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JURISPRUDENCE

Crack Sentencing Is Wack

But a fix may finally be on the way.

By Harlan J. Protass

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In 1986, artist Keith Haring painted a mural called *Crack Is Wack* on the wall of a handball court in Manhattan. Its message sums up the attitude of the late 1980s, when Congress was driven to pass new laws punishing crack offenses much more harshly than crimes involving powder cocaine. For most of the time since, judges, academics, defense lawyers, and the U.S. Sentencing Commission (the expert agency charged by Congress with establishing fair federal sentencing guidelines) have condemned crack penalties as unfair and unfounded. Lawmakers, however, have obstinately refused to change them.

And yet, thanks to science, common sense, and the Supreme Court, the vast disparity between crack and powder sentencing is poised to end, or at least change.

For sentencing purposes, the 1980s federal laws treat as little as 5 grams of crack (roughly the weight of two sugar cubes) the same as 500 grams of powder cocaine (a "half-key" in *Miami Vice*-speak). Both slap a defendant with a five-year mandatory minimum prison term, and longer mandatory minimums ratchet up from there. When this 100-to-1 sentencing ratio was introduced, lawmakers believed that crack was instantly addicting, with young people especially susceptible. They feared a generation of "crack babies" would plague the nation's cities for years to come, and they drew a straight line from crack distribution to violent crime.

Since that time, the sentencing commission, in a series of reports to Congress, has shown that these ideas about crack are myths. Relying on a report in the *Journal of the American Medical Association*, the commission noted that crack and powder cocaine are pharmacologically identical and produce "the same physiological and subjective effects." The harm associated with prenatal exposure to the drugs is also the same, and both crack and powder are significantly less damaging in this regard than previously thought. Recent data also indicate that only 10 percent of crack offenses involve violence, and that use of the drug never reached the epidemic proportions that were so often claimed.

What's more, the 1980s laws failed to achieve the additional aim of locking up major drug traffickers. The sentencing commission reported recently that only about one-third of crack offenders are high-level operators. The overwhelming majority are street dealers, couriers, and lookouts. Meanwhile, harsh crack penalties disproportionately affect minorities. Of the 25,000 federal defendants sentenced for crack offenses over the past five years, about 80 percent were black.

With this information at hand, Congress long ago should have cut the 100-to-1 ratio. It hasn't, and while five reform-oriented bills are pending, probably won't anytime soon. The fear of appearing weak on crime is apparently too strong. But where Congress fears to tread, the sentencing commission and courts are already bound.

In 2005, the Supreme Court's decision in *United States v. Booker* changed the entire federal sentencing landscape. Before *Booker*, federal sentencing guidelines were mandatory. Trial judges had to follow them, except in the most extraordinary of circumstances. *Booker* chucked mandatory application of the guidelines as an unconstitutional incursion on the right to trial by jury. As a remedy, the Supreme Court restyled the guidelines as "advisory." Courts must now consider them when determining sentences, but they can also consider any other reliable and relevant information.

And that's precisely what courts are doing. Trial judges are testing the limits of the law by refusing to sentence crack defendants to prison terms that comport with the 100-to-1 ratio. As justification, they're relying on *Booker* to consider the sentencing commission's findings in its multiple reports to Congress, which essentially say that the 100-to-1 ratio overstates the seriousness of crack offenses and misrepresents the harmfulness of the drug as compared to powder cocaine. On Tuesday, in *Kimbrough v. United States*, the Supreme Court will hear a challenge to the 1980s sentencing laws and the power of judges to disregard the 100-to-1 ratio so that they can give crack defendants lower sentences. As Tom Goldstein argues here for ***Slate***, the same majority that prevailed in *Booker* is likely to give sentencing judges the authority to mete out these reduced sentences. They still won't be able to go below the mandatory minimums, but above that, they will be able to hand out prison terms shorter than those called for by the 100-to-1 ratio.

Booker may also have emboldened the sentencing commission. In a report to Congress (PDF) earlier this year, the commissioners found that the problems associated with the 100-to-1 ratio are so "urgent" and "compelling" that immediate action is required. Although the sentencing commission doesn't have authority to get rid of the 100-to-1 rule entirely, it has written a guidelines amendment (PDF) to somewhat alleviate the ratio's severity. In fact, *Booker* so invigorated the sentencing commission that it is considering applying its changes retroactively—a move that would affect the sentences of tens of thousands of defendants currently doing time for crack offenses. The American Bar Association and influential federal judges already have come out in support of that move.

Unless Congress votes down the amendment by Nov. 1, it will become law. Congress could also pass one of the proposals before it, the most promising of which (submitted by Sen. Joe Biden, D-Del.) would eliminate altogether the disparity between crack and powder cocaine penalties. Really, this should be a no-brainer. Of course crack remains a dangerous drug, and those who deal and use it should be punished. But those penalties should be fair. As the sentencing commission has figured out, and the Supreme Court is likely to, the current sentencing scheme is anything but.

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