. Therefore, those addicted individuals who are incarcerated for the sale or possession of cocaine are better served by treatment than prison (Hatsukami et al., 1996).

## Basic Precepts of Conflict Theory

Conflict Theory provides a theoretical framework with the fundamental premise of law as the primary instrument that maintains the power of the dominant group in society and control of behaviors of individuals who threaten such power (Quinney, 2001). This outlines the works of both traditional conflict theorists such as Ralf Dahrendorf and non-traditionalists such as W.E.B. Du Bois.

This review of literature includes a historiography of laws that criminalized the activities of African-Americans. This methodology accomplishes two purposes: the first an overall analysis of the basic tenets of conflict theory and the second an analysis of the effects, as seen through the lens of an African-American theorist.

Conflict theory is based on the idea that society is made up of groups competing with each other over scarce resources. Different interests produce conflicting definitions of crime that are determined by the group in power. For example, a prison sentence for the distribution of crack cocaine (the form of the drug generally trafficked by African Americans), is ten to fifteen years longer than it is for the distribution of powder cocaine, which is favored mainly by the White middle and upper classes, even though it is the same substance in its raw form.

The purpose of this dissertation is to examine the origins and impact of crack rock cocaine versus powder cocaine punishment using a social historical analysis premised with a conflict perspective. The primary overarching hypothesis for this study is that higher arrest and incarceration rates of African Americans can be directly attributed to enforcement of the aforementioned laws.

into action that make it possible for each group to articulate their ideas. For example, historically particular forms of property, including slavery, feudal landholding, and capital, are upheld by the coercive power of the state. As a result, property divisions, that is, slaves and slave-owners, serfs and lords, capitalists and workers, form classes. These divisions are subsequently opposing agents in the struggle for political power. Marx contends that material contributions determine the extent to which social classes can organize effectively to fight for their interests. Such conditions of mobilization are a set of intervening variables between class and political power (Runciman, 1992).

Bonger (1969) argued that simple crimes are the results of poverty, while fraud and embezzlement stem from greed. Social order is perceived as founded on organized solidarity or coercion. There is an ideological realm of beliefs, such as religion and law that leads to an underlying theme that perpetuates a struggle for power. Ideas and morals do not occur prior to interaction, but are socially created, and best serve the interests of relevant individual parties in the conflict. In reference to African Americans, Bongers noted:

The circumstances in which Negroes live are very different from those of the whites and are strongly conducive to crime. When they were freed from slavery after the Civil War (1861-65), the Negroes were left to their fate under the most difficult conditions. Unadjusted to their entirely new surroundings, [they were] despised and oppressed by whites.... In spite of the greatest difficulties, they have worked themselves a little way up but are still held back in every respect by whites (Bonger, 1969:133).

Expanding on Bongers's summation, Marable (2000) noted that African Americans are often prosecuted for the same crimes as Whites but are less likely to be able to afford adequate legal representation. Blacks more frequently receive prison sentences, versus probation. Real crimes are a matter of conflict between individuals

in a stratified society as a result of capitalist economic distribution. Marable asserts that American capitalism is preserved for two essential and integral factors: fraud and force. Fraud is the ideological and cultural hegemony of the capitalist creed; that is, the belief that enterprise is free and competition exists for all in the marketplace. Force is generally disguised within a capitalist society with democratic forms of government (Marable, 2000).

The oppressed Black minority is generally given to violence because it: (1) is concentrated in the lowest paid, blue collar, unskilled and service sectors of the labor force; (2) is comprised of a substantial portion of the U.S. reserve army of labor (the last hired and the first fired during periodic recessions); and (3) is the historic target for brutality within a racist culture and society, occupying a perceived inferior racial position which has remained unaffected since the demise of slavery (Marable, 2000).

Marable (2000) further argued that property crime is a social creation. Robbery and theft are deemed crimes because of the component of owning property in a capitalist society. It is this system that requires those to sell their labor to acquire goods and for others to exist who have the means of contracting the labor.

### Conflict Theory and the Origins of Law

The conflict perspective is based on the premise that societies are composed of groups with different interests and values with the dominant economic, political, and social power groups in control of the organized state. It is the control of these resources that generates the major portion of conflict in society. Control of these resources creates a dominant power, and that power is utilized to expand the resources of one group at the expense of others (Quinney, 1980). Thus, policy and law are



formulated and implemented to protect the interests and values of the dominant group. For that reason, conflict establishes a relationship between power relationships, law, and defining crime. Law, and the creation of laws, are identified as the instrument that maintains the power of the dominant group and controls the behavior of individuals who threaten that power elite (Quinney, 2001). Power relationships are determined by those with the means to influence the majority's public opinion in order to meet their own personal interests (Siegal, 2000:168). Conflict is produced by the unequal distribution of power through a perceived competition for dominance.

The ability of the powerful majority to control people is exemplified by the relationship between the U. S. justice system and African Americans. The ways the justice system victimizes Blacks have been well-documented (Georges-Abeyie, 1989). Under this structure, the powerless were more likely to be defined as criminals. As such, the most powerful group(s) has the means to define or legislate behavior that is deemed unacceptable and results in the less powerful being criminalized and experiencing statistically higher crime rates. For example, when law enforcement is highly concentrated in predominately Black neighborhoods, it usually results in higher arrest and crime rates.

Thorsten Sellin (1938) contends that cultural conflict is the foundation of crimes committed by different groups through society's cultural diversity. These various groups learn different conduct norms depending on the resources of the community. Consequently, these norms conflict with other groups over time as the dominant group transitions them into criminal law. Then, because of the availability of more resources, the dominant group sets the legal standard through its control of the

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legislative, executive, and judicial functions that are external manifestations of authority resulting in power structures that reflect the values and norms of the dominant group (Lilly, Cullen, & Ball, 2002).

The conduct norms of the less powerful are antithetical to the established crime norms. This leads to deviant behavior and criminal classifications of the normal conduct of oppressed groups. Sellin (1938) further contends that as these group populations grow, they will present a larger threat and the frequency of the conflicts will increase. The conflation of blackness and crime in collective representation and government policy thus reactivates race by giving a legitimate outlet to the expression of anti-Black animus in the form of public vituperation of criminals (Wacquant, 2002:41). In his article he states:

Throughout the urban criminal justice system, the formula 'Young + Black + Male' is now openly equated with 'probable cause' justifying the arrest, questioning, bodily search and detention of millions of African American males every day (2002:41).

Vold and Bernard (1998) postulated that groups are formed out of situations in which members have common interests and needs that can be best furthered through collective action. The theoretical framework's foundation supports the view that humans are fundamentally group-involved beings and are products of group associations. As new interests continue to form, new groups form around these interests with the process weakening the existing groups. Groups come into conflict with one another as the interests and purposes they serve overlap, encroach on each other, and become competitive. Competition between groups promotes individual loyalty to each respective group.

Legislative politics present the most visible area of conflict between groups. First, conflict has to exist before any legislation can be adopted and enacted. Second, the dominant group utilizes the state for assistance in defending and protecting their interests. Demand for the creation and implementation of laws helps to maintain the social order. Once a new law is adopted, those who oppose it are more likely to violate the law because it defends interests and purposes that are in conflict with their own. Promoters are more likely to obey the law(s) and demand enforcement by police (Vold & Bernard, 1998). The majority controls the police authority over the state and it is these law enforcement agents who consequently decide who is most likely to violate the law. Subsequently, lawmaking, lawbreaking, and law enforcement are the results of conflict between group interests. Groups with lesser political, economic, and social resources are unable to promote and defend their interests adequately. Vold and Bernard (1998) argued that sociological conflict is the basis for understanding this kind of conflict, including its limitation in failing to explain impulsive and irrational criminal acts.

McGarrell and Castellano (1991) propose that there are three levels used in analyzing the criminal law formulation process. These levels are defined as (1) structural foundation, (2) enactment of criminal law, and (3) enforcement of criminal law.

The first level describes the structural foundation of crime and conflict in societies. Societies differ in heterogeneity in things such as race, ethnicity, religion, urbanization, and economic and political inequality, followed by the contention that greater differentiation (based on the aforementioned) is associated with more

interpersonal and inter-group conflict. These higher levels of conflict, in turn, lead to a greater use of criminalization as a method of dealing with conflicts between groups.

Certain cultural beliefs in individual responsibility, and the tradition of vigilantism, can interact with high social differentiation to produce even greater criminalization (McGarrell et al., 1991). Complex, highly differentiated societies are composed of people who live under very different conditions. A person's values or beliefs about what is good, right, and just, or at least excusable and his/her interests (what rewards or benefits the person), are generally shaped by the conditions in which the person lives (McGarrell et al., 1991). Therefore, the more complex and differentiated that societies are, the more people within the society have different and conflicting values and interests.

With regard to individual action, people tend to act in ways that are consistent with their values and interests. That is, they tend to act in ways they think are good, right, and just, or at least excusable. They also tend to act in ways that benefit themselves personally (McGarrell et al., 1991). When values and interests come into conflict, people tend to adjust their values to come into line with their interests. Over time, people tend to believe that the actions that benefit themselves personally are really good, right, and just, or at least excusable. Because the conditions of one's life (and therefore one's values and interests) tend to be relatively stable, people tend to develop relatively stable patterns of actions that benefit themselves.

Law is used as the instrument to maintain the power of the dominant group in society and to control the behavior of individuals who threaten that power (Quinney, 2001). As such, the dominant group utilizes its ability to criminalize conduct it deems

as unacceptable. In contrast, theories arguing solely on the basis of class fail to adequately address the actions of racial profiling, police brutality, or suspected criminal deviance. Race is the determinate variable that designates what phenotypic characteristics apply to which racial groups. Class affects the process, however, and racism is incorporated as a component at every stage of capitalism. For examples, one form of racial profiling, that is, “driving while Black” (D.W.B.), or the administration of capital punishment sanctions, are incorporated as a natural function of capitalism when arrests result.

Racism, or some degree of it, is considered to be normal. To reject racism and its facets is symbolically abnormal (Armour, 1997). Racism benefits the bourgeoisie absolutely and relatively White working class Whites are usually part of the larger social mechanism of racist accumulation which helps contribute to Black exploitation (Marable, 2000).

Expanding on the theoretical view of conflict theory and its impact criminologist Samuel Walker (1999) contends:

Conflict theory explains racial disparities in the administration of justice as products of broader patterns of social, economic and political inequality in U.S. society. Such inequalities are the result of prejudicial attitudes on the part of the white majority and discrimination against minorities in employment, education, and housing (Walker, Spohn, & Delone, 1999:156).

In essence, conflict theory attempts to clarify the overrepresentation of African Americans within the criminal justice system. This includes all aspects of the system, including arrest, prosecution, conviction, length of incarceration, and capital punishment. Accordingly, those who dominate the political and legislative majorities control each of these aspects.

The second level of conflict between groups focuses primarily on the enactment of criminal law. Crime, itself, is produced by factors described within the first theoretical level. The enactment of criminal laws is part of a conflict and compromise process in which organized groups and, to a much lesser extent, private individuals attempt to promote and defend their values and interests (Vold et al., 1998). Specific criminal laws usually represent a combination of the values and interests of many different groups, rather than just one particular group. Nevertheless, the greater a group's political and economic power, the more criminal law, in general, tends to represent the values and interests of that group. Therefore, in general, the greater a group's political and economic power, the less likely it is that actions consistent with the values and interests of group members will violate the criminal law, and vice versa (McGarrell et al., 1991).

The third level of conflict between groups focuses on the enforcement of criminal law(s). By enacting new legislation, more criminal behavior is defined and that increases the punitive response by the system. The framework incorporates ideas of power relationships and the effects of differentiation on crime and criminal justice by interrelating theory of criminal behavior with theory of criminal law. As such, this theoretical perspective generalizes social and structural characteristics and moves through the processes by which individuals within similar social structural locations learn similar patterns of behavior. It concludes by relating those patterns of behavior to the processes of enacting and enforcing criminal law to explain the distribution of crime (Vold et al., 1998).

In general, the more political and economic power a person has, the more the person is able to obtain official intervention from law enforcement agencies when he or she is victimized by someone else. Additionally, the more political and economic power a person has, the more difficult it is for official law enforcement agencies to process the person when he/she victimizes someone else (Vold et al., 1998).

Therefore, law enforcement agencies tend to process individuals with less, rather than more, political and economic power. Specifically, the greater the power differential between the victim and the offender, the more likely an offender will be processed if the offender is less powerful than the victim, and the less likely the offender will be processed if the offender is more powerful than the victim. Because of the processes of criminal law enactment and enforcement, the official crime rates of individuals and groups will tend to be inversely proportional to their political and economic power. These processes are independent of any other factors that might also influence the distribution of official crime rates (e.g., social, psychological, or biological factors affecting the behavior of offenders or the behavior of criminal justice agents) (Vold et al., 1998).

#### Law as an Instrument of Conflict Theory

Donald Black (1980) visualized law as a governmental social control that posits the normative relationship between a state and its citizens and codifies through legislation and litigation. Consequently, law is an instrument that measures the morality of society, that is, a method of determining what is good or bad. It is a quantitative variable that can be measured in degrees during periods of time or in particular settings, and determined by reviewing the extent to which it is applied. Just



as there are degrees of freedom, there are degrees of law. A complaint is more law than no complaint, an indictment is more law, and a conviction is even more law (Black, 1980). Therefore, the variables of law can be measured historically in various settings and with different social indicators.

In contrast, law may also be viewed as a qualitative variable in that different types of laws exist throughout the same social conditions. In this respect different types of laws are defined as being used for various individual actions. A theory of law, therefore, would set up predictions of how the degree and style of law would change across social settings and between particular individuals. Black (1980) contends that law has an inverse relationship with other forms of social control. It increases at the point of perceived differentiation. Thus, African Americans historically have constituted a group with various points of differentiation for which more laws have been created. In this model, the style of law is also different in that the greater the relational distance among racial groups, that is, Blacks and Whites, the more likely the law will involve punishment rather than reconciliation. Strangers are more likely to see themselves as adversaries, while those who are friends will tend to try to reestablish harmony (Black, 1980). Accordingly, African Americans do not create the law, and therefore, they do not embrace any of its harmonious aspects.

Black (1980) also speaks of differences in law based on radial position. By this he means that the degree of integration or importance to the society determines the position. When considering a circle with its center and periphery, those at the center are more important than those at the margin, or edges, which is the least important, and centrifugal law is greater than centripetal law. This means that the offense of a

marginal person or a group against an integrated person will involve more law than vice versa. While centrifugal law varies directly with radial distance, centripetal law varies indirectly with radial distance (Black, 1980). Principally those who are marginal are more deviant because they are more likely to be defined as such, not just in terms of labeling theory, but also because norms and judgments are more likely to be exercised outwardly. Therefore, people on the margin are more likely to be pursued, judged, and punished than those at the center. Punishment will also differ by typology. White-collar crime near the radial center, for example, would receive a different punishment than that of blue-collar crime and crimes that cross race and class tend to benefit those near the center or the top.

#### Why History is Germane to Conflict Theory

History is a series of epochs. These epochs may be described in terms of their static aspect, the mode of production, or social structure, which is represented and defended by the ruling class. The core element of any social structure, and the basis of class rule, is functioning property, the economic system of ownership and dependence. Social structures, and the ruling class, do not change much in the course of an epoch (Dahrendorf, 1967:20).

A study without a comparative historical analysis would be inadequate and severely flawed. To understand adequately a historical period of study, one must first have insight into the world of these respective elemental groups. First, changes in history are because of the interaction of elements within the social structure and are necessary. Second, measures are observed over time that allow for introduction and removal of various social elements. Finally, comparative elements are Blacks as the subordinate group and Whites as the elite dominant group.

C. Wright Mills (2000) proffers that a researcher must expand the temporal reach of the analysis. Without the use of history and without an historical sense of psychological matters, the social scientist cannot adequately state the kinds of spurious problems sought in orienting his studies. He contends that a researcher must have an understanding of present day comparative facts: "...you must know the historical phases and the reasons for varying rates and varying directions of development and lack of development (2000:211)."

Mills further asserted that both comparative and historical studies are intertwined and that a researcher must temporally expand his/her analysis. This is accomplished by knowing the historical phases and reasons for varying rates and varying directions of development, as well as lack of development. For the historian, no aspect of social life is off limits in his/her research. Ultimately, the researcher's purview is social science emphasizing the study of changes over time. However, unlike the social scientist, the historian does not engage in comparative studies when presenting an organized memory of humankind.

Social science differs in the historical perspective in the way comparative modes of research are emphasized. Mills asserted that history is indispensable to social science and that it contains a multitude of resources from which the social scientist can draw. History is a necessary component for a well-conceived and developed social science. Subsequently, every well thought-out social science study requires an historical scope of conception and a full use of historical materials (Dahrendorf, 1967:20). In order to utilize conflict theory as a theoretical basis for this research, the history component must be included to strengthen its validity.

Delinquency in colonized countries is the direct result of the existence of a lumpenproletariat (Fanon, 1967).

According to Vold and Bernard (1998), crime is a byproduct of a group's struggle within society, as opposed to individual law violators. Because people are by nature social beings, groups are formed from those with shared interests and needs. Competition is produced in order to maintain and/or expand one position relative to the group in control of the necessary resources (i.e., money, education, employment), thereby causing an interaction between these groups. This competition is expressed as a political struggle/conflict with the group most efficient at controlling political processes as the one that has the authority to pass laws that limit the fulfillment of the needs of the minority group (Vold et al., 1998).

Ralf Dahrendorf (1959) expanded on Marxism's emphasis that social relations of production is the key to understanding power and focused on the struggle for institutional authority in a modern industrial society. This is power that is embedded in the structural relations characteristic of a given society and is legitimate power that is often divorced from ownership of productive forces. Then this power presents control in the social institutions that dominate everyday life and leads to the authority vested in groups that control key positions in religious, educational, governmental, and even family relations. This authority can be linked to economic position, but it is not necessarily dependent upon it (Dahrendorf, 1959). For the African American, these key positions are outlined by and central to the regulation of their existence. In addition, the idea that dependence is not totally based on economic standards conflicts

with African Americans and exceeds class arguments, but does not wholly dismiss them.

Allen Liska (1987:38) raised two fundamental questions addressing this notion: First, under what conditions are authority-subject cultural and behavioral differences transformed into legal conflict? Secondly, under what conditions do those who violate laws become criminalized (Liska, 1987:38). In other words, under what circumstances are laws enforced? He addressed these questions in his six propositions explaining conflict:

- Proposition 1:* Conflict between authorities and subjects occurs when behavioral differences are compounded by cultural differences.
- Proposition 2:* The occurrence of conflict is more probable the more organized the authority against those who engage in an illegal acts.
- Proposition 3:* Conflict is more probable the less sophisticated the subjects.
- Proposition 4:* The probability of enforcement of legal norms increases as the congruence between the cultural and behavioral norms of authorities increases.
- Proposition 5:* The lower the power of the resisters i.e., subjects, the higher the probability of enforcement.
- Proposition 6:* The lower the realism of norm violators, i.e. resisters, the higher the probability of enforcement (1987:38)

#### Criticisms of Conflict Theory and its Component Areas of Empiricism, Objectivity, Tentativeness, Ethical Neutrality, Reliability, Validity, and Limitations

An examination of the social conditions is necessary to determine proper application of conflict theory as it relates to African Americans and race-based laws. Those who are reluctant to identify with Marxism may find the theoretical perspective beneficial in that it provides the opportunity to digest conflict theory on its merits and

thus relinquish any bias toward socialism. As such, Marxian principles are based on a class, as opposed to racial model, and advocate a capitalist interest in enforcing the law against certain groups.

In using an investigative research science approach, ethical principles are required in the design and execution of the research project. Science implies primarily an attitude of intellect—one that is distinguished by adherence to several principles. These principles address the process of implementing the scientific perspectives of empiricism, objectivity, tentativeness, ethical neutrality, reliability, validity, and limitations (Cox & Fitzgerald, 2001).

### Empiricism

Empiricism emphasizes the role of first-hand observation of phenomena. In this case, the targeted area of study is race-based law within the United States. While it is plausible for a researcher to speculate on what causes conflict with African Americans, a direct approach is required to fully evaluate the level of impact. Empirical evidence presents commanding support of the validity of social science research; however, it's not without its faults as outlined in the following sections.

### Objectivity

No scientific research is absolutely absent of the researcher's subjective biases. In fact, scientists bring their own values, customs, and norms to the research. Objectivity does not mean that the facts, and only the facts, are unbiased and undistorted. The best alternative is to outline the social historical impact of African Americans and the law in degrees by utilizing empirical observations, including multiple perspectives (Cox et al., 2001). Cox and Fitzgerald argued that this method

empirically strengthened the research. However, constant vigil must be maintained over one's own values and points of view. Claims of scientific knowledge should always be thought of as tentative. Social scientists, as seekers of knowledge, should be acutely aware of potential shortcomings and make a concerted effort to overcome them whenever possible through the application of well-established procedures and safeguards (Cox et al., 2001).

### Tentativeness

The aspect of tentativeness requires that the researcher not claim their conclusion(s) as the final universal truth, particularly when addressing conflict. Instead, as more evidence becomes available, research outcomes are subject to change over time. For example, will there be a continuation of race-based laws as the White population demographics decreases and the Latino and Black populations' increase?

Good research not only precisely demonstrates the intent of the findings but also offers other explanations that don't support hypothetical conclusions. As cultures (including the racial identities therein) continue to change, conflict theory will continue to apply. Dahrendorf contends that social reality escapes theory; therefore, new theories must be continually developed. In order to do so, class, conflict, and change must be addressed from their origins (Dahrendorf, 1959). Under this premise, the impact of the research may change over time from its original analysis.

### Ethical Neutrality

Ethical Neutrality is the process by which a researcher attempts to not permit moral or ethical beliefs to influence the research, particularly in gathering and

presenting data in the final analysis (Cox et al., 2001). A breach occurs when the researcher jeopardizes other areas, including objectivity and tentativeness, subsequently threatening the whole research.

### Reliability

Reliability in research depends on the degree to which categorization and measurements empirically produce identical results following repeated application of the same procedures. For example, we can assess the number of arrests and incarceration of African Americans after the federal crack laws were implemented. Then, over time, we can reassess the numbers and by comparing the two results establish whether or not conflict theory or some other theoretical perspective is appropriate for this study.

Vold and Bernard (1998) asserted that there are three major problems with testing the accuracy of conflict theory. First, the theories are far too methodologically simplistic. Second, they have not been well guided theoretically, including an inability to distinguish alternative explanations of deviant behavior. Finally, they have treated all conflict theories alike without giving attention to specific propositions or different types of theories (Vold et al., 1998). For example while conflict may provide a sound rationale for crimes committed by African Americans, it fails to consider other variables that may lead to arrest. Also, Blacks may receive harsher sentences because they are less likely to be able to afford a private attorney.



## Validity

A categorization is valid if it reflects a characteristic or property of the real empirical world (Cox et al., 2001). This raises the social historical question that laws may be created as a tool to control the behavior of African Americans. Ultimately a determination should be made as to whether the application of law, in comparison to the dominant racial group, is valid, i.e. arrest, sentencing, and incarceration rates.

The legitimacy of these questions is addressed by determining the external and internal validity. External validity refers to the legitimacy of applying external research beyond the group. For example, can conflict theory be expanded to other groups in addition to African Americans, and would it yield similar results? This depends on the homogeneity of the group, that is, African Americans. Internal validity occurs when variables other than those identified by the researcher become apparent and contribute to the observed effects. Researchers have an ethical responsibility to acknowledge these variables and their impact.

## Limitations

As in other areas of social research, the oversimplification of the conflict model is due partly to the fact that it is a perspective rather than a well-formulated theory with a testable hypothesis (Greene & Gabbidon, 2001:212).

In essence, conflict theory is a class theory that does not holistically embrace racial variations but, rather, is utilized to explain the surface level racial disparities. In his critique of conflict theory, Darnell Hawkins raises critical questions regarding a testable hypothesis and argued that most authors on the subject fail to present a consistent testable instrument and thereby leave the theory open for major criticism

(Greene& Gabbidon, 2001). Conflict theory mainly is framed around Marxian social class as opposed to race stratifications. One of the theoretical frameworks for introducing the conflict perspective is that it is utilized on the basis of capitalism as the foundational root that produces crime and criminals.

Class arguments, for instance, fail to adequately address racial profiling, police brutality, or suspected criminal deviance. Race is the determinate variable that designates what phenotypic characteristics apply to racial groups. Class has an effect on the process; however, it does not totally exclude membership. For example, racial profiling such as “driving while Black” (D.W.B.) or the administration of capital punishment sanctions has nothing to do with class. Walker, Spohn and Delone (Walker et al., 1999:156) expanded on his theoretical view of conflict explaining that racial disparities in the administration of justice are products of broader patterns of social, economic, and political inequality in U.S. society. Such inequalities are the result of prejudicial attitudes on the part of the White majority and discrimination against minorities in employment, education, housing, and other aspects of society (Walker et al., 1999:156).

Conflict theory attempts to clarify the overrepresentation of African Americans within the criminal justice system, in all aspects of the system, including arrests, prosecutions, convictions, lengths of incarceration, and capital punishment. Accordingly, those who dominate the political and legislative majorities, control each of these aspects.

Racial oppression takes on two dimensions, a physical/structural dimension, wherein the structural arrangements of social institutions act to physically control a member’s perceived inferior group through discriminatory actions. Socio-cultural dimension, whereby the cultural

(prejudicial) beliefs and the statutory (legal) requirements act to estimate or sanction these physical controls of the subordinate group (Aguirre& Baker, 1989:249).

The above indicates that racial oppression is correlated with the framework of conflict theory. The postulation of a desire to maintain both physical and structural control is rooted in the historical plight of African Americans. Sellin (1928) argued that in conflict the subordinate group acts outside of the conducted norms. In this instance, the norms are based on race, and the confluence is the use of law as legislation develops on a continuum. The dominant group has the means to decide what the norms are, and to criminalize those who act outside of these norms. Criminologist Helen Taylor Greene (2001) offers four alternatives to enhance the viability of conflict theory:

- Criminal punishment must be seen as contingent not only on race of the offender but race of the victim.
- Researchers must recognize the theoretical as opposed to the purely methodological significance of grouping crime into categories and using such grouping to assess levels of racial difference to punishment. Use of such categories is important for improving our understanding of dynamics of assigned punishment for crime across racial groups.
- Power-threat considerations must be considered when assessing temporal or regional variations in Black and White punishment. Power threat is the actual or perceived potential of a minority group to pose a realistic challenge to White political or economic control.
- This includes a historical examination of race and criminal punishment. That is variations in levels of punishment by race must be more fully analyzed and explained within the context of the larger structural forces from which they emanate and their proper temporal perspective. Such a historical-contextual analysis would allow for more attention to the political economy of criminal punishment (Greene et al., 2001:212).

## **METHODS**

### **Research Design, Selection, and Data Collection**

#### **Research Design**

The primary data used in this dissertation was obtained from the United States Sentencing Commission. The United States Department of Justice, Federal Bureau of Investigation (FBI), Uniform Crime Reports (UCR), and the Bureau of Justice Statistics compile and report data to the Sentencing Commission. All three agencies annually collect data and are considered reliable sources by researchers in the criminal justice field.

The FBI, through its National Incident-Based Reporting System (NIBRS), collects UCR data. Guidelines for reporting crime statistic data by city, county, and state law enforcement agencies are established in the Uniform Crime Reporting Handbook and include age, race, and gender. Reported crimes are indexed into typologies such as robbery, assault, drug trafficking, and so forth. The NIBRS has two primary goals, the first of which is to enhance the quantity, quality, and timeliness of crime statistical data collected by the law enforcement community (state, county, and local municipalities). The second goal is to improve the methodology used for compiling, analyzing, auditing, and publishing the collected crime data (FBI, 2003). Participation by law enforcement entities brings benefits that include:

An indispensable tool in the war against crime is the ability with precision when and where crime takes place, what form it takes, and the characteristics of its victims and perpetrators. Armed with such

information, law enforcement can better make its case to acquire the resources it needs to fight crime and, after obtaining those resources, use them in the most efficient and effective manner. NIBRS provides law enforcement with that tool because it is capable of producing more detailed, accurate, and meaningful data (FBI, 2003).

City, county, and state law enforcement agencies from all fifty states report data by tallying the number of occurrences of crime, as well as arrest data, and by submitting directly to the FBI, or established state UCR programs, aggregate counts of the collected data in monthly summary reports. The tallied data include the numbers of offenses, clearances, types and values of stolen and recovered properties, and also the ages, gender, and race of those arrested. The information also includes basic crime indicators of volume, rates, trends, and an explanation of community demographics (FBI, 2003).

#### Selection of Variables

As of April 2, 2001, the total population of the United States was estimated to be 281,421,906, according to the United States Census Bureau. The breakdown in races was White (75.1%), followed by Black/African Americans (12.3%), Asian (3.6%) American Indian/Alaska Natives (0.9%), and Native Hawaiian/other Pacific Islanders (0.1%). The remaining 12.5% of the population was of Hispanic origin, with no race specified.

During 2001, there was a total of 1,586,902 state and local arrests for drug abuse violations in the United States. Race information was available on 1,089,900 of these drug abuse violations and 64.2% of those arrested were White, 34.5% were Black, 0.7% was Asian or Pacific Islanders, and 0.6% was Native American. There were a total of 24,255 federal defendants charged with a drug offense in 2001. More

than a quarter of the defendants were White (26%), nearly one third were Black (30.5%), and the majority was Hispanic (43.1%). The most common drug type arrests for Hispanic defendants were for heroin and/or marijuana possession; for Black defendants it was crack cocaine; and for White defendants, it was metamphetamaine and/or other drugs.

Of the total reported drug offenders convicted in State courts during 1998, 42% were Black and 29% were White. During 2000, there were a total of 1,206,400 defendants sentenced to State prisons, 251,100 of which were incarcerated for drug offenses. The majority of drug offenders held in State prisons were Black (145,300), followed by Whites (58,200), and Hispanics (43,300).

Researchers acknowledge that most crimes, particularly drug offenses, have a higher rate of occurrences in certain jurisdictions. These variables directly impact the actual number of reported offenses. The FBI standardized its gross index crime statistics comparatively by using the U.S. Census Bureau population data and dividing the total population by 100,000. The gross number of crimes is standardized using the resultant denominator (FBI, 2003). Using a regression analysis of the population would standardize crime rates so that the size of the African American population would not produce spurious results when examining certain independent variables.

#### Limitations of the Uniform Crime Report as a General Indicator of Crime and Critical Analysis of Utilizing Existing Law Enforcement Data

Official crime data, that is, the Uniform Crime Report (UCR) has not been immune to criticism. For more than three decades, one of the most prominent

disparagements was that the FBI's method of measuring crime lacks substantive validity. Some criticisms are:

- No federal crimes are reported
- Reports are voluntary and vary in accuracy and completeness
- Not all police departments submit reports
- The FBI uses estimates in its total crime projections
- If an offender commits multiple crimes, only the most serious is recorded. Thus, if a narcotics addict rapes, robs, and murders a victim, only the murder is recorded. Consequently, many lesser crimes go unreported
- Each act is listed as a single offense for some crimes, but not for others. If a man robs six people in a bar, the offense is listed as one robbery, but if he assaults or murders them, it would be listed as six assaults or six murders
- Incomplete acts are lumped together with complete ones
- Important differences exist between the FBI's definition of certain crimes and those used in a number of states (Siegal, 2000:168)

### Missing or Unclean Data

Human error, such as poor record keeping and invalid coding or processing of collected data, can contribute to spurious results because of the resultant unclean data set. The most minute data errors can impact the data, particularly when the set was examined for another purpose other than its initial intention (Cox et al., 2001). A poorly constructed data set can require reassessing the entire research. The presumption is that potential errors are held to a minimum because of the longevity of the agency that first collected the data. Data sets developed by research agencies are given more credibility than those produced by non-researchers (Maxfield & Babbie, 2001).

### Validity of Utilizing Existing Data

Finding a suitable data set compatible to the research question of determining a social historical analysis of race-based laws within the United States has always been a dilemma for the researcher. The contention is that the positives of reinterpretation of existing data pertaining to the crack versus powder cocaine outweigh the negatives. Secondary analysts must frequently make do with measures that are not precisely those desired (Chambliss & Nagawasa, 1969). In social science, there has been an ongoing debate regarding the use of existing statistical data. Use of such data sets has become commonplace in criminal justice research and this only contributes to the debate. A redefinition of key concepts of existing data could result in a reduction in the validity of the research.



## **FINDINGS**

### The History of Conflict within the United States for African and Chinese Americans

The historiography in this research focuses on events that impact the responses of African Americans today and how these events have contributed to the development of in sentencing disparity in treatment between the races. I will begin by outlining the history of conflict within the United States between African and Chinese Americans. Then I will explore their contact with the police, as well as the government's acrimonious relationship with Blacks, and the reactionary policies and major court decisions that gave legal definitions of the rights of both the African and Chinese American groups. This section further explores the legality of control methods through conflict. Primarily, I will emphasize the focus on law and the mechanisms of the enforcement of law as the final component justifying conflict theory. The intent is not to rehash existing research concerning Blacks and the criminal justice system, but to construct a framework from which the process originated and evolved to a form of "reasonable racism" (Armour, 1997).

In the years of slavery, various control tactics were used on a daily basis, including whippings; beatings and selling of the unruly or ungovernable enslaved Blacks. For petty crimes, such as stealing, disciplinary action was most likely implemented by the owner of the slaves, and not the local peace officer. Thus, punishment never went beyond the owner's method of discipline, no matter how draconian it was. As such, there is no record of any criminal activity made by

bondsmen. Enslaved Blacks were considered as property and therefore had no rights whatsoever. Given this legal definition, slaves were subjected to any type of inhumane discipline, including death. Under such circumstances, unlimited disciplinary acts created an on-going conflict between the oppressed and the oppressor.

### Chicago Labor Riots of 1919, Episodes of Law Supporting Unfair Practices

The Chicago Riot of 1919 was, for the time, one of the most violent riots that ever occurred, with a death toll of 23 African Americans, 15 whites, and more than 500 injured. The riot extended over a three-day period, from July 27-30 and caused some \$38,000 in property damage. The Governor of Illinois appointed a study commission, called the Chicago Commission on Race Relations. The Governor charged the commission to determine the underlying cause of the racial violence and to suggest remedies to prevent a recurrence of riots. Its findings included the following themes as the variables contributing to the insurgence, racial prejudice, economic competition, political corruption, exploitation of the Black vote, police inefficiency, newspaper embellishment on Black crime, the failure of law enforcement to protect African Americans from crime, inadequate housing conditions, and racial reactions from mistreatment during World War I.

A background of strained race relations brought to a head more rapidly through political corruption, economic competition and clashes due to the overflow of the greatly increased colored population into sections outside of the so-called "Black Belt," embracing the Second and Third Wards, all of these contributed, aided by magnifying of Negro crime by newspapers, to the formation of a situation where only a spark was needed to ignite the flames of racial antagonism. That spark was contributed by a white youth when he knocked a colored lad off a raft at the 29th Street bathing beach and the colored boy was drowned (White, 1919:25).

African Americans were used to drive a wedge between capitalism and labor unions. Subsequently, large numbers of African Americans were recruited from the South for economic competition. Because Blacks were generally denied admittance to labor unions, they had minimal support during strikes. For example, after a labor dispute was settled, Blacks found themselves out of a job. This fomented White resentment for Black labor.

The Race Relations Commission found that there was woeful inefficiency and criminal negligence on the part of the police authorities of Chicago, both prior to and during the riots. This was evidenced by the preponderance of prostitution, gambling, and the illicit sale of whisky that flourished openly and apparently with minimal or no fear whatsoever of police interference (White, 1919:25). All of these activities contributed to an open disregard for and contempt for the law. Because of either political pull-or reciprocal arrangements, many notorious organizations were in operation, or policemen were afraid to arrest the proprietors. During the riots, the conduct of the police force as a whole was open to criticism. While the police showed a willingness to arrest Black rioters, they were unwilling to arrest White rioters. Those who were arrested were released almost at once. In one case, a Black man, who was light-skinned enough to appear to be White was arrested for carrying concealed weapons, together with five White men and one Black man. In a few minutes, the light-colored man and the five Whites were released and their ammunition given back to them with the remark, "You'll probably need this before the night is over" (White, 1919:25).

Additionally, for a long period prior to the riots, organized gangs of White hoodlums had been perpetrating crimes against Blacks for which no arrests had been

made. In many instances, these gangs masqueraded under the guise of athletic and social clubs, but later it was revealed that there was a direct connection between them and incendiary fires started during the riots. Black men, women, and children were beaten in the parks. In a number of cases during the period from January 1918 to August 1919, there were bombings of homes that were occupied by Blacks living outside of the so-called "Black Belt." Also during this period, as many as 20 bombings took place, yet only two people were arrested and neither of the two was convicted (White, 1919:25).

The findings in this study by White demonstrate a pattern of behavior wherein the police engage in selectively protecting citizens who they deem more valuable to society. Thus, the police ignored the existence of organized mobs, under the pretense of them being social clubs, even while terrorizing Blacks, while at the same time using their authority to enforce the law to its fullest extent against African Americans.

Glaring, prejudicial headlines in the Chicago newspapers played up or outlined every crime, or suspected crime, committed by an African American. Headlines such as "NEGRO BRUTALLY MURDERS PROMINENT CITIZEN," "NEGRO ROBS HOUSE," and the like, appeared with alarming frequency and the news articles beneath such headlines had the same sort of inflammatory verse (White, 1919:25). These media-induced embellishments assisted in inducing White fear of Black criminal deviant behavior. The media also noted that Black war veterans refused to submit to this abuse. One of the greatest surprises to many of those who came down to "clean out the niggers" is that these same "niggers" fought back (1919:25).

The level of panic continued and discrimination in housing was one way that demonstrated this fear. Much has been written and said concerning the housing situation

in Chicago and its effects on the racial climate. The problem is a simple one. Between 1915 and 1919 the Black population of Chicago more than doubled. In four years it increased from just over 50,000 to and 150,000. An already overcrowded 'Black Belt' could not possibly accommodate this doubling of the Black population. As a result, the Property Owners Association was created for the purpose of keeping White neighborhoods intact. Various plans were put in place to keep the Blacks entrenched in their part of the town. One way to accomplish this objective was to discharge Black people from employment positions they held at the time they attempted to move into White neighborhoods (White, 1919:25). Thus one can readily see in the above the disparate treatment of Blacks and how they were more frequently criminalized.

#### The Dred Scott Decision An Argument for Police Regulation

Back in the days of slavery, Dred Scott and his wife, Harriet, were the property of Dr. John Emerson and traveled with him through the northern territories of Illinois, Wisconsin, and Iowa while he was in the military service.. At one posting, slavery was not legal because it had not extended to Wisconsin under the Missouri Compromise. They also traveled South to Louisiana for a brief period. One of Scott's daughters was born in the free Wisconsin territory. In 1843 Emerson moved to Davenport, Iowa, where he later died. Subsequently Scott was loaned to a brother-in-law who traveled back to Louisiana. He later returned Scott to Emerson's widow Irene who was living in St. Louis.

On April 6, 1846, Dred and Harriet Scott petitioned the Missouri circuit court seeking permission to sue Irene Emerson for holding them in false imprisonment. The petition alleged that they "filed declarations of initiating actions of trespass for assault

and false imprisonment ("Dred Scott v. Sanford," 1857). The case made its way through the state court system. In a prelude to the Supreme Court ruling, the Missouri Supreme Court wrote that slavery was a civilizing force that had raised the American Negro far above the miserable African. As such, the court concluded, "[T]he introduction of slavery amongst us was the providence of God, who makes the evil passions of men subservient to his own glory, a means of placing the race within a pale of civilized nations" (Taney in Higginbotham, 1978). During this period, Emerson sold Scott and his family to her brother John Sanford. Ultimately the United State Supreme Court, with Chief Justice Taney writing for the majority, heard the case:

The question is simply this: Can the Negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizens? [O]n the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, had no rights or privileges but such as those who held the power and the Government might choose to grant them. They had, for more than century before [the Declaration of Independence and the Constitution of the United States], been regarded as beings of inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which a white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit ("Dred Scott v. Sanford," 1857).

Clearly Taney outlined the very theoretical basis of conflict theory when he made reference to Blacks having been "subjugated by the dominant race." The Court's intention was to find closure on the question of slavery with Taney's written confirmation of the inferiority of Blacks. He never even made reference to Blacks as human beings, instead declaring:

...that if they (Blacks) were entitled to the privileges and immunities of citizens, it would exempt them from the operation of special laws and from "*police regulations*" which they consider to be necessary for their own safety... if they were accorded the same rights as whites, it would endanger the safety of the state ("Dred Scott v. Sanford," 1857).

The idea that he advocated, "policing" for enslaved Blacks demonstrates a social historical pattern of police as an instrument for regulating the occupation of African-Americans. With this judgment, the Nation's most powerful Court not only legally justified slavery, but it also campaigned for police occupation of Blacks as a designated subordinate group. This is another clear example of disparate treatment under the 'law.'

#### Whippings, Floggings, and Beatings Sanctioning Violence

Whippings were a form of discipline administered to slaves, depending on the severity of the crime or the individual plantation's violation. This treatment was administered on bare flesh and served as a form of deterrence to others considering committing the violation. Often after receiving whippings, red pepper, salt, or other saline solutions were rubbed into the open flesh to increase the level of pain. Tragically, it was not uncommon for slaves to be whipped or beaten to death. The chief reason for the whippings was usually attitude toward work. Others reasons included absconding, insubordinate language toward Whites, and selling liquor. Some planters formulated scales designating the degree of wrongdoing for their wide assortment of "crimes." For example:

The following is the order in which offenses must be estimated & punished--1st Running Away. 2nd Getting drunk or having spirits. 3rd Stealing Hogs. 4th Stealing. 5th Leaving Plantation without permission. 6th Absence after horn blow. 7th Unclean House or Person. 8th Neglect of mule. 9th Neglect of tools. 10th neglect of work. The highest punishment must not exceed fifty lashes in one day (Jones, 1990:71-72).

Other barbaric sanctions of enslaved Africans were nose slitting and branding with a hot iron. For example the letter "T," which stood for "theft," was branded into the forehead of the slave charged with this crime. Such action was meant to be a warning of the type Black bondsmen would receive. Methods of confinement, such as prison and plantation stockades were also used. Both public and private prison facilities existed during slavery. Wealthier slave-owners usually owned a private stockade, or had a building structure conducive to confining the slave. The public confinement facilities were referred to as "workhouse" or "sugar-house."

Torture was another form of disciplinary action taken against slaves. Often bondsmen were stabbed in the shoulders and male slaves were castrated. Piercing with forks, burning with tar, skinning with knives, and killing outright with whips and pistols are documented methods of torture. Hands, arms, or legs were tied in awkward ways for several hours in order not to cause visible physical damage. Mental cruelty included withholding food from slaves or the entire slave family. Burning alive was the ultimate form of torture. As with other measures, this was done to deter others who might fail to comply with given directives.

#### Convict-Lease, Peonage, Creating the Lumpenproletariat

It will be seen that Negro Slavery, while preserving the community from an excess of technical pauperism, naturally furnished the same atmosphere of vice and crime, when the strong hand of slave labor was removed by general emancipation. A similar result followed the emancipation of the serfs in the middle ages, and explains the outbreaks of crime and disease that marked the 14<sup>th</sup> and 15<sup>th</sup> centuries on Europe (Bonger, 1969:133).

Sociologist W.E.B. Du Bois expanded on this thematic analogy in his work on African Americans. He made a significant contribution toward defining the cause of



Black crime in relation to conflict theory while it was being virtually ignored by mainstream academics within the criminal justice academe. His thesis asserted that significant variables regarding crimes were framed around unjust, unwise laws and customs of society. African Americans were caught in a web that allowed for limited mobility and minimal resistance. The newly manumitted status of Blacks evolved to serfdom by state sanctioned free labor to the highest bidder (Du Bois, 1904).

Du Bois outlined the importance of reviewing historical laws and court decisions beginning in the 1600's. His intent was to provide documentation to support the proposition that the state plays a role in the criminality of African Americans. Beginning with the State of Georgia, Du Bois research concluded that there were four central causes of African American crime. First, and the most damaging, was the state's interest in generating revenue by legally exploiting the free labor of Blacks. The establishment of the convict-lease system secured the state's intent. The system, the equivalent of legalized slavery, was convicting Blacks and turning them over to private citizens for their use. They were not allowed to serve on juries and, in many cases, were only seen by a magistrate in county courts. Thus African Americans found themselves criminalized through vagrancy laws, subsequently and easily reducing them from freedmen to serfdom.

State courts sought to do by judicial decisions what the legislature had formerly sought to do by specific law. As a result the sudden mass increase in arrest, prosecution, and conviction of Blacks overwhelmed courts-an increase so large that the state prison systems was unable to and had no intention of housing the Black criminal offspring. Immediately state legislatures passed laws authorizing public officials to lease the labor of convicts to the highest bidder on a contractual basis. The lessee, business owner, or company representative exercised legalized control over the convict (Du Bois, 1904:15).

As with the system of slavery, the lives of Black men, women, and children were placed in the hands of those whose only intention was to maximize the largest profit margin. The Justice of the Peace's position was originally a small salaried position that was enhanced by the revenue generated by fees from every conviction. Subsequently, it was incumbent to gain a conviction for as many cases as possible. Collusion occurred frequently as a result. Oddly, the convicts' living conditions and treatment were worse than even for slavery. Slave owners had an interest in keeping their "property" alive to maximize profit. However, if injury or loss of life occurred through the convict-lease system, there was no financial loss to the lessee, therefore they had no vested interest.

In politics the relationships between southern and northern democrats were forged mainly through economic ties. The Cotton Triangle existed between Europe, the South, and New York. Cotton from the South that left the U.S. flowed through New York docks to Europe. In essence the North had an economic interest in maintaining the oppressive condition of Black Americans even after abolishment of the slavery system. States profited from this arrangement as well. Consequently, working-class Blacks existed only for the profit of Whites; therefore those were the only rights to be considered. While the overall numbers of Blacks subjected to an organized system of bondage was reduced through the Emancipation Proclamation, the harsh vestiges of slavery remained intact for this select group of African Americans. In consequence, you have the origin of what is commonly referred to today as the Prison Industrial Complex (PIC) (Donzinger, 1996).

According to Du Bois (1904b), the impact of the convict-lease system had a devastating impact on Blacks and resulted in a link between crime and slavery as a form of oppression. The same methods to control Blacks during the enslavement period were exercised. Black convicts were routinely subjected to torture, beatings, poor and overcrowded housing, and given minimal food. Sexual assault/abuse of Black women and girls by guards (or those employed by the private proprietor,) were commonplace (Du Bois, 1904:15).

As a final comparison to the slavery system, once the services of leased convicts was exhausted, the private proprietors were back into court for a fresh body to replenish their labor force. More than a half-century after the Civil War, John Williams and his Black overseer were convicted of murdering 11 slaves through peonage. Wealthy landowners, such as Williams, visited local jails and paid the fines owed by Black inmates. Those Blacks, in turn, were released to the custody of the person paying the fine for use as free labor. The FBI launched an investigation into the matter. Concerned he would be caught, Williams ordered his overseer to murder the 11 Blacks to conceal any proof of slavery. He discerned this method would shield him from prosecution. In spite of this strategy, both Williams and the overseer were eventually convicted. This was largely the result of the testimony of a Black witness—an event rarely allowed in court (Freeman, 1999).

The second cause of African American criminality was the racial dualism that went on in courts in sentencing. It was commonplace for Whites to receive lenient sentences, while Blacks, on the other hand, received harsher penalties for the same crimes. Courts herded African Americans through the system and awarded them jail

terms, which in turn made them eligible for the convict-lease system. In contrast, Whites were given no jail time or very light sentences regardless of their recidivism rates. During this postbellum period, it was rare for Whites to send fellow Whites to prison. "To deny a man his liberty was to treat him like a slave" (Du Bois in Oshinsky, 1996).

Du Bois contended that the third cause of crime was the high number of Blacks being lynched. He believed this violent act caused the death of countless law-abiding Black citizens, many of who were innocent. As a result, many African Americans lost trust in the criminal justice system and began to harbor Blacks who were targeted for lynching, despite their being suspected in a crime, no matter whether guilty or innocent. In short, the lawlessness encouraged crime (Du Bois, 1999).

Finally, Du Bois noted that sentencing bias occurred along racial lines. He reviewed court records in Philadelphia, including prison data and noted:

In convictions by human courts, the rich always are favored somewhat at the expense of the poor, the upper class at the expense of the unfortunate classes, and whites at the expense of Negroes (1904:17).

Although this work partially laid the groundwork for today's conflict theory, it also exposed one of the main criticisms, that is that in the justice system race supercedes class (Du Bois, 1989).

### The Chinese Exclusionary Act

The discovery of gold in 1848 set in motion the large-scale immigration of primarily Chinese males to the United States. During this period of expansion of the early American West, the Chinese found jobs in gold mining, agriculture, irrigation,

and the transcontinental railroad. However, xenophobic fear exacerbated the idea that the Chinese were an inferior race who took jobs away from Whites. The labor unions also opposed their being employed as a means for a cheaper labor force. Chinese were not allowed to join labor unions. This led to the establishment of the 1886 Chinese Exclusionary Act, an act to criminalize and prohibit Chinese laborers from coming into the United States. Further, it penalized any person found to assist in the immigration of anyone Chinese, despite the fact that at the time only less than 1% of the United States population was Chinese. This act was the first major restriction of a non-White racial group by the federal government following the emancipation of enslaved African Americans. The Chinese Exclusionary Act entailed:

Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that from and after the expiration of ninety days next after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States.

SEC. 2. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land or permit to be landed, and Chinese laborer, from any foreign port of place, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and may be also imprisoned for a term not exceeding one year (Congress, 1882).

However, there were loopholes in the Act that allowed for a minimal continuance of immigration despite an already overall reduction in the numbers of immigrants. A provision in the Act allowed for the exemption of merchants, students,

teachers, and designated visitors. This presented a problem of interpretation and enforcement of the Act because of a lack of consensus. Passed by the 47th Congress, this law suspended immigration of Chinese laborers for ten years. Those already here as of November 17, 1880, were permitted to stay, travel abroad, and return, but no Chinese were allowed to become naturalized citizens.

Two years later, in 1882, Congress passed the next significant exclusionary legislation, the *Act to Prohibit the Coming of Chinese Persons into the United States*, referred to as the Geary Act to resolve complications (Greene et al., 2001:212). This act proposed that any person of Chinese descent that was arrested would be deported unless he/she could prove his/her right to stay in U.S. Even American-born Chinese found to be engaging in some form of labor, could be sent to China unless affirmative proof of exception could be presented at the time of inquiry or imprisonment. Exempt classes could be admitted upon presentation of a certificate from the Chinese government.

During World War II, the United States shifted its focus toward the Japanese after the 1941 attack on Pearl Harbor. The alliance between the United States and China led to repeal of the Geary Act in 1943. This *Act to Repeal the Chinese Exclusion Acts, to Establish Quotas, and for Other Purposes* also lifted restrictions on naturalization of Chinese (Congress, 1943). Thus, in the above, one can see how the Chinese were treated in a disparate fashion similar to Blacks.

## The Social Historical Impact of Enforcing the Law as an Instrument of Conflict Theory Within the United States

### Rockefeller Drug Laws, a Guide for Federal Expansion

Under the leadership of New York Governor Nelson Rockefeller, the Rockefeller Drug Laws were enacted in 1973. He contended that rehabilitation efforts had failed and only harsh prison sentences would adequately address the drug problem. Violation of the law occurred regardless of the circumstances whether first-time or repeat offender. The level of guilt was determined by the amount or weight of drugs in possession at the time of arrest and, not by his/her role (buyer or seller) in the drug transaction. Under those statutes, being caught with one pound of heroin or cocaine equaled life in prison, while a 15-year sentence was given for possession of an ounce of marijuana (Lusane, 1991).

The above policy created an incentive for law enforcement to concentrate primarily on poor, lower class Black and Latino neighborhoods. In these communities, drug transactions were more likely to occur in public view, which made an arrest easier. The Rockefeller drug laws were the foundation for every regressive criminal justice policy adopted by what was several states and the subsequent federal expansion of drug laws. For example, stop-and-frisk, zero tolerance police sweeps, three strikes laws, and mandatory minimums sentencing were instigated. The policy also adopted a means of voter disenfranchisement in that it removed the right to recommend that convicted felons be given probation or parole. Rockefeller pushed for an expansion of laws mandating life imprisonment for assorted crimes. If the perpetrator ingested an illicit drug within twenty-four hours of committing a crime,

Rockefeller contended that made the offender an addict who would eventually be convicted of a crime punishable by life sentence (Miller R. L., 1996). The legislation required a minimum of 15 years to life for possession, sale, or use of illegal drugs and thereby, permanently and potentially removed an offender as a threatening burden to society. Additionally, a minimum five-year civil prison term given to drug users criminalized them and also paved the way for life imprisonment of these drug users if convicted of a crime. Civil commitment could last up to twenty years, depending on the state's evaluation. Failure to comply would result in a potential criminal conviction.

In an attempt to further make his policy on dealing with drugs and users of drugs even harsher, Rockefeller, during his tenure as governor, advocated the establishment of concentration camps for offenders. Also, by declaring a state of emergency, New York could seek federal assistance in dealing with drug trafficking. Had the President declared such an emergency, authorization of neighborhood sweeps of innocent people could be undertaken even though several people that were searched and arrested had not been accused of any crime. This action could have been carried out legally and without congressional approval. Sweeps of this nature can be ordered under the threat of national security or in time of war, as demonstrated by the Japanese internment camps during World War II. In 1988, concern over crack cocaine led to a lowering of the weight threshold for possession to enable the arrest and prosecution of people possessing small amounts of the drug.

The Rockefeller Drug Laws have remained essentially unchanged since then. In 1996, Blacks and Latinos comprised approximately 23% of New York's general



population. At the same time, more than 85% of the people indicted for drug felonies, and were incarcerated, are Black or Latino and constitute more than 85% of the overall prison population ("Cruel and Usual Punishment: Disproportionate Sentences for New York Drug Offenders," 1997).

### Legislation and Congressional Response to the Crack Cocaine Epidemic

The focus on the nation's drug epidemic reached its peak in the 1980s. In response, Congress created the United States Sentencing Commission to act as an independent agency within the judicial government branch. At the time, the political climate necessitated a redress on criminal sentencing and politicians argued that judges had too much flexibility in sentencing criminal offenders. Consequently, Congress established the Sentencing Reform Act with provisions of the Comprehensive Crime Control Act of 1984. The Commission was established as an outgrowth of the Act and it is an ongoing, independent agency within the judicial branch. The seven voting members on the Commission are appointed by the President of the United States, confirmed by the Senate, and serve six-year terms. At least three of the commissioners must be federal judges and no more than four may belong to the same political party. The Attorney General is an *ex officio* member of the Commission, as is the chair of the U.S. Parole Commission (U.S.S.C., 1990). The sentencing guidelines established by the Commission are designed to incorporate the purposes of sentencing (that is, just punishment, deterrence, incapacitation, and rehabilitation). They are also meant to provide certainty and fairness by avoiding unwarranted sentencing disparity among offenders with similar characteristics convicted of similar crimes, while at the same time permitting sufficient judicial

flexibility when relevant aggravating and mitigating factors exist. The guidelines are also designed to reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process. Further, Congress created the Commission to serve as an expert agency in federal sentencing matters. The Commission:

- Advises Congress and the executive branch on crime and sentencing policy
- Maintains the nation's most comprehensive database on federal sentencing
- Trains thousands of judges, probation officers, prosecutors, defense attorneys, and others involved in the sentencing process
- Analyzes and researches crime and sentencing-related issues
- Collects and disseminates information on federal sentencing practices
- Assesses the guidelines' effectiveness in achieving the sentencing purposes of just punishment, deterrence, incapacitation, and rehabilitation
- Provides reports and technical assistance to Congress and the judiciary on sentencing issues
- Amends the guidelines as necessary
- Operates a telephone help line to assist judges, probation officers, and prosecuting and defense attorneys with application of the guidelines
- Provides sentencing information to the courts, inmates, the general public, the defense bar, students, professors, the business community, and congressional offices

The Commission's primary duties and authority are to establish sentencing policies and practices through a detailed framework of sentencing guidelines for the federal criminal justice system as outlined in Chapter 58 of Title 28 of the United States Code. Additionally, they are to monitor, research, and report periodically on the operational effectiveness of the sentencing guidelines. Before guidelines were

developed, judges could give a defendant a sentence that ranged anywhere from probation to the maximum penalty for the offense (U.S.S.C., 1990). Ultimately, the Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular congressional session and May first. Such amendments automatically take effect 180 days after submission, unless a law is enacted to the contrary (O'Bryant et al., 2002).

Based on the Commission's recommendation, Congress passed the Comprehensive Crime Control Act (CCCA) of 1984. The CCCA, and its subsequent amendments, was the prerequisite for providing the 100:1 ratio between powder cocaine and crack cocaine. On October 17, 1986, under the Anti-Drug Abuse Act, Congress expanded the CCCA by adding an amendment to create a mandatory minimum penalty for possession with the intent to distribute cocaine hydrochloride (cocaine powder) and cocaine base with a radical hydroxyl element in its chemical compound known as crack cocaine. Penalties differed for various drugs and for different forms of the same drugs. Penalty seven of the Act provides that a defendant who is convicted of possessing with the intent to distribute 453.6 grams (one pound) of powdered cocaine would serve significantly less prison time than a defendant convicted of possession with the intent to distribute only five grams of crack cocaine. The sentencing disparity found in the sentencing guidelines is derived directly from 21 U.S.C.A 841 (b), which mandates the same minimum sentences for crimes involving fifty grams or more of a substance containing cocaine base as it does for crimes involving 5,000 grams or more of powder cocaine ("Comprehensive Crime Control Act," 1984)

The Commission in 1987 used the 100:1 quantity in establishing drug penalties under the sentencing guidelines. Mandatory minimum statutes listing only two quantities for each form of the drug, with crack, five and five hundred grams, with a corresponding five- and ten-year mandatory minimum sentences for first offenders. In 1988, by creating a mandatory minimum penalty for a first offense of simple possession of crack cocaine, Congress made a clear distinction between crack and powder cocaine. This is the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance. Under this statute, possession of more than five grams of cocaine is punishable by a minimum of five years in prison. Simple possession of any quantity—including powder cocaine—by first-time offenders is a misdemeanor offense and punishable with probation or a maximum of a one-year prison sentence (Gray, 2001; U.S.S.C., 2001). In January 1989, the Supreme Court upheld the constitutionality of the Sentencing Commission and the guidelines in *Mistretta v. United States*, 488 U.S. 361 (1989), and full nationwide implementation of the federal sentencing guidelines followed.

#### Equal Protections and the Crack Statutes I: The United States v. Clary

The crack versus cocaine sentencing disparity has not gone without legal challenge. Under a State of Missouri statute, Edward Clary was convicted for intent to distribute 66.7 grams of crack cocaine. At the time, he was an 18-year-old Black male with no prior criminal convictions. Under federal law, Clary received the mandatory minimum sentence of 10 years for intent to distribute over 50 grams of crack. He alleged that the mandatory minimum sentence was discriminatory towards him and

other African Americans because they were more likely than Whites to engage in trafficking the drug crack ("United States v. Clary," 1994). Further, he pointed out the disparity by highlighting the 100:1 ratio in crack sentencing in that a minimum of possession of 5,000 grams of cocaine powder was necessary to qualify for the same ten-year sentence. The court noted the background of racism in America generally, and specifically, noted the history of racism inherent in America's attempt to control crime. However, the court was constrained by prior Eighth Circuit precedent and found no overt racial discrimination on the part of Congress in adopting the 100:1 penalty ratio for crack cocaine.

Judge Clyde S. Cahill refused to invoke the mandatory sentence for Clary, since he had a comprehension of the disparity of fairness in sentencing. In writing his opinion, Judge Cahill lamented on the discriminatory practices of the justice system. He pointed out that the first federal laws criminalizing the possession and sale of marijuana, heroin, and cocaine were enacted because these actions targeted the precarious nature of African Americans. Cahill found that "equal protection analysis must consider unconscious racism by legislators and found that a crack sentencing law that burdens Blacks disproportionately is a '*de facto* suspect classification' that could be traced to unconscious racism ("United States v. Clary," 1994)." Finding an unconsciously discriminatory classification, the court applied strict scrutiny, which required a compelling government interest and a law narrowly tailored to address that interest. Under this higher level of scrutiny, it found the statute violated federal equal protection guarantees citing that the Harrison Act of 1914 became federal law as a result of this alleged behavior (Cahill in Kennedy, 1998).

Almost every major drug has been at various times in America's history treated as a threat to the survival of America by some minority segment of society. Panic based upon media reports that incited racial fears has been used historically in this country as a catalyst for generating racially based legislation (Kennedy, 1998:385-86)

Cahill further argued that Congress had no substantive basis to distinguish between crack rock cocaine and powder cocaine and Congress had engaged in a form of subconscious racism when drafting this legislation since there is no reasonable basis for this distinction (Cahill in Gillmer, 1995). Cahill clearly pointed out that Congress never would have enacted legislation had the perception been that young White males were the major proprietors in trafficking crack powder. In closing, Judge Cahill suggested:

It would be far more fair and just, in keeping with the "get tough" rhetoric...to require that both Black and White violators serve the same 10 years imprisonment, be it crack or powder cocaine. Cocaine is really cocaine. No crack would exist without cocaine powder. Eliminate cocaine and crack disappears! This would be simple and fair to eliminate racial injustice. Of paramount value it would enhance the respect of the judiciary and the nation by bringing equal justice for all-not merely punishment for JUST US (Kennedy, 1998:385-86).

The U.S. Court of Appeals overturned the ruling citing that defendants must demonstrate that the government acted with the intention of racial consequences and held that the court finding of unconscious racism simply did "not address the question whether Congress acted with a discriminatory purpose" (Gray, 2001). However, the Appeals Court acknowledged the government's role in contributing to the sentencing disparity, but that there was no demonstration of the application of sentencing as being malicious and racially biased (1995). Further, there is no substantial evidence that Congress acted with the intent of racial bias when adopting legislation. The U. S. Supreme Court upheld the Appeals Court decision. The government acknowledged

contributing to and creating an environment of conflict in the Cahill ruling, but also showed an unwillingness to address the issue because of the high standard of proof required. Simply put, yes there was racial disparity, but that it would not be redressed, since there was no malicious intent by the government. While some states, such as Michigan, New York, and Illinois, are reconsidering drug legislation, the Clary ruling currently stands unchallenged. The Justice Department under George W. Bush's Presidential Administration recently affirmed its position on the Crack versus Cocaine sentencing disparity. The Administration doesn't favor reducing the 100:1 ratio because they deem that crack is a more deadly drug than is cocaine in the powder form. Furthermore the Bush Administration is attempting to protect the minority communities from the devastation of the use of crack (Lewis, 2002).

#### Equal Protections and the Crack Statutes II: Statistical Analysis

The 1980s saw a dramatic increase in the use of crack rock cocaine in Black communities throughout the country. As a result, gang violence escalated, and it became common practice for law enforcement personnel to create state-sanctioned drug dealer profiles. The profile defined the subject to be a Black male between the ages of 15 and 25 years of age, who dresses in an upscale sweat suit, wears expensive gold jewelry around his neck, and possibly drives an automobile priced beyond his financial means (Lusane, 1991). Subsequently, state and federal governments enacted harsh penalties for drug trafficking in rock cocaine and that led to an explosion in the Black prison population in particular. In 1984, Congress enacted the Sentencing Reform Act of 1984, which established the U.S. States Sentencing Commission (Sentencing Commission). The Sentencing Commission was given the authority to

promulgate sentencing guidelines for federal courts. In 1987 the Sentencing Commission developed Sentencing Guidelines that, in part, eliminated racial disparity in sentencing. To accomplish this goal of fair sentencing, sentencing discretion was removed from judges who once had full autonomy in application. Mandatory minimum sentences, particularly for drug offenses, then replaced the judges' sentencing discretion.

Approximately five years later, the U.S. General Accounting Office (GAO) issued a report indicating that because of "data limitation, [it is] impossible to know how effective the Federal Sentencing Guidelines had been in reducing racial, as well as other disparities, in the sentences given to similar offenders for similar crimes" (Conaboy, 1995). The GAO's report, however, indicates that in some areas of the Sentencing Guidelines, there are still disparities in sentencing between Blacks and Whites for the same offenses. Further, the GAO's report suggests that the way prosecutors traditionally plea-bargain with defendants may adversely impact Blacks and interfere with the Sentencing Commission's mission of eliminating disparity based on race.

In the Anti-Drug Abuse Act of 1988, Congress further distinguished crack cocaine from both powder cocaine and other drugs by creating a mandatory minimum penalty for possession of crack cocaine. It was the only such federal penalty for a first-time offense of possession of a controlled substance. Under this statute, possession of more than five grams of crack cocaine has a minimum sentence of five years in prison. Possession of any quantity of any other substance—including



powder—by a first-time offender is a misdemeanor offense punishable by a maximum of one year in prison.

Initially in August 1991, the Commission acknowledged the sentencing disparity of a mandatory minimum as incompatible with the sentencing guidelines. However, they failed to launch a full investigation until a few years later. In 1995 a report and proposal was filed with Congress. The following table represents the findings on sentencing disparity. Key to this debate was that drug traffickers of crack cocaine are more likely to be Black, while traffickers of powder cocaine are more likely to be White. However, it was undisputed that both are a derivative of the same substance. In fact, the Commission defined that powder cocaine and crack cocaine are two forms of the same drug, containing the same active ingredient—the cocaine alkaloid (Conaboy, 1995). Simply put, H<sub>2</sub>O is a form of water, yet when one lowers the temperature of cocaine powder added to H<sub>2</sub>O, it becomes hardened that creates the ice called rock cocaine.

**Table One**

5 grams or more of crack cocaine	equals	5-year mandatory minimum penalty
500 grams of powder cocaine	equals	5-year mandatory minimum penalty
50 grams or more of crack cocaine	equals	10-year mandatory minimum penalty
5,000 grams of powder cocaine	equals	10-year mandatory minimum penalty
Adopted from the Special Report to the U.S. Congress, (U.S. Sentencing Commission, 1995)		

Table two is a data composition of index crimes from 1980 to 2001 complied by the Federal Bureau of Justice Statistics (See Number of Person in of State Correctional Authorities by Most Serious Offense, 1980-2001, 2004). The years 1980 through 1986 are prior to the creation of the federal mandatory minimum sentencing for crack cocaine. Drug crimes during this period had the second lowest percentage next to public order offenses. However the years after 1986 reveal a sharp increase in drug offenses. The other listed crimes are as follows; violent offenses include murder, negligent and non-negligent manslaughter, rape, sexual assault, robbery, assault, extortion, intimidation, criminal endangerment, and other violent offenses. Property offenses include burglary, larceny, motor vehicle theft, fraud, possession and selling of stolen property, destruction of property, trespassing, vandalism, criminal tampering, and other property offenses.

Drug offenses include possession, manufacturing, trafficking, and other drug offenses. Public-order offenses include weapons, drunk driving, escape/flight to avoid prosecution, court offenses, obstruction, commercialized vice, morals and decency charges, liquor law violations, and other public-order offenses.

**Table Two**

Number of persons in custody of State correctional authorities by most serious offense from 1980-2001

	Violent	Property	Drug	Public order
1980	173,300	89,300	19,000	12,400
1981	193,300	100,500	21,700	14,600
1982	215,300	114,400	25,300	17,800
1983	214,600	127,100	26,600	24,400
1984	227,300	133,100	31,700	21,900
1985	246,200	140,100	38,900	23,000
1986	258,600	150,200	45,400	28,800
1987	271,300	155,500	57,900	31,300
1988	282,700	161,600	79,100	35,000
1989	293,900	172,700	120,100	39,500
1990	313,600	173,700	148,600	45,500
1991	339,500	180,700	155,200	49,500
1992	369,100	181,600	168,100	56,300
1993	393,500	189,600	177,000	64,000
1994	425,700	207,000	193,500	74,400
1995	459,600	226,600	212,800	86,500
1996	484,800	231,700	216,900	96,000
1997	507,800	236,400	222,100	106,200
1998	545,200	242,900	236,800	113,900
1999	570,000	245,000	251,200	120,600
2000	589,100	238,500	251,100	124,600
2001	596,100	233,000	246,100	129,900

Source: Correctional Populations in the United States, 1997, and Prisoners in 2002

The following information was downloaded from the United States Sentencing Commission's website drawn from the 2001 Sourcebook of Federal Sentencing

Statistics. Table three indicates that during 2001, the average length of imprisonment received for Federal crack cocaine offenders was 115 months.

**Table Three**

Mean and Median Length of Imprisonment, Federal Drug Offenders, 2001

Type of Drug	Mean (in months)	Median (in months)
Powder cocaine	77.0	60
Crack cocaine	115.0	95
Heroin	63.4	46
Marijuana	38.0	24
Methamphetamine	88.5	70
Other	41.1	30

(See figure L of <http://www.ussc.gov/ANNRPT/2001/Fig-L.PDF>)

As of 2001, approximately 83% of the federally sentenced crack cocaine offenders were Black. The statistical data presents a 100:1 quantity ratio of powder cocaine to crack cocaine, that is, it takes 100 times as much powder cocaine, as compared to crack, to bring the mandatory minimum penalties. In essence, the mandatory minimum guideline's differentiation means that, for any given quantity of cocaine, sentences for offenses involving crack cocaine are much more severe than similar offenses involving powder cocaine as indicated in table four.

**Table Four**

**Race/Ethnicity of Federally Sentenced Crack and Cocaine Offenders, 2001**

Race/Ethnicity	Powder Cocaine (%)	Crack Cocaine (%)
White	18.1	7.0
Black	30.5	82.8
Hispanic	50.2	9.3
Other	1.2	0.9

(See figure J of <http://www.ussc.gov/ANNRPT/2001/fig-j.pdf>)

Table five indicates there are no significant difference in the 5-year mandatory minimum sentencing for powder cocaine, crack cocaine, and all other drugs.

However, when reviewing the 10-year mandatory minimum, the sentencing for crack cocaine is significantly higher than powder cocaine and other drugs. This is because crack cocaine traffickers are more likely to be arrested with more than the minimal five grams that triggers the sentencing. Additionally when adding both five and ten-year mandatory minimums, the highest percentages receiving mandatory minimum penalties were crack cases, with 76.0%.

**Table Five**

**Percent of Crack and Cocaine Offenders Receiving Mandatory Minimum Sentences, 2001**

Type of Provision Received	Powder	Crack	All Drugs
No mandatory minimum	27.6	24.0	40.6
5-year mandatory minimum	34.2	29.4	29.1
10-year mandatory minimum	38.2	46.6	30.3

(See table 43 of <http://www.ussc.gov/ANNRPT/2001/table43.pdf>)

Despite the racial disparities in sentencing, the Sentencing Commission has taken two steps to lower crack penalties. Initially the Commission contended that “[T]here is no evidence that Congress or the Sentencing Commission acted with any discriminatory intent in setting different statutory guideline penalties for different forms of cocaine (Conaboy, 1995).” However, in June of 1995, the House Judiciary Committee’s Crime Subcommittee held a hearing to examine the Commission’s recommended changes to the Sentencing Guidelines. First, the Commission recommended that Congress eliminate the differential treatment of crack and cocaine powder in the mandatory minimum penalties currently provided by statute. In addition, the Commission submitted an amendment of the sentencing guidelines to make the punishment for crack and cocaine powder possession and/or sale the same under the guidelines, regardless of whether or not Congress first revised the statutory minimum penalties. The U.S. House of Representative in September of 1995 voted 332 to 83 to reject the Sentencing Commission’s proposal to reduce the disparity

caused by federal sentencing, including equalizing the crack and cocaine sentencing statutes. Instead, the majority decided to perpetuate these discriminatory laws by passing and reporting out H.R. 2259, which disapproved the recommendations of the U.S. Sentencing Commission to eliminate the disparities in federal sentencing for crack cocaine and powder cocaine offenses. It should be noted that the proposal would have gone into affect without calling for a Congressional vote. However, for the first time in history, the Commission's recommendations were summarily dismissed without adopting any portion of their recommendation. The rejection also received the support of President Clinton, who in 1993 sponsored the most punitive crime bill in history. The former President's bill increased the number of criminalized laws and expanded the application of capital punishment.

#### The Supply and Demand of Crack Cocaine, A Business Perspective

Because of the relatively low production cost of making crack, it is relatively cheap even when including baking soda or ammonia. As such, crack cocaine is the drug of choice for poor Americans, many of whom are African Americans and live in the nation's inner cities. Conversely, powder cocaine is much more expensive, and it tends to be used by more affluent White Americans. As of 1993 the cost per dose, in comparison, places this disparity into perspective. That is, 500 grams of powder cocaine produces 2,500 to 5,000 doses with a street value of between \$32,500 and \$50,000. In contrast, 5 grams of crack cocaine produces 10 to 50 doses and has a street value of between \$225 and \$750. Thus, at the high end of the scale, a defendant convicted of trafficking \$750 worth of crack cocaine would receive the same

mandatory minimum five-year sentence as a defendant who trafficked \$50,000 worth of powder cocaine (U.S.S.C., 1993).

### The Demographical Impact of Sentencing

In 1993 the U.S. Attorney assigned to Los Angeles publicly acknowledged that federal agents focused their resources in predominantly African American and Latino communities. As a result in 1993, not a single White had been convicted of a crack cocaine related offense in the federal courts surrounding Los Angeles since Congress enacted its mandatory sentences. The data supported that practically all White offenders had been prosecuted in the state courts. A 1992 survey by the Commission found a similar pattern in major metropolitan cities that prosecuted crack cocaine cases (U.S.S.C., 1993). No Whites were federally prosecuted in 17 various states or in many cities, including Boston, Denver, Chicago, Miami, Dallas, and Los Angeles. Only one White was convicted in California, two in Texas, three in New York, and two in Pennsylvania (U.S.S.C., 1993).

This evidence as indicated in table six supports the premise of this dissertation that U.S. Attorneys use racial discretion in prosecuting potential defendants. As of 2001, approximately 48% of the federally sentenced drug defendants in the U.S. Fourth Circuit were charged with committing a crack cocaine offense. The Fourth Circuit encompasses Maryland, North Carolina, South Carolina, Virginia, and West Virginia.



**Table Six****Defendants Sentenced for Cocaine Offenses, by Circuit, 2001**

Circuit	Crack Cocaine		Powder Cocaine	
	# of Offenders	% of Total Drug	# of Offenders	% of Total Drug
First	190	21.7	409	46.7
Second	428	24.2	567	32.0
Third	254	27.9	284	31.1
Fourth	1,080	47.8	847	16.4
Fifth	713	13.8	847	16.4
Sixth	464	25.1	470	25.4
Seventh	425	39.7	295	27.6
Eighth	344	20.4	257	15.2
Ninth	193	4.3	594	13.4
Tenth	151	11.7	188	14.6
Eleventh	641	22.9	967	34.5
D.C.	58	55.8	17	16.3

From USSC FY 2001 Federal Sentencing Statistics by State, District, and Circuit <http://www.ussc.gov/JUDPACK/JP2001.htm>

Table Seven provides the state territory composition within the 11 federal circuits and additionally the District of Columbia.

**Table Seven**

Areas of Each Circuit

Circuit	State Territories
First	ME, MA, NH, Puerto Rico, RI
Second	CT, NY, VT
Third	DE, NJ, PA, Virgin Islands
Fourth	MD, NC, SC, VA, WV
Fifth	LA, MS, TX
Sixth	KY, MI, OH, TN
Seventh	IL, IN, WI
Eighth	AR, IA, MN, MO, NE, ND, SD
Ninth	AK, AZ, CA, Guam, HI, ID, MT, NV, Northern Mariana Islands, OR, WA
Tenth	CO, KS, NM, OK, UT, WY
Eleventh	AL, FL, GA
D.C.	Washington

From USSC FY 2001 Federal Sentencing Statistics by State, District, and Circuit <http://www.ussc.gov/JUDPACK/JP2001.htm>

### Impact of Mandatory Minimum Drug Sentencing

A study conducted by the Federal Judicial Center found that mandatory minimum sentencing has an alarmingly larger impact on African Americans than it does on Whites (Meiehoefer, 1992). In 1986 the average sentence was 6% higher for

African Americans than for Whites before the mandatory minimum sentences for crack offenses became effective. However, only four years later, in 1990, the average sentence was 93% higher for African Americans. This trend also includes a shift for transactions of other drugs of 11% to 49% for offenses related to cocaine, opiates, and marijuana (Meiehoefer, 1992).

Three factors contributed to the statistical patterns: first, increased participation by Black male gang members in street sales in the new underground economy; second, selective enforcement of drug laws as they pertain to street dealers; third, harsher mandatory sentencing guidelines aimed at crack cocaine versus powder cocaine users/sellers (Meiehoefer, 1992). This Sentencing Project study followed on the heels of the 1990 findings that nearly one-fourth of all Black males 20 to 29 years of age were in prison, jail, or on probation or parole (U.S.S.C., 1990). By 1993, Black males were incarcerated at a rate more than four times that of Black males in South Africa with 3,109 Black prisoners per 100,000 people, compared to South Africa's 729 per 100,000 (Reinarman et al., 1997).

In contrast, by turning back the clock to just more than a half-century ago, the incarceration rates were remarkably different. Approximately 77% of all prisoners within the United States were White, while only 22% were Black. In 1933, Blacks were incarcerated at a rate almost three times that of Whites. In 1950, the ratio had increased to approximately four times; in 1960 it was almost five times; in 1970 it was six times; and in 1989, it was seven times that of Whites (Hacker, 1992). Continued expansion has lead to the current incarceration of more than one million Black males in prisons throughout the United States (Miller L., 2002).

## The Parallels of Slave Labor, Including Leasing Newborn Babies

I will now outline the parallels that exist in the modern-day criminal justice system and the exploitation of Black Africans as free labor through the capitalistic slavery system. As mentioned earlier, former President Clinton signed the largest crime bill in U.S. history. Funding dissemination required that federal, state, and municipal localities actively demonstrate an aggressive approach to combating crime. For example, higher arrest numbers would meet the qualification standards. Targeting Black males who, in fact, had been profiled, processed through the justice system, and whose labor then became available, was the target of the Crime Bill. The similarities are much like a slave targeted for capture, and then exploited with the intent to profit by using race as a variable. Just as the original bondage system initially did not conceive of race as the primary motive to enslave Blacks, the prison explosion did not either. However, the new system paved the way for a subsequent return to a reformulated convict-lease program.

The 1980s marked a significant time in world history. It brought the end of the cold war and the fall of the Soviet Union. Prior to this time, the economy was fueled by the arms' race. When it ended, crime began to escalate within the United States and there was an onslaught of crack cocaine that invaded inner-city communities. As a result, the prison population doubled in capacity. Subsequently, former President Ronald Reagan declared a war on drugs in an effort to combat the epidemic that was targeting African Americans.

Assuming racism is still a tool to the proletariat, that is, those who do not have extra capital, and that stereotypical labels are ingrained in the psyche of America after

some four centuries, one could argue that African Americans are contributing to the economic expansion and labor exploitation of the penal industry. In 1989, in Kalamazoo, Michigan, a law was enacted that stated: "No person shall knowingly loiter about, frequent or live in any building, house, vacant lot, street, curb, lawn, alley, yard, apartment, store, automobile, boat, boathouse, airplane, or other place where controlled substances or drug paraphernalia are sold, dispensed, given away, or stored" (Reinarman et al., 1997). Anyone convicted of this offense found him/herself with a \$500 fine and up to 90 days in jail. Several other cities throughout the country adapted similar policies.

Another current popular trend is to build more prisons as a way to combat crime. Prison expansion is one of the Nation's fastest growing industries, with a profitable enough margin to inject a boost to the economy. The annual expenditure averages \$165 billion by both public and private agencies. Prisoners are the raw material central to guaranteeing continued growth. Nearly 70% of the prison population is African American. On any given day, one out of ten African American males is incarcerated in the United States, Black men 18 and over have a one in 17 chance of getting arrested and Black men 18 to 34 have a one in ten chance of getting arrested (Donzinger, 1996). The warehousing of these Black individuals is referred to as the Prison Industrial Complex (PIC).

According to Donzinger (1996), a 1994 article, the Wall Street Journal asserted that the private corrections industry used the war against crime as a lucrative business market much in the same way the defense industry used the threat of Communism during the Cold War. The fear of crime drives investment potential, and crime control is a

source of profit. For example, the high volume of sales of the 'club' is centered on the fear of theft of your automobile and the fear that Black males perpetuate this crime.

Some of the largest private corporations have restructured their divisions to facilitate entry into the competitive prison industry market. This includes some of the largest investment houses on Wall Street. Two such examples, Goldman Sachs and Co. and Smith & Barney, compete to underwrite jail and prison construction with private, tax-exempt bonds that do not require voter approval. Former titans of the defense industry such as Westinghouse Electric and Alliant Techsystems, Inc., have created special divisions to re-tool their products for law enforcement needs (Donzinger, 1996).

As in the days of the slave system and the post bellum (Jim Crow) era, the government played a significant role in the exploitation of labor. Dubois referred to this process where the incentive was to criminalize Blacks and contract their services to the highest bidder as "convict leasing" nearly a century ago. Currently, the three-strikes policy in states such as California maintains the same methodological supply of human labor as by enacting this policy. This entails a 25-years-to-life prison sentence with no chance of parole for any adult convicted for a third felony. California also has the provision that if the third crime is a misdemeanor, it can be increased to a felony in order for the state to obtain the three-strike provision.

Both the federal and state governments have elected to have their inmate populations placed in private prison facilities owned by corporations, such as Wackenhut. These corporations receive tax incentives and other perks to assume the government's cost to house a prisoner. Some states actually send prisoners to corporate facilities in other states. They can require inmates to work without receiving at least minimum wage,

thus a large return on the product. The condition of these facilities and the need to protect prisoners' rights as citizens has occasionally come into question, particularly when injury or death occurs.

Melonie Green, an African American women resident of Rockford, Illinois, was arrested in 1989 when her infant son died of oxygen deprivation days after he was born (Roberts, 1997). The State's attorney, Paul Logli, charged Green with involuntary manslaughter based on the fact that the baby's death was linked to the mother's drug addiction, that is she used crack cocaine while she was pregnant. This was a first of its kind, precedent-setting case as never beforehand has a woman been charged with manslaughter in connection with a drug addiction and this case received national attention. Green was demonized as an irresponsible, uneducated crack mother on welfare, who was a liability to the state. Further, she was depicted as a woman who chose crack cocaine over the health of her unborn child.

Logli stated publicly that his intention was to send a message that would deter other pregnant women/mothers from using drugs, or, if they did, this action was to make it clear that they would go to prison. He even went so far as to have a 24-hour police guard at Green's hospital door (Roberts, 1997). This was not for her protection, but rather was intended to prevent Green, who had just given birth, from leaving the hospital to go and feed her addiction. Apparently he believed that this woman would somehow find the strength to find drugs immediately after she delivered a child. It was no coincidence that Logli chose a Black women. She was less likely to have public support for her addiction and was more likely to lose her child. The state was prepared to take custody of the child had it survived. A jury refused to convict Green of the manslaughter

charge. However, this prompted the Illinois legislature to adopt the Infant Neglect Control Substance Act of 1989 (Illinois Criminal Law and Procedures, 1993). This law expanded existing child-abuse laws to include passing drugs to newborn babies in childbirth to be a felony.

National opinion polls during and after the case indicated that the majority of those responding supported the state criminally charging a crack drug-abusing mother who passed on the addiction to the child by using drugs during her pregnancy. Ultimately, crack took on its own identity as a drug. Crack mother meant Black mother. These mothers are portrayed as having no maternal instinct for their children.

The media hypes this when, in the rare instance, a Black women sells/trades her child for crack. However, it should be noted that since the Green case, the use of leasing babies (paying to use a baby as a cover for a drug trip) in drug trafficking has become more commonplace. At present, several members of Sisters in Struggle, a female component of the Gangster Disciples Chicago street gang have been arrested and indicted on operating an international drug smuggling ring. The smugglers routes include Panama City, Montego Bay, and Kingston, Jamaica; also to Chicago, New York, London, and Birmingham, England (Cohen, 2004). Drug addicted parents lease their newborn children to traffickers in exchange for drugs or \$200-\$400 dollars, while couriers make up to \$4,000 per trip. Scoring a transaction entails purchasing liquid cocaine and placing it the baby's formula cans. A women traveling with a baby and baby formula was thought to draw the least amount of suspicion. A kilo of cocaine (the equivalent of approximately three formula cans) that costs \$5,000 in Panama can reap \$20,000 or more if turned into crack in the United States(Cohen, 2004).



One legitimate concern that has arisen is what if the child is accidentally given the formula that is laced with the cocaine? A trafficker who is not the actual parent is less likely to have these concerns. Custom agents had cases where a three-week-old baby had been left alone in an empty bathtub during a drug transaction and in another case, where the baby was left alone in a slum hotel while the trafficker sought alcohol and drugs.

### Acrimonious Blacks, Profiles and Symbolism

The power of the dominant group is also advocated by symbolism. For example I have personally seen a mural inside the federal building in Jackson, Mississippi, depicting Blacks in inferior positions, likened to a happy slave stereotype, and notably justice is shown as a White character. This mural can be viewed in the late Judge Leon A. Higginbotham last work entitled 'Shades of Freedom: Racial Politics and the Presumption of the American Legal Process' (See Higginbotham, 1996). A more modern-day example is a photo that was captured and shown nationally of former New Jersey Governor Christine Todd Whitman engaging in a stop and frisk of an African American male. In it, Sherron Rolax, a 17-year-old Black male, is shown with his legs spread and his hands leaning against a wall. Ironically, police who were conducting a drug sweep of the Camden area had already subjected Rolax to a search. He was then handed over to the Governor who searched him again. Despite both searches taking place, Rolax was not arrested. The legality of the search questions the constitutionality of invading his individual rights of protection from illegal search and seizures.

## CONCLUSION

### Has The Law Achieved Its Purpose?

The following steps were necessary in order to properly create a methodology that adequately addresses the premise of this study. First, a social historiography was established that includes a literature review on the introduction of Africans/African Americans to the United States and how criminalization of their behavior occurred. Then, a search for materials that affected interaction, that is, a description of law as a social control, followed. Then there was a discussion of how the creation and application of law is the key instrument in establishing conflict (Moyer, 2001). Also, the review demonstrated the importance of solidarity among the dominant group, and why it is a necessary tactic to maintain control of subordinate groups. Lastly, a comparison of empirical evidence of the conditions under which conflict produced certain outcomes occurred.

The United States Sentencing Commission's recommendation of statutes for crack cocaine, adapted and passed by Congress, was the Comprehensive Crime Control Act (CCCA) of 1984 as already demonstrated it was the prerequisite for providing the 100:1 ratio between powder cocaine and crack cocaine and, therefore, should come as no surprise regarding the racial impact on sentencing for crack cocaine. This is not to be considered as a conspiracy indictment against the majority; however, it is a construct to comprehend the social historical impact of law, and subsequently, the impact on race or racial bias and how it plays a major role. Given this, the question

remains: Have the laws achieved their purpose in deterring the use, sale, and distribution of crack cocaine for the purpose of protecting the health and well being of the population? The short response would be an emphatic 'no;' however an adequate answer is provided only after reviewing the relevance of the social historical regulatory methods of control of African Americans since that is the population that traffics in crack the most. The abolishment of slavery through emancipation, the constitutional amendments, and civil rights movement act(s) ideally should have created a race-neutral society, as well as a neutral criminal justice system (McIntyre, 1993). Hence in a putative context, ideally, justice being blind exercises race neutrality for all.

The impact of race varies, depending on one's identified status in American society, that is, racial group status. Under the current structure, crack laws and mandatory minimums have ended up placing a large number of an entire generation of Blacks behind bars. In 1989 a study by the Sentencing Project found that one in four Black men between the ages of 20-29 is under some form of criminal justice supervision, either in jail or prison, or on probation or parole. Thus, half of the prison population is now African American, compared to the 13% of the entire population of the United States (Mauer, 1999a).

The recent court challenges to the sentencing disparity follows a social historical pattern established in the Dred Scott ruling. As noted in the Clary case, federal court rulings support the notion that no discrimination existed in the conception of the drug laws. Another example of this conduct by the Courts is the 1991 case of the United States v. Armstrong. This entails four defendants charged with trafficking crack cocaine who filed a motion for discovery or dismissal, alleging

that they were victims of “selective prosecution.” The Supreme Court ruled that the defendants did not meet the required threshold showing that similarly situated suspects of other races were not prosecuted (Mauer, 1999b). Prior to reaching the Supreme Court, the U.S. Court of Appeals ruled that Congress had not acted with a discriminatory purpose in setting greater penalties for cocaine-based crimes than for powder cocaine offenses. Thus regardless of the intent, the Courts have ignored the racial impact on its citizens.

In 2002 the Sentencing Commission reported to Congress that the current penalties on crack are based on beliefs about the association of crack offenses with violence that have been shown to be inaccurate (Coyle, 2004). The Commission found that violence associated with crack is primarily related to the drug trade, not the drug itself. In data from a 2000 study of federally prosecuted cocaine cases, the Commission found weapon involvement for powder cocaine offenses to be 25.4% and 35.2% for crack cocaine offenses. For powder cocaine, the frequency rate with which weapons are actually used is 1.2% and for crack offenders it is 2.3%, not a significant difference to justify the 100:1 quantity disparity (Coyle, 2004). Additionally the Commission’s research showed that the median amount of crack found on the majority of low-level offenders is 52 grams, which is enough to trigger a ten-year mandatory sentence because of current laws. The average for holding powder cocaine is 340 grams, which does not even trigger the five-year sentence (Coyle, 2004).

The long-term cost of incarceration from mandatory minimum sentencing drug laws has created a financial burden for states, such as Michigan, which in 2002 subsequently repealed the laws. The Violent Crime Control and Law Enforcement

Act of 1994 authorized funding for state and local law enforcement and crime prevention measures, including increasing the number of crimes punishable by death and establishing a "three-strikes" provision for violent offenders. Law-enforcement agencies were given an additional one billion dollars to assist with the increased workload expected from the mandates of the Act (O'Bryant et al., 2002).

For some states, however, the financial incentive from the federal government is no longer cost efficient. On December 12, 2002, a bipartisan majority of the Michigan Senate passed an historic package of three sentencing reform bills—HB 5394 (H-3), HB 5395 (H-2) and HB 6510 (H-1)—that eliminated most of the state's draconian mandatory minimum sentences for drug offenses. The reform allows judges to impose sentences based on a range of factors in each case, rather than solely on drug weight, and replaces lifetime probation for the low-level offenders with a five-year probationary period ("Michigan Repeals Mandatory Minimum Drug Sentence," 2002). The repealed legislation also allows parole boards the discretion to permit early parole for prisoners. Advocacy groups, such as the Families Against Mandatory Minimums (FAMM), argue that the previous mandatory minimums warehoused low-level nonviolent offenders that became a high expense to taxpayers.

This will save taxpayers millions as judges can now use guidelines to impose sentences that more accurately reflect the individual factors in each drug case. In an article published December 22, 2002, the *Detroit News* estimated that Michigan could save as much as \$41 million in 2003 between the earlier parole eligibility dates for certain prisoners and discharges from lifetime probation (See Heinlein, 2002). Taxpayers will also save millions in the future, as judges use sentencing guidelines to

impose sentences that more accurately reflect the individual factors in each case (Heinlein, 2002). In addition, overall drug-related crimes rates are down. By 1997, the U.S. Justice Department's National Institute of Justice was reporting that crack cocaine use by both adults and youths has dropped dramatically. For example, the institute reported that the proportion of young people arrested in Detroit who tested positive for cocaine dropped from 45% in 1987 to only 5% in 1996, (Heinlein, 2002). According to the Sentencing Commission, since 1980, the number of drug offenders in state prisons has increased thirteen-fold, and drug offenders now comprise one-fifth of all state prisoners (U.S.S.C., 1990). The drug laws have achieved their purpose in incarcerating low-level nonviolent offenders with most having no prior criminal record. However, there is scant empirical evidence that suggests that this "get tough" policy has had any appreciable effect on stemming the flow of drugs into the country or decreasing the use of illicit narcotics (Reinarman et al., 1997).

### Limitations and Minimizing the Adverse Effects

As noted, the Federal Courts have concertedly ruled that there is no evidence that Congress acted racially malicious (discriminatory) in enacting the different statutory guidelines for different forms of cocaine. However, this failure to amend the sentencing disparity feeds into cultural misconceptions about trafficking in crack cocaine and the following draconian sentencing. It suppresses a racist and classicist undertone of society's power structure of conflict through a political, legal, and law-enforcement structure. Rather, those in power use these mechanisms as methods to control subordinate groups, such as African Americans. In 2002 the Commission reported to Congress that patterns of drug purchases and use demonstrate that, overall,

drug users reported their main drug providers are sellers of the same racial or ethnic background as they are. Yet, research shows that in the year 2000 of all of the federal crack defendants, 84% were Black (Coyle, 2004). Access to this information is nothing new for Congress. Ironically, the Commission included this in its reports for more than a decade.

Jury nullification is a radical approach to addressing the sentencing disparity in crack cocaine cases. Paul Butler published an article entitled “Racially based jury nullification: Black power in the criminal justice system” in the *Yale Law Review* (Butler 1995). In this article, he advocated that Black jurors have a moral responsibility to consider ignoring the facts of the case and voting their consciousness in nonviolent, victimless crimes. Consequently, he contended that “the race of a black defendant is sometimes a legally and morally appropriate factor for jurors to consider in reaching a verdict” because: “The decision as to what kind of conduct by African-Americans ought to be punished is better made by African-Americans themselves, based on the costs and benefits to their community, than by the traditional criminal justice process, which is controlled by White lawmakers and White law enforcers (Butler, 1995)”. For serious violent crimes, Butler contends juries should consider a case strictly on the evidence presented.

To support his perspective, Butler (1995) presented the history of jury nullification as part of English and American law, citing examples such as abolitionist juries refusing to find escaped enslaved Blacks guilty of violating the Fugitive Slave Law. Historical precedent governing this issue of jury nullification expressly forbids judges and attorneys from notifying juries of such an avenue in the courtroom. Thus,

juries should be informed on strategies about the possibility and tradition of nullification. To construct a moral case for jury nullification, Butler (1995) endorsed a radical critique of criminal law as racist (because it, along with most of the rest of our legal system, functions as an instrument of White supremacy), and conjoins this with a critique of democracy-based arguments against nullification (Butler, 1995).

Butler's goal was the subversion of the American criminal justice system, at least, as it now exists, but in the form of constructive and carefully targeted civil disobedience. This strategy was meant to apply pressure to government authorities to get them to consider non-criminal methods of addressing some types of antisocial conduct (Butler, 1995). Expanding on Butler's framework, it is the moral responsibility of all jurors to take a radical step, as long as the overwhelming disparity in sentencing for crack cocaine exists. Utilizing his same example of jury nullification by White juries during the period of Fugitive Slave Laws, one should not assume that, with proper insight to the clear-cut disparity that exists, that the outcome would not change. In a society where racism is woven into its very fabric, the impact would be effective if it involved and was supported by White jurist.

In addition to this radical approach, the following steps are recommended: First, since the crack cocaine laws were originally designed to encapsulate high-level drug offenders, then penalties for powder cocaine should be higher since more people are involved in trafficking at levels much higher than the street dealer. Second, penalties for powder cocaine should be higher than crack cocaine since the latter substance cannot be made without the former. Simply put, ice cubes cannot be made unless you have water. Third, increase the mandatory minimums for all other drugs



equal to crack possession. Currently, the maximum sentence for simple possession of any other drug is a one-year prison term. Fourth, reduce the weight minimums to within a range suggested by the Sentencing Commission—the current recommendation is a range of 2:1 to 15:1 (U.S.S.C., 1997). Fifth, provide sentence enhancements for drug crimes that involve a firearm or some other type of dangerous weapon, which results in death or serious injury, and/or trafficking in locations or to individuals considered to be protected.

A primary limitation to this study is the statistical data utilized from Uniform Crime Reports. Since reporting is voluntary, some law-enforcement agencies may have ulterior motives for not submitting data. For example, Atlanta's Police Chief Richard Pennington referred to his city as the most dangerous in the nation. After conducting an internal audit Pennington found that officers intentionally and routinely underreported crime(s), by discarding crime records and improperly closing open cases. He argued that city officials were more concerned with the city's image as a tourist destination. The report found that Atlanta has a murder rate 52% higher than the national average and residents, particularly African Americans, were more likely to be victims of a violent crime than residents of Washington, D.C., Detroit, Chicago, or Los Angeles (Barry, 2004).

### Recommendations for Further Study

For future studies, this research should expand on to include the impact of science and religion (Christianity) as it relates to the influence and establishment of law. Christianity has traditionally been primarily utilized to justify the bondage system in the United States. According to Inciardi, the Mosaic code (also known to as

the Ten Commandments) is the basis from which United States laws were established (Inciardi, 1996).

With regard to science, Charles Darwin's "Origin of Species" laid the groundwork for what is now referred to as "biological assumptions on crime." A component of his theory of natural selection evolved to include "Social Darwinism," positing that the stronger species survive and dominate the weaker ones. Crime and genetic theories developed as a subsequent outgrowth of Darwin's original thesis. Caesar Lombroso's work on "biological crime" is the genesis of the Italian School of Criminality. The theory hypothesizes variant strains within the human family with some having a higher genetic predisposition to crime than others. It also theorizes that those who engage in criminal activity can be identified through the physical characteristics of biological determinism; that is, the premise is that there are members of the human family who have characteristics, which when placed in a certain environmental framework, were predisposed not only to commit a crime, but also to commit certain types of crime as well. As such, "free-will" disappeared under determinacy, equality bowed before natural differences, and expert knowledge and human laws were created and became scientific laws that were discovered (Lanier & Henry, 1998).

In the 1927 case of *Buck versus Bell*, Justice Oliver Wendell Holmes of the U.S. Supreme Court wrote: "It is better for all the world if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind (*"Buck v Bell,"* 1927)." Following the Court's ruling, 30 states enacted laws allowing for the

sterilization of convicted criminals in the interest of protecting the community from generations of criminals.

Religion, science, and law present a symbiotic relationship in which one cannot exist without the merits of the other. Viewing within a historical context, I would argue that through the premise of conflict there developed a cultural dualism that imposes its conscious and unconscious will on Blacks. Subsequently, either of the methodologies was created as a reaction to the conduct of the subordinated group, or in order to regulate their conduct. The intent remained the same; that is, to control the activities of the subordinate groups.

Additional recommended research include how has the disenfranchisement of African Americans created the development of an industry referred to as the “prison industrial complex?” The expansion of prison building has boomed throughout the country. Municipalities are competing through tax incentives to have the next prison facility built in their community. The most important variable for the PIC is housing the inmates and present research demonstrates they are more likely to be Black inmates.

Finally conduct a survey analysis to assess if the perception of Black criminality (particularly Black males) is embedded within the white society as a cultural norm. This survey should not only include the common variables of gender and demographics but also age e.g. Whites who were born after the Civil Rights era, the Reagan era, and during the Hip Hop Era. Then also include non-White racial groups who self-identify with Whiteness.

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