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Forty Year War: Analyzing America's Shifting Crack Cocaine

Sarah Reasoner

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Forty Year War: Analyzing America's Shifting Crack Cocaine

Abstract
Understanding the impact of American drug laws created as part of the War on Drugs is vital for social workers in their pursuit for social justice and effective advocacy. This policy analysis utilizes the David Gil policy analysis framework (1970) to evaluate the Anti-Drug Abuse Act of 1986 and the Fair Sentencing Act of 2010. These two laws concerned mandatory minimum sentences for crack cocaine. This research seeks to compare and contrast the history behind these laws, their intended and unintended consequences, and the values underlying these laws. This analysis shows the Anti-Drug Abuse Act and the Fair Sentencing Act had a disparate impact on African American communities. African American communities suffered the unintended consequences of these laws including being subjected to disproportionate sentencing and being deeply impacted by cycles of incarceration. In addition, this research will provide suggestions regarding how crack cocaine laws can be amended through retroactive applications and adjusting sentencing ratios and changes the government can enact overall in the justice system to eliminate racially disproportionate sentencing and mitigate other consequences of these laws.

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FORTY YEAR WAR: ANALYZING AMERICA’S SHIFTING CRACK COCAINE POLICIES

By
Sarah Reasoner

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Abstract

Understanding the impact of American drug laws created as part of the War on Drugs is vital for social workers in their pursuit for social justice and effective advocacy. This policy analysis utilizes the David Gil policy analysis framework (1970) to evaluate the Anti-Drug Abuse Act of 1986 and the Fair Sentencing Act of 2010. These two laws concerned mandatory minimum sentences for crack cocaine. This research seeks to compare and contrast the history behind these laws, their intended and unintended consequences, and the values underlying these laws. This analysis shows the Anti-Drug Abuse Act and the Fair Sentencing Act had a disparate impact on African American communities. African American communities suffered the unintended consequences of these laws including being subjected to disproportionate sentencing and being deeply impacted by cycles of incarceration. In addition, this research will provide suggestions regarding how crack cocaine laws can be amended through retroactive applications and adjusting sentencing ratios and changes the government can enact overall in the justice system to eliminate racially disproportionate sentencing and mitigate other consequences of these laws.

Keywords: Racial disparities, cocaine, crack, sentencing, policy, recidivism
Introduction

In 1982, President Ronald Reagan responded to growing public concern about drug use by declaring a “War on Drugs.” Since then, the American government has spent trillions of dollars fighting this war and developed policies catapulting America to become a world leader in imprisonment (American Civil Liberties Union [ACLU], n.d.). Congress passed the Anti-Drug Abuse Act (ADAA), a law specifically targeting crack cocaine users, in 1986 in response to public concerns that crack cocaine was a highly dangerous drug that would eventually leak into suburbs (Vagins & McCurdy, 2006). This law created mandatory minimums for sentencing crack cocaine users that were over 100 times the mandatory sentencing minimums for powder cocaine users (Vagins & McCurdy, 2006). Although the federal government attempted to offset the Anti-Drug Abuse Act’s impact through their passage of the Fair Sentencing Act (FSA) in 2010, racial disparities within sentencing remains an issue throughout the country.

Racial disparities in sentencing is a huge social justice issue within the American criminal justice system. According to the American Civil Liberties Union’s (ACLU) 2014 report, race plays a role sentencing decisions under the current mandatory minimum structure and this is apparent in disproportions in sentencing (ACLU, 2014). For example, in the federal system, African American men are given sentences that are on average “nearly 20 percent longer than those imposed on white males convicted of similar crimes” (ACLU, 2014, p. 1). This racial disparity is also an issue with drug sentencing specifically. According to one study, “African Americans comprise only 15% of regular drug users, but represent 37% of individuals arrested, 59% of those convicted,
and 74% of those sentenced to prison for drug offenses” (Palamar, Davies, Ompad, Cleland, & Weitzman, 2015, p. 109).

Incarceration in the United States can have serious repercussions for defendants and their families. According to one study about incarceration and public health, incarceration can lead to health complications from overcrowding and insufficient health services and can exacerbate existing health issues (Dumont, Brockmann, Dickman, Alexander, & Rich, 2012). Incarceration causes lasting issues for those leaving jails or prisons. The study states incarceration “increases the odds of being homeless or marginally housed” and often impairs individuals’ ability to find jobs and reconnect with society (Dumont et al., 2012, p. 331).

Incarceration has a variety of impacts on family members. Dumont et al. explains that while some families benefit from having violent or dangerous family members incarcerated, many families’ lives are disrupted when their loved ones are put in prison. It can lead families to financial stress if their sole provider is incarcerated and emotional stress (Dumont et al., 2012). Children especially feel the negative impact of seeing family members incarcerated. Dumont et al. writes that children of the incarcerated “are five times more likely to enter the criminal justice system themselves than are the offspring of the nonincarcerated” (Dumont et al., 2012, p. 332). Communities are also deeply impacted by high-density incarceration and often find themselves in a state of perpetual poverty because of the impact of incarceration. According to Dumont et al.,

Former prisoners and their dependents often remain locked in low socioeconomic status, unemployment, and unstable housing, factors that are consistently associated with low access to health care as well as poor health outcomes. These
effects are exacerbated by the social and economic aftermath of entrance into the criminal justice system. (2012, p. 332)

This is because in many states, certain criminal records can prevent someone from becoming eligible for public assistance such as food stamps, public housing, and student loans. Having a prior criminal record can also make it harder for those individuals to get a job or even go back to school (Dumont et al., 2012).

Recidivism is another common consequence of incarceration in the U.S. prison system. According to the National Institute of Justice, recidivism “refers to a person's relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime” (National Institute of Justice, 2014, para. 1). According to the National Institute of Justice, a study conducted in 2005 found that “within three years of release, about two-thirds (67.8 percent) of released prisoners were rearrested. Within five years of release, about three-quarters (76.6 percent) of released prisoners were rearrested” (2014, para. 2). Recidivism rates are disparate across races (Hartney & Vuong, 2009). According to the Hartney and Vuong (2009), African Americans are more likely to recidivate than Hispanic or White individuals.

Incarceration is a social issue that is deeply entrenched in our prison system and, because of racial disparities perpetuated by laws like the Anti-Drug Abuse Act, have had a profound impact on African American communities. By understanding the goals, effects, and implications of the Fair Sentencing Act and the Anti-Drug Abuse Act, social workers can better address issues involving incarceration by advocating for changes in policy that would adequately address these issues.
This policy analysis will compare and contrast the Anti-Drug Abuse Act with the Fair Sentencing Act, focusing on the myths underlying the laws, the political interest that underlies these laws, and the impact these laws have on individuals who use crack cocaine, especially African American users. This analysis will then provide solutions to better address the issue of crack cocaine use and the racial disparity in sentencing that the Anti-Drug Abuse Act helped create and the Fair Sentencing Act has failed to adequately address.

**The David Gil Policy Analysis Framework**

This policy analysis for the Anti-Drug Abuse Act of 1986 and subsequent Fair Sentencing Act of 2010 is guided by a modified version of David Gil's (1970) social policy analysis framework (see Table 1). This framework is based on the idea that,

Social policies are concerned with the right ordering of the network of relationships between men and women who live together in societies, or with the principles which should govern the activities of individuals and groups so far as they affect the lives and interests of other people. (Gil, 1970, p. 413)

The Gil framework views social policies as both caused by the existence of certain statuses and relationships within society and as perpetuating and governing these relationships. This framework guides this analysis of the Anti-Drug Abuse Act and the Fair Sentencing Act to help examine the impact of these acts and the future of the “War on Drugs.” Several aspects of the Gil framework can be incorporated into this analysis. First, the social problems of crack cocaine usage, racially disparate sentencing, and society's reaction to crack cocaine usage can be compared during the conception of both the Anti-Drug Abuse Act and the Fair Sentencing Act. Through this comparison, an
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analyst can evaluate how social values and pressures contributed to these policies. Next, the effects of each of the Acts can be compared to evaluate their effectiveness and societal impact. Finally, the Gil framework can guide an analysis in how crack cocaine laws can be improved and reframed to eliminate the dangerous effects of drug usage and to solve issues involving disparate sentencing.

Table 1

*Adapted Gil Framework*

<table>
<thead>
<tr>
<th>Framework Component</th>
<th>Description of Component</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part one: History and background</td>
<td>Explores the history behind the two policies including the history of the Sentencing Commission at the time shortly before each of the two acts were signed into law.</td>
</tr>
<tr>
<td>Part two: Forces and political interests surrounding each of the acts</td>
<td>Explores the politics surrounding each of the laws, the public interest in the creation of each of these laws, and determines how societal hierarchy, political and public pressures led to the creation of both policies.</td>
</tr>
<tr>
<td>Part three: The content and value premise of each policy</td>
<td>Explains the policy objectives, and value premise underlying the policy objectives of both policies. Explores how these values are both perpetuated by and perpetuate societal hierarchy and values.</td>
</tr>
<tr>
<td>Part four: Whether the policies accomplished their intended goals</td>
<td>Explores the intended “interactions... between the policy and other components of the system of social policy [and] the legal system” (Gil, 1970, p. 425). Specifically, this section examines whether the policies accomplished their goals.</td>
</tr>
<tr>
<td>Part five: Exploring unintended consequences</td>
<td>Examines the unintended effects of the policies. Reflects on how the unintended consequences relate to societal values surrounding the social issues. Provides some solutions to both policies’ unintended consequences. Examines how crack cocaine laws themselves can be changed and how values surrounding the criminal justice system in general can be adjusted to solve the stated social issues.</td>
</tr>
<tr>
<td>Part six: Where we go from here</td>
<td></td>
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</tbody>
</table>


History and Background

The Gil framework emphasizes that understanding context is important to understanding a policy. Because both the Anti-Drug Abuse Act and the Fair Sentencing Act principally concern crack cocaine sentencing, this section will provide background information about the emergence of crack cocaine. Furthermore, this section will explain the history behind the United States Sentencing Commission, which was an agency involved in the development of both the Anti-Drug Abuse Act and the Fair Sentencing Act as well as involved in important research into the effects of these laws (see Table 1).

The Emergence of Crack Cocaine

In the mid-1980s, during the beginning of the United States pronounced “War on Drugs,” a new method of “packaging” cocaine was popularized in urban areas throughout the United States (Vagins & McCurdy, 2006). According to Vagins and McCurdy (2006) in their analysis of the history and effect of the ADAA, producers would heat a mixture of powder cocaine, water, and baking soda to produce a hard material, like a rock, which became known as “crack”. Crack cocaine became popular in inner-cities because it was widely available and significantly less expensive than powder cocaine (Vagins & McCurdy, 2006). There is also racial disparity in the use of crack versus powder cocaine. Vagins and McCurdy write “because of its relative low cost, crack cocaine is more accessible for poor Americans, many of whom are African Americans. Conversely, powder cocaine is much more expensive and tends to be used by more affluent white Americans” (2006, p. i). Crack cocaine’s emergence was associated with several serious problems in inner cities such as growing violence, an increase in juvenile involvement in
drug trafficking, and an increase in women's involvement in drug trafficking (United States Sentencing Commission, 1995).

Public fear of crack cocaine's spread began to grow. In June of 1986, Newsweek magazine declared that crack cocaine was the biggest story since Vietnam and Watergate (Alexander, 2012). This came to a head in June of 1986, when a Maryland basketball star named Len Bias died of an overdose on alcohol and what the public assumed to be crack cocaine. Soon after, it was discovered that Bias actually died on an overdose of powder cocaine, but Congress had already begun to take action by beginning the process of passing the ADAA (Vagins & McCurdy, 2006).

The Emergence of the United States Sentencing Commission

In 1970, Congress became concerned with judges across the U.S. sentencing individuals differently, often for similar or the same crimes. In response, they created the U.S. Sentencing Commission in 1984 by passing the Sentencing Reform Act (Vagins & McCurdy, 2006). The U.S. Sentencing Commission (USSC) serves as "an independent expert panel given the responsibilities of producing federal sentencing guidelines and monitoring the application of the guidelines" (Vagins & McCurdy, 2006, p. 1). After the Sentencing Reform Act, Congress began to pass mandatory minimums under the guidance of the U.S. Sentencing Commission in an effort to reform the criminal justice system and combat inconsistent sentencing.

The Anti-Drug Abuse Act of 1986

This analysis of the Anti-Drug Abuse Act will follow the adapted Gil framework highlighted in Table 1. First, the analysis will look at the forces and political interests surrounding the ADAA's creation. Next, this analysis will look at the actual content of
the ADAA and how it reflects societal values in the 1980s. Finally, this analysis will look to the ADAA’s effects and whether it actually accomplished its goals.

**Forces and Political Interests Leading to the Anti-Drug Abuse Act’s Creation**

The first part of the adapted Gil framework is to evaluate the social pressures and political history behind the Anti-Drug Abuse Act to see how social perception and interaction both guide and are guided by the ADAA. The Anti-Drug Abuse Act was conceived both as a response to the enormous public pressure on Congress to fight drug use and to restructure the justice system to create more consistent sentencing. Public fear of crack cocaine influenced the ADAA’s creation immensely (Vagins & McCurdy, 2006). This fear was fueled, according the Vagins and McCurdy (2006), by a lack of scientific research about the effects of crack cocaine, by public perception of increased violence surrounding crack cocaine, and belief in myths about crack cocaine.

Alexander talks in her book, *The New Jim Crow*, about research evaluating the impact of the media on public perception of crack cocaine. In the early 1980s, media coverage about powder cocaine focused mostly on white users and on recovery. However, by 1985, with the War on Drugs in full swing, media coverage of drug use focused in on non-white, poor crack cocaine users (Alexander, 2012). According to the book,

The Reagan Administration hired staff to publicize the emergence of crack cocaine in 1985 as part of a strategic effort to build public legislative support for the war. The media campaign was an extraordinary success. Almost overnight, the media was saturated with images of black “crack whores,” “crack dealers,” and
"crack babies,"- images that seemed to confirm the worst negative racial stereotypes about impoverished inner-city residents. (Alexander, 2012, p. 5)

With this perception adopted by the public, politicians were able to focus in on crack as a focal point of the War on Drugs.

In an interview on National Public Radio, Eric Sterling, former counsel to the House Subcommittee that drafted the ADAA and current president of the Criminal Justice Policy Foundation, explained the politics behind the ADAA. Republicans had pushed the “War on Drugs” in the early 1980s and had taken the majority away from Democrats in the Senate in 1980 (Connan & Sterling, 2011). As Sterling explains in his interview, the efforts by the Republicans to fund this war scared Democrats; they wanted to look “tough on crime” and “tough on drugs” to try and win back the Senate (Connan & Sterling, 2011). After Len Bias’ death, the Democrats seized their opportunity and quickly drafted the ADAA in the House. According to Sterling, an original goal of the ADAA was to tackle large drug kingpins, but as the bill was drafted, Congressmen from districts like Louisville objected because there was not a lot of drug trafficking in those districts, thus their constituency were less likely to perceive the law as useful. This led to smaller amounts of crack cocaine being targeted by the law (Connan & Sterling, 2011).

Once the bill was passed in the House and sent to the Senate, the Republicans decided that they could not be outdone (Connan & Sterling, 2011). This lead to the Republicans and Democrats trying to outdo each other by making lower amounts of crack more punishable. On October 27, 1986, Ronald Reagan announced that he had signed the ADAA into law by announcing, "The American people want their government to get
tough and go on the offensive... And that’s exactly what we intend, with more ferocity
than ever before” (Boyd, 1986, para. 2).

The Anti-Drug Abuse Act’s Content and Value Premise

The Anti-Drug Abuse Act created a 100:1 ratio of crack cocaine to powder
cocaine sentencing, meaning that someone possessing crack cocaine would receive at
least one hundred times the sentence for having the same amount as someone possessing
powder cocaine (Vagins & McCurdy, 2006). According to the Department of Justice
(DOJ), the ADAA created a three-tier system for mandatory minimums, “(i) penalties
involving 10-year or greater mandatory jail terms; (ii) penalties involving 5-year or
greater mandatory jail terms; and (iii) penalties involving primarily non-mandatory jail
terms” (1987, p. 1). More specifically, category one was reserved for individuals with
either 50 or more grams of crack cocaine or 5,000 or more grams of powder cocaine and
category two was reserved for those with either 5 grams of crack cocaine or 500 grams of
powder cocaine (United States Sentencing Commission [USSC], 1995). The United
States Sentencing Commission identified the reasoning behind this ratio as rooted in a
belief crack cocaine was a more dangerous drug than powder cocaine (USSC, 1995).
Although this bill was initially conceived to tackle drug kingpins, the bill focused on
small amounts of cocaine that were inconsequential to stopping large drug trafficking
rings (Connan & Sterling, 2011).

The ADAA’s focus and content reflect the prevailing views of society during the
mid-1980s. The 100:1 ratio reflects society’s preoccupation with crack cocaine as one of
the most dangerous drugs during the 1980s. The cycle of public fear fueling media
attention to stories involving crack cocaine, which fueled more public fear, led to the
ADAA. Public perception of drug use as primarily an inner-city issue creeping into the suburbs is reflected in the Act’s focus on crack cocaine. This is illustrated by the release of the ADAA being at the same time as the media’s reframing of drug use through the Reagan administration. According to Vagins and McCurdy (2006), the Act reflects public belief in several myths surrounding crack cocaine, specifically about “crack babies,” the idea that crack is more addictive than other drugs, and that crack causes violent behavior, all of which were ideas that were pushed by the Reagan Administration in the few years before the ADAA was made a law. Years later, the USSC and scientific and medical organizations would find that most of these fears and myths were not founded in science. Vagins and McCurdy (2006) explain that all of these beliefs have been disproven by experts who have testified in front of the U.S. Sentencing Commission. For instance, the use of cocaine, whether crack or powder, has the same effect on newborns. Experts have explained that a newborn affected by crack versus powder cocaine are indistinguishable. Similarly, the addictive nature of crack versus powder cocaine are incredibly similar. Furthermore, Congress’ and society’s view that crack cocaine itself caused people to become violent because of the way it affected users physiologically later proved to be unfounded. One study decades after the ADAA stated, “Although Vaughn et al. (2010) found that crack was associated with higher likelihood of violence in bivariable analysis, there was no increased likelihood for violence after controlling for demographics, mood disorders, and other substance use disorders” (Palamar et al., 2015, p. 109).

Although violence did increase after the introduction of crack cocaine into inner-cities, this violence mostly resulted from the drug market attempting to stabilize itself, not because people were becoming violent as a result of the symptoms of crack cocaine.
The Reagan administration’s War on Drugs campaign played into fears that had no basis in reality. When the ADAA was enacted, there simply was not enough research done for medical professionals to understand its actual impact. Rather than encourage communities to remain calm and wait for the facts, politicians enacted the ADAA based on myths and fear. This illustrates Gil’s framework by showing how fear perpetuated the ADAA. The ADAA’s creation reinforced myths surrounding crack cocaine. This stigma became so pronounced that even decades later these myths affected the Fair Sentencing Act despite new access to scientific data.

Another value illustrated in the ADAA was society’s prevailing philosophy about the purpose of the justice system. The ADAA’s solution to public concerns about crack cocaine usage reflect the popular belief held by Americans that harsh punishment was the secret weapon that would win the government the War on Drugs. The ADAA’s focus on punishment rather than rehabilitation reflects society’s definition of effective justice: that by setting strict sentencing guidelines, the government will send those who use or distribute crack cocaine a clear message that it will no longer be tolerated, thus diminish the prevalence of crack cocaine (USSC, 1995).

The ADAA was driven more by sensationalistic media presentation of crack cocaine than scientific reasoning. The only difference between crack and powder cocaine is the packaging, the cost, and the population that society associates with it. The U.S. Sentencing Commission stated in a 1995 report that “Public opinion tends to associate the country’s drug crisis, specifically its perceived "crack problem," with Black, inner city neighborhoods” (1995, p. 34). This reflects societal beliefs during mid 1980s that drugs
primarily consumed in inner-cities by primality individuals in lower socioeconomic statuses are inherently more dangerous to society, even when science shows this is not the case. These beliefs are also shown in the implementation of the ADAA.

**Did the ADAA Accomplish its Intended Goals?**

**The ADAA’s effect on crack cocaine use.**

By examining if the ADAA accomplished its central goals, this analysis turns to the next parts of the adapted Gil analysis, as highlighted in Table 1, and looks to the intended and unintended consequences of the ADAA. In 1995, the United States Sentencing Commission conducted an extensive report evaluating the effectiveness of the ADAA in accomplishing its goals. First, they examined whether the ADAA had curtailed drug use and drug trafficking (USSC, 1995). The USSC compiled data from numerous research organizations to create a broad picture of cocaine usage in the United States in the decade following the ADAA’s implementation. The ADAA determined that from 1988-1992, casual use of cocaine as a whole went down, but use of crack cocaine and heavy use of any form of cocaine remained relatively consistent (USSC, 1995).

Furthermore, despite the implementation of the ADAA, the proportion of 12-year-olds to 17 year olds using crack increased in the 1990s. While it is impossible to say if crack cocaine use would have risen if not for the implementation of the ADAA, crack cocaine usage certainly has not declined, making the ADAA’s success in this area difficult to measure.

**The ADAA’s effect on crack cocaine trafficking.**

During their 1995 report, the United States Sentencing Commission determined, “the 100-to-1 quantity ratio creates anomalous results by potentially punishing low-level
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(retail) crack dealers far more severely than their high-level (wholesale) suppliers of the powder cocaine that served as the product for conversion into crack” (1995, p. iii). Many researchers agree that the ADAA failed in its objective to curtail major crack cocaine trafficking. Vagins and McCurdy (2006) stated, “The Sentencing Commission reports that only 15% of federal cocaine traffickers can be classified as high-level, while over 70% of crack defendants have low-level involvement in drug activity, such as street level dealers, couriers, or lookouts” (p. 4).

The ADAA’s lack of effect on crack cocaine trafficking can be seen as derived from the political backdrop of its creation. Because Democrats were under enormous pressure from their leadership to create a bill that would make them appear “tough on crime” and Republicans were under enormous pressure to not lose the political momentum they had gained from launching the “War on Drugs,” politicians rushed to outdo one another in order to push the ADAA through. This lead them to cave to pressures from politicians representing districts where constituents would be less concerned about the impact of drug trafficking and wanted smaller amounts of crack addressed by the bill. These political forces led those politicians to lose sight of the original intent of the ADAA. Because the amounts addressed by the ADAA were so small, it could not possibly have had a major effect on drug trafficking.

The Anti-Drug Abuse Act’s Unintended Consequences

Racial disparity in sentencing.

One of the issues the ADAA attempted to address was the seemingly random sentencing practices that had been occurring throughout the United States before the Sentencing Reform Act was passed (USSC, 1995). This was perhaps the goal that the
ADAA neglected the most. Although the ADAA was created to effect crack cocaine users as a whole and to make sentences more predictable and even, the racially disproportionate implementation of the mandatory minimums in the ADAA show that this goal was not accomplished. Under the Gil framework, the ADAA’s implementation can be seen as both perpetuating and perpetuated by society’s view of African Americans affected by drug addiction as more dangerous than whites.

Research has substantiated the idea that the ADAA, at worst, promoted racial disparity in sentencing for both powder and crack cocaine sentences or, at best, completely failed to stop it (USSC, 1995; Vagins & McCurdy, 2006). A 1995 USSC report shows a racial breakdown in what races reported the use of either crack or powder cocaine. In 1991, 75% of powder cocaine users were white, 15% were black, and 10% were Hispanic. Similarly, 52% of those reporting crack cocaine use were white, 38% were black, and 10% were Hispanic. However, in 1993, African Americans accounted for 88.3% of crack cocaine convictions and 27.4% of the powder cocaine convictions (USSC, 1995). This trend of disproportionality continued in the years after the ADAA. One study examining the impact of incarceration on individuals and communities explains, “The twenty-first century opened with blacks disproportionately arrested and incarcerated to a greater extent than they were during the Jim Crow 1920s” (Dumont et al., 2012, p. 326). For example, in 2003, despite 66% of crack cocaine users being either White or Hispanic, 80% of those convicted of crack cocaine crimes were African American (Vagins & McCurdy, 2006).
In addition to being targeted more in convictions, African Americans are also more likely to serve longer sentences for crack cocaine use. Vagins and McCurdy (2006) reported

In 1986, before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites. Four years later, the average federal drug sentence for African Americans was 49% higher. In 2000, there were more African American men in prison and jails than there were in higher education, leading scholars to conclude that our crime policies are a major contributor to the disruption of the African American family. (p. ii)

African American women have also been affected by the ADAA. Vagins and McCurdy (2006) report, “African American women’s incarceration rates for all crimes, largely driven by drug convictions, increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period” (p. 3). The data shows a stark disproportionality in African Americans’ drug sentences. Multiple organizations, including the United States Sentencing Commission themselves, have acknowledged the racial disparity in sentencing for crack cocaine.

Though this bill was created to target drug users and traffickers as a whole, the ADAA ended up being implemented against primarily African Americans. The Sentencing Commission in 1995 denied that the disproportionate impact this policy had on African Americans was motivated by racial bias as it is indisputable that there is no provision in the ADAA that creates advertently discriminatory sentencing guidelines, but African Americans still are impacted more than any other racial group by this policy.
(USSC, 1995). Looking at the ADAA through the lens of the Gil analysis shows that, because all policies are influenced by and, in turn, influence social hierarchy and relationships, the ADAA's disparate implementation is indicative of institutional racism. The ADAA certainly failed to accomplish its goal of creating fair, consistent sentencing even across the same type of drug conviction.

**Damage to African American communities.**

The policies created as part of the War on Drugs, particularly crack cocaine laws, were destructive to African American families and communities in a way that is analogous to crack cocaine itself. In *The New Jim Crow*, Michelle Alexander writes, “no one should ever attempt to minimize the harm caused by crack cocaine and the related violence” (2012, p. 51). However, she explains that the United States had multiple choices about policies that they could implement to address this issue and the path they chose was incredibly destructive (Alexander, 2012). In a 2007 report to Congress about cocaine mandatory minimums, the USSC detailed that an expert witness who had testified before the council had stated that in 2005,

> There were more African American men in prison than in college ... one of every 14 African American children has a parent in prison, and 13 percent of all African American males are not permitted to vote because of felony convictions. [The Expert] asserted that the harsh treatment of federal crack cocaine offenders contributes to the destruction of families and communities. (2007, p. B-6)

The Anti-Drug Abuse Act was eventually expanded to allow public housing authorities to immediately evict those who were using or allowed the use of drugs in their homes and to take away federal scholarships for those who struggled with substance abuse (Alexander,
These consequences tore apart African American families just as crack cocaine itself had.

**Mass incarceration.**

The ADAA itself was not the only cause of mass incarceration, but the ADAA and policies like it have contributed to the issue. Alexander (2012) concludes in *The New Jim Crow* that mass incarceration is a complex issue sparked by a number of policies and practices on multiple levels of government. She writes that local government plays a role in mass incarceration. Prosecutorial discretion and policies shielding prosecutors from claims of racial bias, and racial bias with judges all play a role in lengthier prison sentences. Mandatory minimum laws passed around the same time as the ADAA on a federal level in general impacted prison populations. One comprehensive study looks into the effects of mandatory minimums set in the 1980s after the creation of the USSC (like the ADAA) on offenders and incarceration rates. They write, "In fiscal 1992, 38,081 offenders were sentenced under the guidelines. Of these, 16,834 (44%) were convicted primarily of a drug offense" (Vincent & Hofer, 1994, p. 4). They contend that as a direct result of the mandatory minimum laws, low level drug offenders (individuals with no violent record and who have served no prison time) were, "serving an average sentence of 81.5 months and constitute more than one-third of all of the drug violators incarcerated in federal prisons" (Vincent & Hofer, 1994, p. 4). Overall, they conclude, "We know from previous work by the Bureau of Prisons that 70% of the prison growth related to sentencing since 1985 is attributed to increases in drug sentence length" (Vincent & Hofer, 1994, p. 9). Alexander (2012) and other researchers maintain that even though there are other causes for mass incarceration, the federal drug laws during the Reagan
administration, like the ADAA, play a huge role in setting the tone for racially discriminatory practices.

**History and Background of the Fair Sentencing Act**

Just like how the history of the USSC and crack cocaine’s emergence paints important context around the creation of the ADAA, it is important to look at the factors playing a role in the Fair Sentencing Act. Because the FSA, like the ADAA, is reflective of social values and hierarchy, historical context will allow policy analysts to explore how society went from the 100:1 ratio in the ADAA to the lower ratio in the FSA. This section will provide context for the development of the Fair Sentencing Act in 2010, as is outlined in Table 1.

**Pressure from the United States Sentencing Commission to Change Anti-Drug Abuse Act**

Between 1986 and 2010, the Sentencing Commission recommended that the crack to powder cocaine ratio be adjusted multiple times. In 1995, the commission stated, “...Congress' objectives with regard to punishing crack cocaine trafficking can be achieved more effectively without relying on the current federal sentencing scheme for crack cocaine offenses that includes the 100-to-1 quantity ratio” (USSC, 1995, p. xiv). Later that year, the Commission submitted revised sentencing guidelines that created a 1:1 ratio for crack: powder cocaine, which congress rejected just a few months later (USSC, 2015).

The Commission reiterated this recommendation numerous times before the Fair Sentencing Act was finally passed in 2010. In 2007 they stated, “the Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly
undermines the various congressional objectives set forth in the Sentencing Reform Act” (USSC, 2007, p. 8). In 2007, the Commission provided stronger recommendations toward Congress for adjusting mandatory minimums, including focusing on higher quantities of crack cocaine in order to target drug traffickers and repealing the mandatory minimum for simple possession of crack cocaine (USSC, 2007). In the Commission’s 2015 report to Congress, they stated,

The Commission reached this conclusion based on its core findings regarding crack cocaine penalties as they existed before the FSA: they overstated the relative harmfulness of crack cocaine compared to powder cocaine; they swept too broadly and applied most often to lower level offenders; they overstated the seriousness of most crack cocaine offenses and failed to provide adequate proportionality; and their severity mostly impacted minorities. (2015, p. 3)

The Commission ended up specifically recommending a ratio of “no more than 20:1” (USSC, 2015, p. 3).

Changes in sentencing practices before the FSA.

A few changes were made to sentencing guidelines surrounding crack cocaine after the ADAA was implemented, but before the FSA was implemented. One of these was the “Safety Valve” Amendment. In 1994, Congress and the Sentencing Commission worked together to write this amendment into the Violent Crime Control and Law Enforcement Act of 1994. According to the Sentencing Commission, this amendment “would permit courts to sentence certain low-level, non-violent drug offenders below the otherwise applicable mandatory minimum penalty, including crack cocaine offenders”
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(USSC, 2015, p. 6). There are a number of conditions an individual has to meet in order to be sentenced under the “safety valve amendment” including,

- not have more than one criminal history point,
- must not have used violence or weapons,
- must not have been an organizer or leader,
- must not have engaged in a continuing criminal enterprise,
- and must have provided, in a timely manner, all information about the offense to the government. In addition, the offense must not have resulted in death or serious bodily injury. (USSC, 2015, p. 22)

The addition of this safety valve may have marked a shift in values in American society about who “deserved” harsher punishment and who did not. Since policy can be considered an extension of interpersonal relationships throughout society, the adoption of new exceptions to sentencing guidelines could be viewed as a shift of the whole justice system.

Another more major change had to do with the importance of the United States Sentencing Commission sentencing guidelines as a whole. Although when the USSC was created the guidelines were meant to be mandatory, this changed in the mid-2000s. In the Supreme Court cases United States v. Booker in 2005 and Kimbrough v. United States in 2007, the United States Supreme Court found that the mandatory nature of the USSC guidelines violated the Constitution, instead deeming that the guidelines need to be “advisory” (Bjerk, 2017). These decisions weakened the authority of the United States Sentencing Commission and allowed judges to consider mitigating factors in sentencing beyond just what was allowed in the Safety Valve.

The last big change that was made before the Fair Sentencing Act was passed was the United States Sentencing Commission’s guideline change in 2007. The 2007 Crack
Cocaine Amendment lowered the sentencing range associated with crack cocaine convictions (Bjerk, 2017). Although not mandatory, this change may have encouraged a downward trend in drug sentencing lengths (Bjerk, 2017).

**Crack Cocaine Use in the Years Before and Right After the Fair Sentencing Act was Fully Implemented**

Crack cocaine use was beginning to decline a few years before the Fair Sentencing Act, starting in 2008 (USSC, 2015). This is true for both age groups over and under 25. However, there was still a perception about the racial demographics of crack versus powder cocaine users.

In 2015, a group of researchers conducted a study of 154,328 individuals in the United States about their use of cocaine, their arrest history, and their demographics in order to create a picture of the demographics surrounding crack cocaine use. When examining the data, the researchers noted that on the surface there were racial disparities in reported cocaine use. When one combines both types of cocaine, whites are more likely to report lifetime use than African Americans or Hispanics, but the rate of those reporting use in the past year is about even for all three racial groups (Palamar et al., 2015). African Americans are more likely than Whites or Hispanics to report both lifetime crack cocaine use and crack cocaine being used in the past year, as was the perception of many politicians and large groups of people in the United States. However, the perception that race plays a role in the likelihood of drug use has been shown by researchers to be incorrect (Palamar et al., 2015).

In particular, Palamar et al. (2015) highlight a variety of other factors that play a role in crack and powder cocaine use in the years immediately before and immediately
after the Fair Sentencing Act. Some of these factors include: age, employment, residence, income, field of work, the amount of time a person works each week, and education level (Palamar et al., 2015). For instance, Palamar et al. found that “Subjects who were older, employed, resided in cities, or reported government assistance were at higher odds for use of each form of the drug” (2015, p. 110). They also found that, “Highest family income was associated with increased odds of powder cocaine use, but any income >$20,000 was associated with reduced odds for crack use” (2015, p. 110). In terms of education level, “having a high school diploma or some college were associated with increased odds for lifetime powder cocaine use, but high school and college graduates were at low odds for crack use” (Palamar et al., 2015, p. 110). African Americans were only at a higher risk when other socioeconomic factors were not controlled for, “Therefore, it appears that blacks are in fact at higher risk for crack use and associated outcomes, but this may be driven by socioeconomic factors—suggesting that SES may be a fundamental cause of racial disparities in crack use” (Palamar et al., 2015, p. 113).

The broad conclusion that crack is an “African American Drug” paints an ominous picture about the social context in which the FSA was adopted. Like the Anti-Drug Abuse Act, beliefs about the dangers of crack cocaine seemed to be consistent despite wide scientific appeal that crack and powder cocaine are ultimately the same. It is impossible to say how deeply racial stereotypes and misinformation affected the Fair Sentencing Act considering the wealth of information people had to the truth, but like with the Anti-Drug Abuse Act, it almost certainly played a role in the Fair Sentencing Act’s avoidance of creating totally even sentences for crack and powder cocaine users.
The Fair Sentencing Act of 2010

In analyzing the Fair Sentencing Act, the researcher will utilize the same structure based on the adapted Gil framework (1970) that was used to analyze the Anti-Drug Abuse Act (see Table 1). Just like with this paper's analysis of the ADAA, the analysis of the Fair Sentencing Act will first look to the historical changes and context that prompted Congress to pass the Fair Sentencing Act, paying attention to changing social values that drove a change in sentencing structure and the social values that had not changed since the Anti-Drug Abuse Act. Then, this analysis will look at the content of the Fair Sentencing Act and the values it reflects. Finally, this analysis will look to the effects the Fair Sentencing Act had on the justice system and whether the Fair Sentencing Act fulfilled its goals.

Forces and Political Interests Leading to the Fair Sentencing Act's Creation

Shifts in public opinion surrounding drug use.

Under the Gil analysis, the first step this analysis takes in evaluating the Fair Sentencing Act and comparing it to the ADAA, is looking at the political motives and interests behind the Fair Sentencing Act. The interests behind any policy, according to Gil, lie in public perception and interpersonal relationships (Gil, 1970). Gallup polls show a change in public perception of drugs and the "War on Drugs" between 1986 and 2010. For example, Gallup polls show a huge shift in public opinion about marijuana with only 23% believing it should be legalized in 1985, but 64% believing it should be legal in 2017 (Gallup, 2017). Although neither the Fair Sentencing Act nor the Anti-Drug Abuse Act concern marijuana laws, this marks a trend of public perception becoming more skeptical of the "War on Drugs" in general. This trend can be seen most clearly in
the decade before the Fair Sentencing Act, as changes in sentencing policy began to shift. According to Gallup, in 2000, 43% believed that drugs were a serious problem in the United States. This number dropped to 35% when the 2007 Crack Cocaine Amendment was written by the USSC and remained at 35% in the year before the Fair Sentencing Act was passed (Gallup, 2017). The Pew Research Center also details interesting racial trends in public opinion surrounding drug use. According to them, in the early 1990s African Americans were more likely to be concerned about the impact of drugs in their own neighborhoods whereas whites were less likely to be concerned about this same issue. These statistics flipped around in the late 1990s and early 2000s, with more whites seeing drugs as an issue that affects their own communities instead of just other parts of the country (Gallup, 2017; Pew Research Center, 2014).

In addition, public opinion about drug laws has substantially shifted. According to the Pew Research Center in 2014, “More than six-in-ten (63%) say that state governments moving away from mandatory prison terms for non-violent drug crimes is a good thing, while just 32% say these policy changes are a bad thing. This is a substantial shift from 2001 when the public was evenly divided (47% good thing vs. 45% bad thing)” (2014, para. 11). Also, since 2001, individuals have dramatically shifted in their thinking about prisons, believing that eliminating mandatory prison time was good. The groups that are more likely to have reservations about these shifts are older Americans and Republicans (Pew Research Center, 2014).

This is a stark change in public opinion from the Reagan days, where the Republicans won the Senate with their “tough on crime” policies. It makes sense given this shift in public opinion that sentencing practices would also shift. But just like with
the era of the Anti-Drug Abuse Act, the policies and public opinion feed off each other. The media coverage and political pressure about the original crack outbreak fueled public pressure for tougher drug laws, which then fueled the creation of laws so disparate they could only be justified by emotion and public fear. Similarly, under the Gil analysis one can conclude that the Fair Sentencing Act was created from this same force of politics and public interest colliding. Agencies like the United States Sentencing Commission and the ACLU pushing for fairer drug laws and public opinion shifting based on information from those agencies certainly were forces that drove the FSA’s creation. Then, political rhetoric promising to make those changes fueled a greater passion to reform the criminal justice system. This is exemplified by the political rhetoric surrounding the shift in drug laws in the early 2000s.

Political interest and pressure.

The change in public opinion surrounding drug laws was punctuated by a change in political focus and politicians’ statements. During Barack Obama’s presidential bid in 2008, he raised the issue of racism and injustice in the U.S. justice system throughout his campaign. According to Obama’s “Blueprint for Change,” distributed during his first election, he stated “African Americans and Hispanics are more than twice as likely as whites to be searched, arrested, or subdued with force when stopped by police. Disparities in drug sentencing laws, like the differential treatment of crack as opposed to powder cocaine, are unfair” (Obama, 2008, p. 49) and vowed to change these while in office. Obama’s emphasis on reforming the criminal justice system undoubtedly captured the attention of the public, which eventually created enough pressure that Congress acted.
Senate Democrats first introduced the Fair Sentencing Act in late 2009. According to an author of a 2017 evaluation about the effects of the FSA, “A primary goal of this legislation was to lessen the harshness of sentences for crack cocaine offenders and decrease the sentencing gap between crack defendants and powder cocaine defendants” (Bjerk, 2017, p. 370). Lawmaker’s statements at the time acknowledge the racial disparity in sentencing at play, attributing this to the crack cocaine sentencing structure before 2010. The Democratic Whip at the time stated, “The sentencing disparity between crack and powder cocaine has contributed to the imprisonment of African Americans at six times the rate of whites and to the United States' position as the world’s leader in incarcerations” (Johnson, 2009, para. 3). The Fair Sentencing Act, according to Alexander (2012), originally would have equalized the sentencing ratio between crack and powder cocaine. However, during the markup in the Senate, Republicans, whose political base had been warier of changes to the sentencing scheme and more in favor of the traditional tough-on-crime-approach, insisted that the sentences not be completely proportional, so as a compromise the sentencing ratio was lowered to 18:1 (Alexander, 2012). The end result passed with bipartisan support in Congress. Politicians presented this law to the press as the start of a new era in sentencing reform. One democratic senator stated, “After more than 20 years, the Senate has finally acted on legislation to correct the crack-powder disparity and the harm to public confidence in our justice system it created” (Bjerk, 2017, p. 373). Directors of human rights organizations and civil rights groups praised the Fair Sentencing Act as a policy that will restore justice to the American criminal justice system (Bjerk, 2017). This was markedly different from the rhetoric surrounding the Anti-Drug Abuse Act in the 1980s, which was focused on how
drugs were damaging American communities and had a very “tough on crime” standpoint. The change in rhetoric surrounding sentencing is indicative of larger societal shifts in thinking about crime and criminal justice reflected by the public opinion polls over the early 2000s.

The Fair Sentencing Act’s Focus and Value Premise

According to the Department of Justice, the FSA made a number of changes that directly adjusted the sentencing practices originally laid out in the ADAA (Grindler, 2010). Most dramatically, the Fair Sentencing Act reduced the 100:1 ratio laid out by the ADAA to 18:1. The FSA, according to the memo from the Department of Justice, eliminated mandatory minimums for simple possession charges and increased fines for major drug trafficking crimes (Grindler, 2010). The Act also directs the U.S. Sentencing Commission to make appropriate changes to sentencing guidelines reflecting the changes in drug trafficking offenses as well as increase guidelines for offenses where there are other aggravating factors such as if the offender is distributing drugs to minors (Grindler, 2010). These changes did not affect every level of offender. According to researchers, “The FSA changed the mandatory minimum sentences only for crack defendants convicted for quantities between 0.005 kilograms to 0.028 kilograms and those convicted for quantities between 0.05 kilograms and 0.28 kilograms” (Bjerk, 2017, p. 377). In other words, those who are convicted for having between 0.029 and 0.049 kilograms of crack cocaine were not affected by the FSA’s implementation. Although other factors - such as the 2007 Guidelines Amendment- may have impacted these individual’s sentences, the FSA itself would not.
The fact that the sentencing ratio was not lowered to be 1:1 could be viewed as a sign that the FSA failed its objectives in its very language since the FSA was conceived in order to create clear and consistent sentencing guidelines. Although public opinion was shifting from a position of being tough on crime to rehabilitation, this was not entirely reflected in the Fair Sentencing Act. Congress’ refusal to shift to a 1:1 ratio marks underlying reservations from the American public to accept the widely held scientific understanding about the dangers of crack cocaine being almost identical to those about powder cocaine. The racist hyperbole about “crack babies,” “crack whores,” and “crack dealers” that became prevalent during the 1980s had left a stain on the American Justice System that the Fair Sentencing Act failed to wash away.

Did the Fair Sentencing Act Accomplish its Intended Goals?

The Gil framework emphasizes the importance of distinguishing intended and unintended consequences as part of analyzing the effects of various policies. Like the Anti-Drug Abuse Act, the Fair Sentencing Act led to a variety of both intended and unintended results. This can be compared with the results of the ADAA to help evaluate the overall changes in society’s values regarding drug sentencing and see if racism has played more or less of a role in sentencing decisions. However, there are various evaluations about both the effectiveness of the FSA and what other factors may have impacted the effectiveness of the FSA.

Changes in crack cocaine use.

Palamar et al.’s (2015) study about crack cocaine use and the demographics surrounding it was conducted using information in the three years before and the year after the FSA’s full implementation. Observing national trends since then can help policy
analysts to determine whether the Fair Sentencing Act may have impacted long term use of crack cocaine. The National Institute of Drug Abuse (NIDH) has conducted research throughout the years to track crack cocaine use trends. According to the NIDH, in 2017 more 8th, 10th, and 12th graders reported more powder cocaine use than crack cocaine use (NIDH, 2017a). In fact, for all three age groups from 2014-2017, lifetime use for powder cocaine is at least .5% higher in those age groups. For 12th graders, more than double the amount who reported crack cocaine use reported powder cocaine use each year from 2014-2017. For all three of these age groups, lifetime use of crack cocaine has declined each year, except for 12th graders. In 2016, 1.4% of 12th graders reported lifetime use of crack cocaine and 1.7% reported lifetime use in 2017. Powder cocaine has had similar trends for all three age groups, with 3.7% reporting use in 2016 and 4.2% reporting use in 2017 (NIDH, 2017a).

The impact of crack cocaine on juveniles played a significant role in the sentencing disparity originally, but currently more juveniles use powder cocaine than crack cocaine. Although it is impossible to know if these numbers would have declined without the Fair Sentencing Act or if the FSA had any impact on this, some may take this as evidence that the shift in policy, in general, in the past decade has helped to curb juvenile use of crack cocaine. However, it highlights the contradictory nature of the FSA as time goes on. The FSA was created to curb drug use and promote fair sentencing. Despite both drugs being proven to be chemically similar in how they affect behavior and addiction, Congress still continues to promote disproportionate sentencing for crack under the premise that it is more of a risk to society and, more specifically, to teenagers and children. Perhaps the current evidence of powder cocaine use being consistently
higher for those age groups serves as a sign that the focus of the Fair Sentencing Act on crack cocaine more than powder cocaine is misguided.

In addition to the data on juvenile’s use, the NIDH also provides data on general use of crack cocaine on adult age groups. The rate of crack and powder cocaine use individuals over 26 has decreased from 2015-2016, but, like with juveniles, powder cocaine is much more prevalent in this age group in general (NIDH, 2017b). Specifically, 4% of individuals reported using crack cocaine in 2016, but 16% reported using powder cocaine. This once again shows a dissonance between the FSA’s emphasis on crack cocaine and the actual prevalence of crack versus powder cocaine.

**Changes in crack cocaine sentencing and convictions.**

The most comprehensive report on the Fair Sentencing Act comes from the 2015 U.S. Sentencing Commission report (Bjerk, 2017). The USSC reported about the effects of the FSA on crack cocaine use in general. Although there was already a decline in sentence length before the FSA, this decline became steeper after the FSA. According to the USSC, “4,730 crack cocaine offenders were sentenced in 2010, and 2,366 crack cocaine offenders were sentenced in 2014” (USSC, 2015, p. 11). This downward trend happened in concurrence with the rate of crack cocaine use continuing to decrease after the FSA as well. The report also noted that “Although they are responsible for a somewhat larger quantity of drugs, crack cocaine offenders sentenced after the FSA are not, on average, more serious as measured by drug quantity” (USSC, 2015, p. 13). In terms of the types of crimes crack cocaine offenders were being punished for, after the FSA these offenders were “slightly more likely to have organized, led, managed or supervised others in the offense than those sentenced before the FSA” (USSC, 2015, p.
However, it is rare that crack offenders before and after the FSA are prosecuted as involved with others in their offenses.

**Changes in prison population.**

In terms of the prison population, the USSC concluded, "Based on this difference, the Commission estimates that the FSA will result in a savings of 15,320 bed-years to the Bureau of Prisons" (USSC, 2015, p. 26). They also found that many individuals had reduced sentences under the USSC’s retroactively applied guidelines, though the FSA itself is not retroactive. The Commission writes, “As of December 2014, 6,880 crack cocaine offenders had received reduced sentences; the Commission estimates that these reductions will result in a savings of 14,333 bed-years to the Bureau of Prisons” (USSC, 2015, p. 26). The Sentencing Commission believes that the FSA and their own retroactive application of their guidelines have curbed the effects of mass incarceration.

**Changes in racial disparity.**

There is evidence the Fair Sentencing Act failed to have much of an impact on the racial disparities evident in sentencing practices. This is true both for individuals being convicted and the length individuals are sentenced. The Sentencing Commission found that after the FSA,

- male offenders continued to make up the large majority of crack cocaine offenders.... The race and ethnicity of crack cocaine offenders was also largely unchanged after the FSA; both before and after the FSA, more than three-quarters of crack cocaine offenders were Black. The next-largest group of crack cocaine offenders continued to be Hispanic offenders, with White offenders making up a slightly smaller percentage. (USSC, 2015, p. 12)
Even given the racial differences in crack cocaine use, sentencing is still vastly disproportionate with 89% of those convicted for trafficking offenses being African American (Palamar et al., 2015). Bjerk's (2017) report also notes sentencing lengths are disproportionate across race, stating

> The USSC report also finds that eligible black defendants are more likely to receive a sentence consistent with the mandated sentence than are white or Hispanic defendants. While the USSC study suggests that part of the reason black defendants were more likely than defendants of other races to receive a sentence consistent with the mandatory minimum might be because they were more likely to have substantial criminal records, making them ineligible for safety-valve relief, they did not explicitly analyze this issue. (Bjerk, 2017, p. 375)

This means although the sentencing disparity gap between African Americans and Whites has narrowed, African American communities are still disproportionately affected by the consequences of incarceration that Dumont et al. (2012) outlines.

From the information given by the U.S. Sentencing Commission and other organizations, it is clear that racial disparity still exists in sentencing despite the FSA. The Fair Sentencing Act has failed to eliminate the sentencing disparities that were exacerbated by the ADAA. Under the Gil analysis, the persistent racism in the implementation of the FSA can be viewed as an extension of racism in society. The racist implementation of the mandatory minimums set out in this law and the mandatory minimums themselves perhaps having racial motivations because of their focus on crack cocaine, are a reflection of society as seeing African Americans as more dangerous, more likely to reoffend, or less likely to be rehabilitated. Although the Fair Sentencing Act
attempts to break away from this trend, it ultimately failed, though one could argue that
the FSA is less at fault for this than its implementation. The legislative branch of the
federal government can only exert so much control over the judicial branch and can never
really eliminate prosecutorial discretion. One could argue that the goal of the Fair
Sentencing Act to eliminate racial disparity in sentencing was inevitably going to fail
because the FSA was only a response to growing public concern about inequality in the
criminal justice system without any actual leverage to solve the issues it sought to
address.

**Overall effectiveness according to the USSC.**

After conducting their analysis of the Fair Sentencing Act in 2015, the United
States Sentencing Commission outlined the changes that had and had not come from the
Fair Sentencing Act based on their research. They ultimately,

did not find a substantial change in the seriousness of crack cocaine offenders
after the FSA as measured by drug quantity, weapon involvement, function
performed, role in the offense, safety valve application, or criminal history
generally. The Commission did find an increase in crack cocaine offenders
sentenced as Career Offenders [individuals with two or more prior convictions for
drug trafficking, violent crimes, or both], and found that most of this increase was
concentrated among crack cocaine offenders with lower drug quantities. (USSC,
2015, p. 38)

Despite the lack of progress in those areas, the commission did conclude that, “FSA
reduced the disparity between crack and powder cocaine sentences, reduced the federal
prison population, and has resulted in fewer federal prosecutions for crack cocaine”
Although the Sentencing Commission vouches for the effectiveness of the Fair Sentencing Act, many critics including Bjerk (2017) point out that the Act may not have been as effective as the USSC painted it to be.

Other interpretations of the Fair Sentencing Act’s effects.

A 2017 research article examined the United State Sentencing Commission’s claims that the Fair Sentencing Act resulted in sentencing reductions and fewer crack cocaine prosecutions. Bjerk (2017) argues that it is not enough to compare the current average sentence of a crack cocaine user to the sentencing before the Fair Sentencing Act and then argue that the Fair Sentencing Act must have caused the change because the typical criminal history of crack defendants may be changing, leading to less harsh sentencing, and other policies may be impacting sentencing. Bjerk set out to analyze if there were other factors that affected the change in sentencing practices after the Fair Sentencing Act was passed. The study used an algorithm controlling for other factors that may impact sentencing other than the FSA itself using data pulled from 2009-2012 from the annual Monitoring of Federal Criminal Sentences datasets. This data was collected from people who had been convicted of crack, cocaine, or meth, but only looked at people who were convicted of the crack cocaine quantities that the FSA would have impacted. Bjerk looked at sentencing trends for powder cocaine, crack cocaine, and Meth (which was a drug that was unaffected by the Fair Sentencing Act or the sentencing changes in 2007). He found that crack cocaine sentencing that would have been affected by the Fair Sentencing Act as well as powder cocaine sentencing were falling a few years before the Fair Sentencing Act was implemented. This trend is true, according to Bjerk, for both individuals with and without criminal history. Since powder cocaine sentences
were not affected by the Fair Sentencing Act and since the Fair Sentencing Act would have a bigger impact on those with a criminal history (who would not qualify for the Safety Valve), this signals that other factors may have been causing drug sentencing in general to drop, not just crack cocaine (Bjerk, 2017).

In order to evaluate what other factors may have impacted these declines, the author used data going back to 2002 to see where these shifts started. According to that data, “other than a slight uptick in 2009, the mean sentence length for crack has been falling from 2007—the year of the Kimbrough decision and the crack Amendment” (Bjerk, 2017, p. 385). Bjerk (2017) determined, based on the data, that the Supreme Court decisions making the USSC guidelines advisory and the sentencing amendment in 2007 played a large role in the downward trend of sentencing length. Furthermore, Bjerk determined there was no evidence that the Fair Sentencing Act accelerated this downward trend (2017).

Although skeptical of the FSA’s actual impact on sentencing, Bjerk emphasizes that the FSA undoubtedly had some impact on sentencing length. Specifically, “in the absence of the FSA, the mandatory minimums may have impeded the downward trend in sentencing for crack offenders from continuing” (Bjerk, 2017, 387). Bjerk states that while there is no evidence suggesting prosecutorial behavior shifted dramatically as a result of the Fair Sentencing Act, judges and prosecutors undoubtedly had more control over sentencing after the Fair Sentencing Act. However, this could be a double-edged sword because prosecutors could also be less likely to use their discretion to invoke the Safety Valve Amendment since the sentences were lowered as a result of the FSA (Bjerk, 2017). But in the USSC’s report, they found no substantial change in the number of
individuals who were being sentenced under the Safety Valve Amendment before and after the Fair Sentencing Act (USSC, 2015).

Overall, Bjerk concluded the Fair Sentencing Act did not have much of an impact on sentencing. Rather, "it appears that changes in both the structure and implementation of the USSC sentencing guidelines in the mid-2000s allowed prosecutors and/or judges to act on their preferences for more leniency with respect to sentencing drug defendants, particularly crack defendants" (Bjerk, 2017, p. 394).

The Fair Sentencing Act's Unintended Consequences

The Gil analysis emphasizes the importance of looking at intended versus unintended consequences of a policy. The Fair Sentencing Act’s language indicates an intent to shift focus away from minor possession offenses to larger trafficking offenses. The shift in the sentencing ratio also reflects an intent to even out sentencing for powder and crack cocaine. Finally, the language of politicians who played key roles in creating the law indicates that the law was meant to address racial disparities in sentencing. The Act certainly played a role in reducing the length of sentencing and perhaps the number of those using crack cocaine, which were the intended consequences of the Act, but the FSA also had potential unintended consequences in its implementation.

One could argue that by continuing to reinforce the idea that crack cocaine is substantially more dangerous than powder cocaine through the uneven sentencing ratio, the Fair Sentencing Act contributes to the increase in younger kids using powder cocaine because it takes away from the public's perceptions of the dangers of powder cocaine and takes lawmaker's attention away from controlling powder cocaine. However, the main
issues with the Fair Sentencing Act are not with its unintended consequences, but in the goals it did not accomplish and the issues it ignored.

The FSA did not necessarily have as many unintended consequences as the ADAA, but there were many goals that the FSA did not obtain. There is little evidence to support, according to Bjerk (2017), that the FSA had a major impact on sentencing practices nor is there any evidence that the FSA helped to eliminate racial disparities in drug sentencing (Bjerk, 2017; USSC, 2015). The FSA’s concentration on lower drug quantities (though they may have been higher than the ADAA) once again led the law to have little impact on drug trafficking (USSC, 2015). Furthermore, the Fair Sentencing Act’s continued reliance on unfair mandatory minimums and the derived emphasis on incarceration rather than rehabilitation fails to address many of the issues embedded in the U.S. prison system and cause individuals to reoffend after being let out of prison. The Fair Sentencing Act may have lowered the sentencing ratio from 100:1 to 18:1, but it did not address how the prison system deals with those affected with drug addiction to curb recidivism. Like the ADAA, the Fair Sentencing Act focused on “punishment” instead of “rehabilitation” and failed to create a system to prevent the cycles of incarceration that Dumont et al. (2012) explains plagues many communities where incarceration is prevalent.

Another major area that the Fair Sentencing Act failed to address was those who had been subjected to the unfair 100:1 sentencing ratio before the FSA was passed. Although the United States Sentencing Commission retroactively applied their sentencing guidelines, the Fair Sentencing Act itself has not been retroactively applied, meaning that those sentenced under the old guidelines would not always have their sentencing re-
adjusted according to the 18:1 ratio (Grindler, 2010; USSC, 2015). In 2012 the Supreme Court ordered the FSA be made applicable to those who were sentenced after the FSA was passed but convicted before it was passed, but the Supreme Court stopped short of retroactively applying the FSA to all those who were sentenced before its passage (USSC, 2015). The ball is in Congress' court to retroactively apply this law and the FSA’s failure to do so despite wide acknowledgement of the 100:1 ratio being unfair was a massive oversight, whether that decision was intentional or unintentional on the part of Congress.

The Fair Sentencing Act and the Bigger Picture

The social issue of racially disproportionate sentencing was not created solely by the ADAA. A combination of federal, local, state, and even prison policies as well as racial bias in judges, prosecutors, and the public at large have created this issue. This is why Gil’s framework asks analysts to look at the bigger picture, stepping away from looking at the impact of the policy and looking to how the policy has worked as a cog in a larger machine to perpetuate and be perpetuated by the existence of a certain social structure (1970). It is important that analysts looking at the Anti-Drug Abuse Act or the Fair Sentencing Act see both of these laws through the lens of this ‘bigger picture.’

Although it can be easy to blame issues like racially disproportionate sentencing on the War on Drugs, and laws like the ADAA certainly contributed to racially disproportionate sentencing, the ADAA and the Fair Sentencing Act are only one of many contributors. Changing cocaine sentencing guidelines will not fully “fix” the issue of racial disproportionality in sentencing, but there are changes that Congress can make to cocaine
sentencing laws to fix issues involving incarceration while still curbing drug abuse and addiction.

**Where We Go From Here**

The final part of the adapted Gil framework, as outlined in Table 1, calls for policy analysts to develop "alternative social policies and alternative policy objectives" (Gil, 1970, p. 425). This section of this policy analysis will follow this part of the Gil framework. This research will explore ways that the FSA can be amended and alternative policy objective and value premises that can be adopted to solve the social issues involving incarceration, racially disparate sentencing, and substance abuse. Although changing the policies surrounding cocaine mandatory minimums will not, by itself, totally solve these social issue, there are ways that the Fair Sentencing Act and its underlying policy objectives can be amended to help mitigate these social problems for individuals sentencing under the FSA.

**Changes in the Policy**

**One to one sentencing ratio.**

One of the major policy changes that Congress should make to the Fair Sentencing Act is reducing the sentencing ratio from 18:1 to 1:1, as was originally discussed when the FSA was created. Many experts connect the disparate sentencing ratio with racial disparity in sentencing. For example, in their analysis, Vagins and McCurdy (2006) emphasize, "the quantities of crack cocaine that trigger federal prosecution and sentencing must be equalized with and increased to the current levels of powder cocaine" (p. 7). Furthermore, in 2011 Porter and Wright recommend creating a 1:1 ratio between the drugs in their report for The Sentencing Project saying,
“Distinguishing between the two drugs for sentencing purposes contributes to racial disparity in prisons and sends a message of disparate treatment within communities of color” (2011, p. 13). Although there is little research that specifically predicts what will happen if a 1:1 ratio is implemented, reducing sentencing length may mean inherently softening the impact of incarceration that African Americans currently disproportionately feel.

Making the sentencing ratio completely even might also impact underlying attitudes. As discussed above, in order to totally eliminate racially disproportionate sentencing, attitudes and racial bias need to change. Vagins and McCurdy and other researchers advocating for a change in sentencing ratios speak of this philosophical idea of fairness, that because crack cocaine is disparate it only contributes to the racism that underlies the presumption about crack cocaine being more dangerous than powder cocaine. This meshes with the Gil framework because if social policies both perpetuate and are perpetuated by the “status quo” of social hierarchy, interrupting this cycle by modifying the 18:1 ratio could help eliminate bias in the U.S. legal system.

**Retroactive application.**

In addition to changing the sentencing ratio, Congress also has the ability to make the sentencing structure in the Fair Sentencing Act retroactive, meaning it could apply to people sentenced under the Anti-Drug Abuse Act. In 2007, the USSC voted to make their 2007 Crack Amendment retroactive, but since the USSC guidelines are advisory only, it did not affect every individual sentenced under the ADAA (USSC, 2015). There are multiple reasons why the sentencing structure laid out by the FSA should be retroactively applied. First, since there was never any medical or scientific reason to justify the
ADAA’s 100:1 ratio in the first place, there is no reason to continue sentencing individuals under those vastly unfair guidelines. Furthermore, since Bjerk (2017) found the FSA itself did not have as much as an impact as the USSC’s change in sentencing guidelines in their 2017 report, it is possible that the FSA would have had more of an impact if, like the USSC’s guidelines, they were retroactively applied.

As previously identified, one of the major issues that comes with incarceration is recidivism. Another possible effect of retroactively applying the FSA would be reduced recidivism in offenders. This is demonstrated best by looking at a United States Sentencing Commission Study on recidivism. After the 2007 Crack Cocaine Amendment was enacted in the USSC’s guidelines, the commission voted to retroactively apply the amendment and, in 2011, conducted a study about how this retroactive application affected recidivism (USSC, 2011). The study found that 56.7% of individuals who were retroactively sentenced did not recidivate compared to 52.1% in the control group (USSC, 2011). In addition to reducing the sentencing, and therefore reducing the impact of incarceration on individuals sentenced under the ADAA, retroactively applying the Fair Sentencing Act could lead to a reduction in recidivism rates for those sentenced under the ADAA.

Alternative Policy Objectives

Gil’s framework asks analysts to review both the content of the policy and its underlying objectives. Since the issues surrounding incarceration are complex, it is important to look at the values and objectives underlying the FSA that could be shifted. The Fair Sentencing Act is a product of societal values and beliefs and the issues
surrounding incarceration can be effectively addressed by changing the values that underlie not only the Fair Sentencing Act, but related legislation.

**Rehabilitation instead of punishment.**

One of the underlying values of the Fair Sentencing Act is the belief in punishment for crack cocaine use. The Act focuses on prison time for simple possession charges as a means of correcting perceived societal wrongs. One way to correct the issues surrounding incarceration is to shift the value underlying many laws like the FSA from one that emphasizes punishment to one that emphasizes rehabilitation. Numerous studies support the idea that rehabilitation works to help improve individual’s lives after being released from prison and reducing recidivism. According to Bosma, Kunst, Reef, Dirkzwager, and Nieuwbeerta, “During the 1980s and 1990s, however, with the introduction of meta-analytic methods, several factors were identified that had a positive influence on recidivism reduction,” and that as a result of this research, many prisons in Europe and North America developed rehabilitation programs to help curb recidivism (2016, p. 1098).

The effectiveness of rehabilitation programs varies program to program, but according to Bosma et al. (2016), “A widely accepted notion in rehabilitation literature is that treatment programs can be effective if they are directed at reducing risk of reoffending” (p. 1100). For example, Daley et al. (2004) write, “there is good evidence that substance abuse treatment can significantly reduce the likelihood of rearrest and reconviction” (p. 70). Specifically, they mention the Office of National Drug Policy estimating that these types of prison-based rehabilitation programs reduce recidivism by approximately 50%. Daley et al.’s (2004) article conducted an analysis of the cost
effectiveness of substance abuse programs in Connecticut. They found that the four “tiers” of the program drastically reduced recidivism and were cost-effective in that they saved the state more money from incarceration than it takes to implement the programs. By implementing legislation that focuses on programs like the ones discussed in Daley et al.’s (2004) analysis, problems associated with incarceration, such as recidivism, could be effectively mitigated in a way that saves the government money.

**Moving away from mandatory minimums.**

Another value that the Fair Sentencing Act is rooted in is a belief in mandatory minimums to eliminate disparities in sentencing. Similar to the idea of punishment, moving away from this value would help mitigate social issues raised by incarceration. In their report, Vagins and McCurdy state that mandatory minimums prevent judges from using proper discretion in drug-related offenses and recommend that they be eliminated (2006). One study by Fischman and Schanzenbach (2012) evaluated the effects of mandatory minimums and the effect of judicial discretion on racial disparities in sentencing. They conclude that allowing judges to have more discretion in sentencing deters racial disparities in sentencing. One reason for this is, “mandatory minimums ...transfer discretion from judges to prosecutors.... Unlike judges, prosecutors are not required to give reasons when they exercise discretion, and their decisions are not subject to significant appellate review” (Fischman & Schanzenbach, 2012, p. 736). They found that other studies concluding that mandatory minimums decrease racial disparities were flawed in that they ignore the difference between judge and prosecutorial discretion. Moving away from mandatory minimums in the Fair Sentencing Act and future
legislation is a clear way to reduce the racial disparity in sentencing for African Americans.

Conclusion

The effects of long-term incarceration have long plagued the United States. Racial disparities in sentencing mean these consequences impact African American communities more than other communities. The Anti-Drug Abuse Act of 1986 created mandatory minimums that led to crack-cocaine users being sentenced at a ratio of 100:1 to powder cocaine users. This ratio was created based on a lack of knowledge of crack cocaine and racial biases about the use of crack cocaine. The Anti-Drug Abuse Act in turn led to individuals being incarcerated for long periods of time and a large disparity in sentencing, with African Americans being sentenced disproportionately more and disproportionately longer than whites convicted of the same crime.

Although the Fair Sentencing Act of 2010 attempted to rectify this injustice, this Act was fueled by the same underlying misunderstanding of crack cocaine, belief in mandatory minimums as a mechanism for weeding out bias, and in punishment versus rehabilitation. As a result of these social values and of political pressure, the Fair Sentencing Act only lowered the federal ratio to 18:1. The Fair Sentencing Act had relatively little impact on recidivism, racial disparity, or the length of defendants’ sentencing.

Ultimately, solving the social justice issues around incarceration, recidivism, and racial disparity in sentencing is more complex than just adjusting federal crack cocaine laws. Underlying values about punishment and rehabilitation need to shift in society as a whole in order to fully solve this issue. The Fair Sentencing Act can be amended to help
this happen, however. Through eliminating the mandatory minimums within it all together, or at least equalizing the ratio, and by retroactively applying the Act, recidivism and racial disparity in sentencing can be curbed. Although making these changes would not fix everything, it would be a step in the direction of ending the United States’ forty-year war on crack cocaine that has negatively impacted so many African Americans’ lives and communities and instead work toward solving issues of incarceration and substance abuse.
References


website


