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# NOTE

## OFFENSIVE DRUG OFFENSES: APPLYING PROCEDURAL JUSTICE THEORY TO DRUG SENTENCING IN THE UNITED STATES AND UNITED KINGDOM

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### INTRODUCTION

Over the past several years, crack cocaine has reemerged in the U.S. media since first drawing major news coverage in 1985.<sup>1</sup> This time, however, the

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public outcry has demanded a decrease in the penalties associated with crack cocaine. The ultimate result, the Fair Sentencing Act of 2010, dramatically reduced the ratio between sentences for offenses involving crack cocaine and those involving powder cocaine, from a 100-to-1 ratio to an 18-to-1 ratio.<sup>2</sup> During the same period, the United Kingdom also revisited its sentencing scheme, seeking to increase penalties for certain drug offenses, including those involving crack cocaine. It implemented these changes through a new guideline effective February 27, 2012.<sup>3</sup> This divergence in policy choices is curious because the countries adhere to the same underlying sentencing theory: retribution. This Note argues that in the United Kingdom, a greater allowance for public participation and the attendant embodiment of that participation in the ultimate sentencing reforms led to a more principled and thus more legitimate sentencing guideline. In the United States, however, public participation has by and large been relegated to the shadows of the administrative notice-and-comment rulemaking process. Accordingly, the sentencing reforms have adhered less to underlying sentencing principles and have been perceived as less legitimate.

By analyzing these sentencing reforms, two lessons are learned: process matters and actors matter. First, process differences go a long way in explaining the divergence between these countries' goals for reform. According to the procedural justice theory, perceptions of fairness in decisionmaking lead to perceptions of legitimacy and, ultimately, acceptance of those decisions.<sup>4</sup> Perceptions of fairness are influenced by such factors as a person's ability to participate and decisionmakers' acknowledgment of that participation.<sup>5</sup> Thus, increasing public participation in decisionmaking increases perceptions of fairness, which in turn create a more legitimate outcome. Increasing public participation also leads to results that adhere more closely to underlying punishment principles. Both results are important when the state is punishing a large proportion of its citizens for criminal offenses.

Second, any discussion of process necessarily involves a discussion of the actors who implement that process. In the United Kingdom, sentencing

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<sup>1</sup> See *infra* Part II.A.

<sup>2</sup> Press Release, Leadership Conference on Civil and Human Rights, Statement by Wade Henderson, President of the Leadership Conference, on the Senate Judiciary Committee's Vote to Amend and Pass the Fair Sentencing Act (S. 1789) (Mar. 17, 2010), available at <http://www.civilrights.org/press/2010/fair-sentencing-act.html>.

<sup>3</sup> SENTENCING COUNCIL, DRUGS OFFENSES: DEFINITIVE GUIDELINE (2012), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Drug\\_Offences\\_Definitive\\_Guideline\\_final\\_\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Definitive_Guideline_final_(web).pdf).

<sup>4</sup> E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 62, 64 (1988) (discussing how fair procedures and "procedural justice" can "promot[e] citizens' satisfaction with their legal experiences and their perceptions of the legitimacy of law and legal authority").

<sup>5</sup> *Id.* at 102-06 (discussing an examination of the "effects of various types of participation on judgments of the fairness of procedures and outcomes").

policies are reformed primarily by the Sentencing Council, which conducts all public consultations.<sup>6</sup> Parliament is largely absent from this process, and any ultimate reforms are set forth in guidelines created by the Sentencing Council rather than Parliament.<sup>7</sup> The United States relies more heavily on Congress to draft sentencing reforms, which maintains its ability to strike down any guideline revisions crafted by the U.S. Sentencing Commission. For example, while many on the Sentencing Commission believe that the sentencing disparity between crack cocaine and powder cocaine should no longer exist, Congress has not yet allowed the Sentencing Commission to end the distinction.<sup>8</sup> Including Congress in the reformation process interrupts the process by which the Sentencing Commission can implement such a change. To be sure, Congress represents the voice of the people and ordinarily we look to it, as the foundation of our representative democracy, to implement needed domestic reforms. Here, however, where Congress has stalled the Sentencing Commission's implementation of public opinion, perhaps less congressional involvement might mean fairer long-term results. This idea is borne out by the events surrounding the Sentencing Commission's amendment to crack-cocaine sentencing ranges in 2007. Congress failed to act on this amendment, thereby allowing the Sentencing Commission to begin the process of reducing the disparate punishment crack-cocaine offenders receive.<sup>9</sup>

The conclusion from these lessons is simple: by selecting the appropriate process to be used and the appropriate actors to become involved, resulting sentencing reform will adhere more closely to foundational sentencing principles. Using procedural justice theory to define an appropriate process entails looking to perceptions of fairness and legitimacy. In the context of sentencing reform, this is the process by which public commentary is encouraged and acknowledged to the greatest degree practicable. In comparing the process and the actors of the United Kingdom and the United States, this Note maintains that the United Kingdom's process of well-publicized public consultation was implemented by a well-suited actor, and thus led to sentencing reforms that maintained fidelity to the country's underlying sentencing principles. The United States' process, however, involved far less public consultation, was implemented by two often-conflicting actors, and ultimately led to sentencing reforms which do not wholly adhere to the country's foundational principles. This Note argues that the United States should aim to mirror the United Kingdom's process of public consultation and place greater responsibility for implementing the sentencing reform process in the hands of the Sentencing Commission. This will lead to guidelines that conform more closely to the country's sentencing principles.

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<sup>6</sup> *Sentencing Guidelines*, SENTENCING COUNCIL, <http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm> (last visited June 21, 2013).

<sup>7</sup> *Id.*

<sup>8</sup> See *infra* notes 120-130 and accompanying text.

<sup>9</sup> See *infra* notes 113-115 and accompanying text.

Part I discusses the foundational principles of Anglo-American sentencing. It sets forth the theory of retribution, which has held sway for several decades as the prevailing theory of punishment. It then discusses the current statutory frameworks in both countries and the sentencing commissions created to implement that legislation through sentencing guidelines. Part I also highlights the commonalities between the countries' sentencing systems, illustrating why the comparison between them is both warranted and useful.

Part II provides an introduction to the current state of drug offense sentencing in the United States and United Kingdom. It begins by briefly describing the history of drug sentencing in both countries, and the calls for reform which led to both countries' most recent sentencing revisions. It discusses the reasons for these reforms, the process by which both countries attempted to craft reforms, and their respective ultimate products. In the United States, Congress attempted to fix the powder-crack cocaine sentencing disparity through passage of the Fair Sentencing Act of 2010. Congress then oversaw the Sentencing Commission's creation of new guidelines. In the United Kingdom, calls for consultation led to a new guideline published on January 24, 2012, by the Sentencing Council.<sup>10</sup> These guidelines were written primarily after obtaining responses to public consultation and after working with interest groups to revise the proposed guidelines.

Finally, Part III sets forth the lessons to be learned from the reforms of the United States and United Kingdom. These lessons – that process and actors matter – lead to the conclusion that the process used in the United Kingdom, implemented through the Sentencing Council, led to a sentencing guideline closely adhering to underlying sentencing principles. American sentencing reform remained stunted, however, due in large part to the process by which Congress and the Sentencing Commission implemented those reforms. This Note argues that the United States should give the Sentencing Commission a greater role in sentencing reform. It concludes with suggestions for how U.S. policymakers can mitigate what is seen by many as an offensive drug offenses policy.

#### I. THE FOUNDATIONS OF ANGLO-AMERICAN SENTENCING

Both the United States and United Kingdom have, through different avenues, settled upon retribution as the proper principle through which to determine sentencing policy. The idea of just deserts, and particularly the public conception of what each offender deserves as punishment, is growing increasingly important in both countries. In the United States the passage of the Fair Sentencing Act of 2010 was a reflection of public sentiment that those who commit crack-cocaine offenses were receiving *more* punishment than they deserved. At the opposite end of the spectrum, the United Kingdom's Sentencing Council issued a call for public consultation with respect to drug

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<sup>10</sup> *News: Sentencing Guideline for Drug Offences Comes into Force*, SENTENCING COUNCIL (Feb. 27, 2012), <http://sentencingcouncil.judiciary.gov.uk/news-stories.htm>.

offenses, in part because the public viewed drug offenders as receiving *less* punishment than they deserved. The following Section briefly explains the theory of retribution. It then describes how both the United States and the United Kingdom shaped a statutory framework to embody this theory, and created sentencing commissions to implement it.

A. *The Theory of Retribution*

Criminal sentencing in the United States and the United Kingdom must be understood in relation to how the traditional Anglo-American criminal justice system approaches punishment on a theoretical level. The general functions of a criminal code are to define the conduct that society deems sufficiently harmful to warrant protection, and to punish such conduct based upon the gravity of the offense and the characteristics of the particular offender.<sup>11</sup> This Note deals primarily with the latter function, to determine how crack-cocaine sentencing in the United States went astray, and why reforms to that sentencing regime have not fully resolved the problem. A proper analysis of these problems must address retribution, the principal theory of sentencing at the heart of punishment in the United States and United Kingdom.<sup>12</sup>

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<sup>11</sup> 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 1, at 1-2 (14th ed. 1978).

<sup>12</sup> There are three other theories of sentencing that have influenced punishment in the United States and the United Kingdom: deterrence, rehabilitation, and incapacitation. First, deterrence is founded upon the utilitarian idea of “balancing the anticipated pleasure from committing a given crime against the apprehended pain from its consequences” and providing just enough punishment to tip the scales toward greater pain than pleasure. *Id.* § 3, at 11. General deterrence theory emphasizes that penalties must be sufficient to discourage potential offenders and the general public from a particular crime. ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 2:2, at 38 (3d ed. 2004). Specific deterrence inflicts punishment to discourage a particular offender from committing other crimes. WAYNE R. LAFAVE, *CRIMINAL LAW* § 1.5(a)(1), at 26-27 (4th ed. 2003). The success of both types of deterrence are predicated upon punishment which is sufficiently certain to result and sufficiently severe that a rational person would opt not to commit a crime. CAMPBELL, *supra*, § 2:2, at 40; TORCIA, *supra* note 11, § 3, at 12-13. Rehabilitation, or reformation, attempts to prevent the offender from committing further crimes “by instilling in the offender proper values and attitudes, by bolstering his respect for self and institutions, and by providing him with the means of leading a productive life.” TORCIA, *supra* note 11, § 4, at 14. Rehabilitation rests on the belief that by identifying the cause behind an offender’s acts, “therapeutic measures can be employed to effect changes in the behavior of the person treated.” LAFAVE, *supra*, § 1.5(a)(3), at 27. While this theory once prevailed in America, in the late 1970s and early 1980s scholars began to see it as a failed premise and relied more heavily on retribution. *Id.* at 1; *see also* S. REP. NO. 98-225, at 38 (1984). The main reason for its demise lies with the prison system: it is extremely difficult to determine when or whether a prisoner is rehabilitated. S. REP. NO. 98-225, *supra*, at 38. The final theory of punishment, incapacitation, holds that society is best protected when offenders are rendered physically unable to commit further crimes. LAFAVE, *supra*, § 2.3, at 42. This theory briefly held sway in America in the early 1970s, as retribution was gaining public support. *Id.* It makes a value judgment by balancing society’s right “not to be physically assaulted” and an offender’s

The theory of retribution developed from the concept of private vengeance, taking hold at a time when the notion of statehood prompted individual states to assume control over social wellbeing.<sup>13</sup> Articulations of this theory assert that retribution is appropriate because “[t]he offender simply *deserved* to be punished,”<sup>14</sup> because punishment “is deserved when the wrongdoer freely chooses to violate society’s rules,”<sup>15</sup> and “because it is only fitting and just that one who has caused harm to others should himself suffer for it.”<sup>16</sup> Although often overlooked or criticized as an approach to punishment in the early decades of the twentieth century, retribution has again become popular under the label “just deserts.”<sup>17</sup>

Notwithstanding its emergence as a dominant theory in American criminal law, retribution “remains vulnerable to criticism.”<sup>18</sup> First, critics argue that retribution is merely the community’s encouragement of “anti-social impulses” by “mak[ing] scapegoats of offenders.”<sup>19</sup> Second, retribution is an inefficient way to take account of an individual offender and his specific crime (or crimes) during sentencing.<sup>20</sup> Critics also point to the theory’s “alleged failure to focus on prospective, pragmatic improvement of society” and its inability to “seriously reflect or reinforce cultural values in light of other more potent modern-day influences over people’s behavior.”<sup>21</sup> Finally, retribution is

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“right to release,” tipping the scale in favor of society’s rights based upon the seriousness, temporality, and certainty of an offender’s recidivism. A.E. Bottoms & Roger Brownsword, *Incapacitation & Vivid Danger*, in *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* 83, 83-84 (Andrew von Hirsch et al. eds., 3d ed. 2009).

<sup>13</sup> TORCIA, *supra* note 11, § 2, at 8 (arguing that although “public retaliation replaced . . . private vengeance,” such state-imposed punishment “still implied vengeance”); *see also* LAFAVE, *supra* note 12, § 1.5(a)(6), at 30 (“[I]t is claimed that retributive punishment is needed to maintain respect for the law and to suppress acts of private vengeance.”).

<sup>14</sup> TORCIA, *supra* note 11, § 2, at 8.

<sup>15</sup> CAMPBELL, *supra* note 12, § 2:5, at 49.

<sup>16</sup> LAFAVE, *supra* note 12, § 1.5(a)(6), at 29 (“[P]unishment . . . is imposed by society on criminals in order to obtain revenge . . .”).

<sup>17</sup> CAMPBELL, *supra* note 12, § 2:5, at 51-52 (“Until the 1970s, most judicial references to retribution were to deprecate or condemn it. . . . [But w]hen retribution was supplemented by the term ‘just deserts’ in the parlance of sentencing reform, a national consensus began coalescing around this rationale.”); LAFAVE, *supra* note 12, § 1.5(a)(6), at 30 (“Although retribution was long the theory of punishment least accepted by theorists, it ‘is suddenly being seen by thinkers of all political persuasions as perhaps the strongest ground, after all, upon which to base a system of punishment.’” (quoting Martin R. Gardner, *The Renaissance of Retribution – An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 784)).

<sup>18</sup> CAMPBELL, *supra* note 12, § 2:5, at 52.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 52-53.

<sup>21</sup> *Id.* at 53.

criticized for its emotional underpinnings, which “sweep aside scientific inquiry into the true nature of crime the law of sentencing.”<sup>22</sup>

B. *Current Sentencing Theory in the United States and the United Kingdom*

Both the United States and United Kingdom have focused their sentencing efforts on retribution.<sup>23</sup> With this emphasis on retribution comes an emphasis on proportionality and uniformity, and each country’s legislature attempted to instill these principles in their respective sentencing frameworks. Importantly, each country’s legislature passed a series of statutes embodying the foundational sentencing principles and created sentencing commissions to implement these principles as consistently as possible.

1. Legislative Embodiment of Sentencing Principles

Congress has expressly recognized the judiciary’s power to sentence criminals convicted by a jury of their peers. This power must, however, be firmly grounded in theoretical principles to avoid arbitrariness. Statutory recognition of this need takes many forms. As early as 1958, Congress recognized the need to promote “uniformity in sentencing procedures”<sup>24</sup> by mandating the formation of “institutes and joint councils for the purpose of studying, discussing, and formulating the objectives, policies, standards, and criteria for sentencing those convicted of crimes and offenses in the courts of the United States.”<sup>25</sup>

Additionally, 18 U.S.C. § 3553(a)(2) sets forth the underlying purposes of American sentencing, which mirror the criminal punishment theories discussed above.<sup>26</sup> While § 3553(a) details a number of principles upon which American sentencing is to be founded, retribution remains the prevailing theory of punishment in the United States today.<sup>27</sup> Indeed, Congress first instructs judges to impose sentences reflecting “the seriousness of the offense,” promoting “respect for the law,” and providing “just punishment for the offense.”<sup>28</sup> This language exemplifies the purposes of retribution – if one major goal of punishment is to promote respect for the law, then we must punish only those who violate society’s laws. Moreover, if another major goal of sentencing is to

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<sup>22</sup> *Id.* at 54.

<sup>23</sup> Alana Barton, *Just Deserts Theory*, in *ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES* 503, 504-506 (Mary Bosworth ed., 2005) (describing the United States’ shift to retribution and its attendant sentencing reforms, and highlighting that “the United Kingdom [] also saw a shift toward a just deserts model of punishment”).

<sup>24</sup> Celler-Hennings Act of 1958, Pub. L. No. 85-725, 72 Stat. 845 (codified at 28 U.S.C. § 334 (2006)).

<sup>25</sup> *Id.*

<sup>26</sup> *See supra* Part I.A.

<sup>27</sup> *See* Andrew Ashworth, *Desert*, in *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY*, *supra* note 12, at 102.

<sup>28</sup> 18 U.S.C. § 3553(a)(2)(A) (2006).

provide just punishment for the offense, then the sentence should be one that gives each offender what he or she deserves.

Second, Congress wished deterrence to be a factor in sentencing, as evidenced by the statute's requirement that judges impose sentences that adequately deter criminal conduct.<sup>29</sup> This mandate allows judges to consider the individual characteristics of a defendant, as well as whether those characteristics are representative of other offenders. By looking to these characteristics, the judge is better able to deter the specific defendant and other potential offenders from committing the same crime in the future.

Third, sentences must aim "to protect the public from further crimes of the defendant."<sup>30</sup> In other words, judges must impose sentences that incapacitate the defendant from committing other crimes. Finally, judges must consider the need to "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."<sup>31</sup> This requirement signals Congress's desire to further rehabilitate offenders. By determining that a defendant needs educational or vocational training, a judge is determining a path for the defendant's reentry into society. Congress carefully limited the goal of rehabilitation, however, by expressly forbidding imposition of a prison sentence solely for purposes of promoting rehabilitation or correction.<sup>32</sup>

With these underlying goals in mind, § 3553(a) details more generally the factors courts must consider when imposing sentences. A sentence must be "sufficient, but not greater than necessary" to achieve and adhere to the congressionally recognized principles and purposes of sentencing.<sup>33</sup> Congress also highlighted "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."<sup>34</sup> These factors illustrate that Congress disapproved of arbitrary sentences, and § 3553(a) was an additional attempt to limit such arbitrariness while still preserving judicial discretion. Congress coupled this attempt with the creation of the U.S. Sentencing Commission (Sentencing Commission), as discussed below. The ultimate product of the Sentencing Commission was a set of sentencing guidelines which focused most acutely on the theory of retribution.<sup>35</sup>

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<sup>29</sup> *Id.* § 3553(a)(2)(B).

<sup>30</sup> *Id.* § 3553(a)(2)(C).

<sup>31</sup> *Id.* § 3553(a)(2)(D).

<sup>32</sup> *Id.* § 3582(a).

<sup>33</sup> *Id.* § 3553(a); *see also id.* § 3553(a)(2) (setting forth the underlying principles and purposes).

<sup>34</sup> *Id.* § 3553(a)(6).

<sup>35</sup> *See* Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 182 (2010) ("The Guidelines control federal sentencing, and retributive purposes dominate the Guidelines.").

In the United Kingdom, the first major modern attempt to define the underlying policies of sentencing was the government's White Paper, *Crime, Justice and Protecting the Public: the Government's Proposals for Legislation*.<sup>36</sup> This White Paper referenced previous policy statements endorsing four sentencing aims – retribution, deterrence, rehabilitation, and incapacitation – by making retribution “the main guiding criterion for deciding the severity of sentence.”<sup>37</sup> Retribution<sup>38</sup> was deemed preferable because judges are better able to base sentences upon the seriousness of criminal acts rather than upon the potential deterrent effects.<sup>39</sup>

With the passage of the Criminal Justice Act in 2003, the government marked a shift toward a “smorgasbord” approach to sentencing.<sup>40</sup> Section 142 of the Act provides the purposes of sentencing, and directs that sentences must comport with those purposes: “(a) the punishment of offenders, (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offenses.”<sup>41</sup> Although “the leading English authorities on sentencing continue[d] to endorse an emphasis on proportionality in imposing criminal sentences,”<sup>42</sup> and the Home Office expressed skepticism with respect to the effect of deterrence, many provisions of the Act “positively . . . encourage[d] sentencers to adjust sentence severity on ground of deterrence or incapacitation.”<sup>43</sup> There were also several provisions in the 2003 Act that reinforced the prior policy's emphasis on proportionality. For example, section 152(2) states that “[t]he court must not pass a custodial sentence unless it is of the opinion that the offence, or the

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<sup>36</sup> HOME OFFICE, CRIME, JUSTICE, AND PROTECTING THE PUBLIC, 1990, Cm. 965 (U.K.); see also Martin Wasik & Andrew von Hirsch, *Statutory Sentencing Principles: The 1990 White Paper*, 53 MOD. L. REV. 508, 508 (1990) (“It has been clear for some years that English sentencing law lacks any coherent rationale.”).

<sup>37</sup> Wasik & von Hirsch, *supra* note 36, at 509 (agreeing with the White Paper's emphasis because “proportionality is the criterion used in everyday life in evaluating the fairness of penalties and – since punishment by its very nature conveys blame – its severity should be allocated according to the blameworthiness of the criminal conduct”).

<sup>38</sup> Retribution can also be understood as proportionality.

<sup>39</sup> Wasik & von Hirsch, *supra* note 36, at 509 (“It is much harder for sentencers to estimate the rehabilitative, incapacitative, or deterrent effects of a penalty – as those effects are largely uncertain, even to those who may profess some expertise in these matters, such as criminologists.”).

<sup>40</sup> Andrew von Hirsch & Julian V. Roberts, *Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions*, 2004 CRIM. L. REV. 639, 640-42 (“A new provision, [section] 142, calls upon sentencing courts to take into account the aims of deterrence, incapacitation and rehabilitation (in addition to [deserved] punishment).”).

<sup>41</sup> Criminal Justice Act, 2003, c. 44, § 142 (U.K.).

<sup>42</sup> von Hirsch & Roberts, *supra* note 40, at 642.

<sup>43</sup> *Id.* at 645.

combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified.”<sup>44</sup> Also, section 153(2) mandates that “the custodial sentence must be for the shortest term . . . that in the opinion of the court is commensurate with the seriousness of the offence.”<sup>45</sup> The net effect of the 2003 Act and its “across-the-board principles” policy had many concerned that the guidelines would be “unlikely to be effective in guiding sentencing choices.”<sup>46</sup>

The pendulum swung back in 2009, however, with the Coroners and Justice Act.<sup>47</sup> This piece of legislation represents the most modern articulation of sentencing policy in the United Kingdom. As discussed below,<sup>48</sup> the 2009 Act set the path for a return to emphasizing proportionality in sentencing through the creation of the Sentencing Council for England and Wales (Sentencing Council).

## 2. Implementation of Sentencing Principles

In 1984 Congress passed the Comprehensive Crime Control Act, including the Sentencing Reform Act.<sup>49</sup> Under the statute, which established the Sentencing Commission as an independent body of the Judicial Branch,<sup>50</sup> the Sentencing Commission was charged with establishing sentencing practices based on three delegated tasks.<sup>51</sup> First, any guidelines must provide for

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<sup>44</sup> Criminal Justice Act § 152(2).

<sup>45</sup> *Id.* § 153(2).

<sup>46</sup> von Hirsch & Roberts, *supra* note 40, at 646.

<sup>47</sup> Coroners and Justice Act, 2009, c. 25, §§ 118-136 (U.K.) (establishing the Sentencing Council and sentencing guidelines, as well as the principles upon which those guidelines should rest).

<sup>48</sup> *See supra* notes 65-70 and accompanying text.

<sup>49</sup> Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 2017 (codified at 28 U.S.C. § 991 (2006)).

<sup>50</sup> 28 U.S.C. § 991(a). The Sentencing Commission and the sentencing guidelines faced constitutional scrutiny when the Sentencing Reform Act of 1984 was challenged under the nondelegation doctrine. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The Court rejected this challenge, holding that “Congress’ delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet [the] constitutional requirements” of the intelligible principle test. *Id.* at 374. Petitioners also challenged the Sentencing Reform Act as a violation of the constitutional principle of separation of powers. *Id.* at 380. Although recognizing that “the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of” separation of powers, the structure of the Sentencing Commission and its mission – to “resolv[e] the seemingly intractable dilemma of excessive disparity in criminal sentencing” – outweighed any of these concerns. *Id.* at 384. The Sentencing Reform Act of 1984 was therefore held constitutional, as was the Sentencing Commission. *Id.* at 412.

<sup>51</sup> 28 U.S.C. § 991(b)(1); U.S. SENTENCING COMM’N, SIMPLIFICATION DRAFT PAPER – THE SENTENCING REFORM ACT OF 1984: PRINCIPAL FEATURES (1996), available at [http://www.uscc.gov/Research/Working\\_Group\\_Reports/Simplification/SRA.HTM](http://www.uscc.gov/Research/Working_Group_Reports/Simplification/SRA.HTM) (reiterating the

sentencing practices and policies conforming to the purposes set forth in § 3553(a)(2).<sup>52</sup> Second, the Commission was to create uniform sentencing policies that prevented “unwarranted sentencing disparities . . . [and] maintain[ed] sufficient flexibility to permit individualized sentences,” thereby providing both fairness and certainty in the sentencing process.<sup>53</sup> Third, the guidelines had to encompass any “advancement in knowledge of human behavior” which reflects on the criminal justice system.<sup>54</sup> Congress also required the Sentencing Commission to measure the effect and efficacy of its policies and practices in meeting the standards of § 3553(a) generally, and § 3553(a)(2) more specifically.<sup>55</sup>

The intended effect of these provisions was to promote honesty in sentencing, meaning that “the sentence the judge gives is the sentence the offender will serve.”<sup>56</sup> The Act was also meant to combat “an unjustifiably wide range of sentences” among defendants with similar criminal backgrounds who committed similar crimes under similar circumstances.<sup>57</sup> Congress highlighted five principles that the Sentencing Reform Act aimed to adhere to: (1) comprehensiveness and consistency in federal sentencing practices; (2) fairness to both offenders and the community in sentences and patterns of sentences; (3) certainty with respect to sentences; (4) availability of a broad range of appropriate sentences from which to choose; and (5) uniformity of purpose at each stage in the sentencing and corrections process.<sup>58</sup>

In the original guidelines, the Sentencing Commission focused on facilitating two aims – following past practice, and allowing for flexibility.<sup>59</sup>

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background of the Sentencing Reform Act and the three underlying principles).

<sup>52</sup> 28 U.S.C. § 991(b)(1)(A).

<sup>53</sup> *Id.* § 991(b)(1)(B).

<sup>54</sup> *Id.* § 991(b)(1)(C).

<sup>55</sup> *Id.* § 991(b)(2).

<sup>56</sup> Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988) (explaining that Congress viewed honesty in terms of reducing the disparity between the judicially imposed sentence and the sentence actually served pursuant to the Parole Commission); *see also* U.S. SENTENCING COMM’N, PRINCIPLES GOVERNING THE REDRAFTING OF THE PRELIMINARY GUIDELINES (1986), *reprinted in* Breyer, *supra*, app. B at 47-50.

<sup>57</sup> S. REP. NO. 98-225, *supra* note 12, at 38 (arguing that because the underlying purposes of sentencing under the Comprehensive Crime Act (namely, rehabilitation) had failed, judges were “left to apply [their] own notions of the purposes of sentencing”); U.S. SENTENCING COMM’N, *supra* note 56, at 47 (“The Guidelines will seek certainty of punishment so that those with similar characteristics who are convicted of similar crimes will know they will receive similar sentences.”).

<sup>58</sup> S. REP. NO. 98-225, *supra* note 12, at 39 (bemoaning the current state of federal sentencing law, which “fails to achieve any of these goals”).

<sup>59</sup> Breyer, *supra* note 56, at 7-8 (describing the Commission’s analysis of 10,000 previous cases, as well as its allowance for revisions to promote its “evolutionary” character).

The debate centered on retribution and deterrence, based in large part on the Senate Judiciary Committee's acknowledgement that rehabilitation was "outmoded."<sup>60</sup> In an effort to compromise, the Sentencing Commission crafted sentencing ranges that judges believed would deter would-be offenders from committing crimes, and that would justly punish those who knowingly broke society's rules.<sup>61</sup> In a document responding to criticism about the Preliminary Draft, the Commission announced a set of principles for redrafting from late 1986 and into 1987.<sup>62</sup> Within this document, the Commission asserted that "[t]he basic principles governing the distribution of punishment are to provide punishments that (1) efficiently decrease the level of crime through deterrence and incapacitation, and (2) are commensurate with the seriousness of the offense and the offender's blameworthiness."<sup>63</sup> Thus, the Sentencing Guidelines are founded as a whole upon the four major theories of criminal punishment, but in large part upon the theory of retribution.<sup>64</sup>

The British analog to the Sentencing Reform Act is the Coroners and Justice Act of 2009, which announced the underlying sentencing principles in the

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<sup>60</sup> S. REP. NO. 98-225, *supra* note 12, at 38. Those who argued for the "just deserts" approach wanted the Commission to rank by severity the criminal behaviors covered under the Guidelines, and mete out punishments proportionate to such ranked severity. Breyer, *supra* note 56, at 15. On the other hand, those who recommended a deterrence approach advocated for sentences which "reflect the ability of that punishment to deter commission of the crime." *Id.* at 16.

<sup>61</sup> Breyer, *supra* note 56, at 17-18.

<sup>62</sup> U.S. SENTENCING COMM'N, SIMPLIFICATION DRAFT PAPER – LEVEL OF DETAIL IN CHAPTER TWO (1996), available at [http://www.ussc.gov/Research/Working\\_Group\\_Reports/Simplification/CH2LEVEL.HTM](http://www.ussc.gov/Research/Working_Group_Reports/Simplification/CH2LEVEL.HTM) (observing that the Commission had "difficulty in striking a balance between guideline specificity . . . and judicial discretion").

<sup>63</sup> U.S. SENTENCING COMM'N, *supra* note 56, at 47-48 (explaining how, unless otherwise specified in a specific decision by the Commission, the Guidelines will resolve conflicts between commensurability and crime control in favor of crime control). Although the Commission based the Guidelines upon the theories of retribution, deterrence, incapacitation, and to a lesser extent, rehabilitation, it hinted at its desire to deter crime through crime-control measures. *Id.* at 47. For an analysis that highlights the theory of retribution in the Guidelines, however, see Gwin, *supra* note 35, at 180-82 (discussing "[t]he prioritization of [r]etribution by the Federal Sentencing Guidelines"). Judge Gwin bases his argument on the idea that the base offense level is calculated based directly upon the "seriousness of the crime, which, in turn, is measured by the harm caused by the crime and the offender's state of mind." *Id.* at 180. Thus, the calculation of the Guidelines range begins with retributive considerations of "the nature and circumstances of the offense, the seriousness of the offense, and the need to provide just punishment." *Id.* at 181. Moreover, the Commission was tasked with considering several retributivist factors, such as the public perception and concern surrounding each offense; the specific circumstances of the harm, including the way in which the offense was committed and the severity of the harm; any potential deterrence achieved by certain punishments; and the prevalence of the offense. 28 U.S.C. § 994(c) (2006).

<sup>64</sup> See generally Gwin, *supra* note 35.

United Kingdom.<sup>65</sup> In particular, the Council must consider current sentencing practices, the need for consistency and public confidence, victim impacts, the costs and benefits of different sentences, and the results of legislatively mandated monitoring.<sup>66</sup> Moreover, Parliament returned to its earlier focus on proportionality by instructing the Council to consider specific factors when determining the sentencing ranges it would set. Those factors include: (1) the offender's culpability when committing the crime; (2) the harm intended or actually caused, or which may have been foreseeably caused, by the offense; and (3) other factors bearing on the seriousness of the crime.<sup>67</sup> The emphasis on proportionality can be seen throughout the guidelines, where "[s]eriousness, comprising harm and culpability, is the primary determinant of sanction severity, including the appropriateness of custody."<sup>68</sup> More important, the Coroners and Justice Act created the Sentencing Council and required the Council to report on its acts at the end of each fiscal year.<sup>69</sup> The Council was also instructed to create sentencing guidelines based on the principles listed in section 120.<sup>70</sup> Part II discusses the application of these principles and guidelines to the realm of drug offenses. The retributivist strain of sentencing theory is readily apparent in this application, in particular in the American response to rising levels of drug abuse.

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<sup>65</sup> Coroners and Justice Act, 2009, c. 25, § 118 (U.K.); *see also id.* sch. 15 (setting forth the constitution of the Council, the mechanisms for appointing and replacing members, and governance of the Council).

<sup>66</sup> *Id.* § 120. Section 128 of the Act instructs the Council to monitor the effect of the guidelines and draw conclusions from that monitoring. *Id.* § 128. In drawing such conclusions, Parliament instructed the Council to review "the frequency with which, and the extent to which, courts depart from sentencing guidelines," which factors impact courts' sentencing decisions, how well the guidelines promote consistency in sentencing, and how well the guidelines promote public confidence in the criminal justice system. *Id.*

<sup>67</sup> *Id.* § 121.

<sup>68</sup> Austin Lovegrove, *The Sentencing Council: The Public's Sense of Justice, and Personal Mitigation*, 12 CRIM. L. REV. 906, 907 (2010) ("[P]roportionality is again paramount in both the quantitative and qualitative guidance; indeed, in the former, seriousness frames sanction severity. In regard to the quantitative guidance, for each broad offence category . . . , the guidelines identify several variations marking a progressive change in seriousness."). *See generally* SENTENCING GUIDELINES COUNCIL, OVERARCHING PRINCIPLES: SERIOUSNESS (2004), available at [http://sentencingcouncil.judiciary.gov.uk/docs/web\\_seriousness\\_guideline.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf) (articulating how to determine seriousness of offenses for purposes of sentencing). The Sentencing Guidelines Council's report, created prior to the 2009 Act, is still a representative articulation of the Sentencing Council's emphasis on proportionality.

<sup>69</sup> Coroners and Justice Act, 2009 §§ 118-119.

<sup>70</sup> *Id.* § 120.

## II. PUNISHING DRUG OFFENSES

A. *A Brief History of Anglo-American Drug Sentencing*

American regulation of cocaine and, more recently, crack cocaine, has its roots in the late nineteenth and early twentieth centuries.<sup>71</sup> The first major congressional action to regulate the sale and importation of narcotics, the Harrison Drug Act of 1914, limited distribution of narcotics to authorized physicians and purchase and use to those with prescriptions.<sup>72</sup> Regulations increased in the 1930s,<sup>73</sup> and Congress introduced mandatory minimum sentences in 1951 with the Boggs Act.<sup>74</sup> In the 1980s, however, the federal approach to illicit drug regulation became drastically stricter with the Anti-Drug Abuse Act of 1986.<sup>75</sup>

Crack cocaine was originally produced in 1981 and its use quickly expanded throughout the 1980s, presumably due to its low cost and prominence in the

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<sup>71</sup> Prior to 1906, when Congress began regulating illicit drugs under the Pure Food and Drug Act, the U.S. government placed no legal or criminal sanctions on the manufacture, possession, sale, or use of such substances. MaryBeth Lipp, Note, *A New Perspective on the "War on Drugs": Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979, 985 (2004). The prevalence of drug use in America is thought to have begun during the Civil War, when doctors distributed mass amounts of narcotics to ease soldiers' pain, thus promoting addiction often referred to as "'soldier's disease.'" *Id.* at 985 n.18 (quoting JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 7, 21 (2001)). Non-regulation of these drugs compounded the issue, such that approximately 250,000 "people of all races and classes" suffered from drug addiction. *Id.* at 986 n.18 (explaining how such examples as Coca-Cola legally containing cocaine and Bayer Pharmaceuticals being allowed to sell heroin over the counter contributed to the substance abuse problem).

<sup>72</sup> Harrison Drug Act of 1914, Pub. L. No. 223, 38 Stat. 785 (repealed 1970); *see also* Alyssa L. Beaver, Note, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2537 (2010). Medical professionals expressed strong opposition to the Act, on the basis that such regulation would push increasing sale and importation into the black market. *Id.* ("Instead of curbing illicit drug use, the *New York Medical Journal* asserted, the intense regulation of cocaine led to heightened violence on the black market.").

<sup>73</sup> During this time Congress established an offshoot of the Treasury Department, the Federal Bureau of Narcotics, and in 1937 Congress passed the Marijuana Tax Act outlawing possession or sale of marijuana for any purpose beyond medicinal needs. Lipp, *supra* note 71, at 987; *see also* Marijuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937) (repealed by Pub. L. No. 91-513, § 1101(b)(3), 84 Stat. 1236, 1292 (1970)).

<sup>74</sup> Boggs Act of 1951, 21 U.S.C. § 174 (1952) (repealed by Pub. L. No. 91-513, § 1101(a)(2), (4), 84 Stat. 1236, 1291 (1970)). Mandatory minimums were increased with the Narcotic Control Act of 1956, and the Drug Abuse Prevention and Control Act of 1970 codified the federal anti-drug statutes into a schedule of controlled substances. Lipp, *supra* note 71, at 988, 990.

<sup>75</sup> 21 U.S.C. §§ 841-869 (1988).

inner city.<sup>76</sup> Use among minority populations in particular skyrocketed, doubling among African American and Latino populations between 1983 and 1985 alone.<sup>77</sup> With increased usage came increasing numbers of crack-related deaths, and media coverage soon followed.<sup>78</sup> Major media coverage of crack cocaine began with the *New York Times* in 1985, when the newspaper first coined the term “crack cocaine,” and reported on the drug, its addictive quality, and its pervasiveness in the inner city.<sup>79</sup> Perhaps the most prominent casualty of this new “epidemic” was Len Bias, the college basketball star from the University of Maryland who had recently been drafted by the Boston Celtics.<sup>80</sup> He died two days after the draft from a cocaine overdose, and “a media frenzy . . . erupted.”<sup>81</sup> Quick congressional action resulted in the Anti-Drug Abuse Act of 1986, which was drafted, debated, and passed in approximately one month.<sup>82</sup>

The most notorious legacy of the Anti-Drug Abuse Act of 1986 is the sentencing disparity it introduced between crack and powder. Drawing heavily on media reports,<sup>83</sup> Congress created a 100-to-1 ratio between crack and powder sentences, articulating five justifications for the disparity.<sup>84</sup> Congress cited both the highly addictive quality of crack cocaine and the drug’s association with violent crime as two reasons to impose stricter penalties on crack cocaine as compared to powder cocaine.<sup>85</sup> Additionally, Congress reasoned that pregnant women’s use of crack cocaine put their unborn children at risk, and that crack cocaine was relatively inexpensive, so it was “especially

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<sup>76</sup> Beaver, *supra* note 72, at 2538 (citing EDITH FAIRMAN COOPER, *THE EMERGENCE OF CRACK COCAINE ABUSE* 27 & n.4 (2002)).

<sup>77</sup> *Id.* (citing Arnold M. Washton, *Cocaine: Drug Epidemic of the '80s*, in *THE COCAINE CRISIS* 33, 50 (David Allen ed., 1985)).

<sup>78</sup> *Id.* (“As crack cocaine became cheaper, the number of cocaine-related deaths increased. . . . [And a]s death tolls rose, media coverage of the crack cocaine ‘epidemic’ escalated . . .”).

<sup>79</sup> *See id.* at 2539 (“By 1986, major news outlets had declared crack cocaine usage to be in ‘epidemic proportions.’”); Lipp, *supra* note 71, at 991 (asserting that news stories portrayed crack cocaine as an inner-city minority issue that increased “‘urban chaos’” and “‘gang warfare’”).

<sup>80</sup> Beaver, *supra* note 72, at 2539; Lipp, *supra* note 71, at 991-92.

<sup>81</sup> Beaver, *supra* note 72, at 2539; *see also* Adam M. Acosta, Note, *Len Bias’ Death Still Haunts Crack-Cocaine Offenders After Twenty Years: Failing to Reduce Disproportionate Crack-Cocaine Sentences Under 18 U.S.C. § 3582*, 53 HOWARD L.J. 825, 826-27 (2010); Lipp, *supra* note 71, at 991-92 (explaining how Len Bias’s death “stimulated support for immediate and stiff anti-drug measures”).

<sup>82</sup> Beaver, *supra* note 72, at 2544.

<sup>83</sup> *See id.* at 2545 (discussing that “senators used media reports to buttress their claims about the dangers associated with crack cocaine” and mentioning that “Senator Arlen Specter of Pennsylvania cited a ‘cover story in the June 16, 1986 issue of *Newsweek*’”).

<sup>84</sup> *Id.* at 2546.

<sup>85</sup> *Id.*

prevalent and more likely to be consumed in large quantities.”<sup>86</sup> Finally, Congress focused heavily on the fact that more young people were using crack cocaine.<sup>87</sup> The statute imposed mandatory minimum sentences for a number of drugs, but increases in 1988 were limited to penalties for “certain serious crack possession offenses.”<sup>88</sup>

The Act’s penalty scheme was based upon the weight and type of the drug,<sup>89</sup> but in practice the substantial disparity in sentences between crack and powder cocaine created a marked racial inequality. Statistically, African Americans and urban minorities are the dominant consumers of crack cocaine and powder-cocaine users are typically white; non-white drug users thus received much harsher sentences than white drug users for consuming essentially the same substance.<sup>90</sup> For example, a 1995 *Los Angeles Times* study of those charged with crack-cocaine offenses in seventeen state and federal courts across six major cities revealed that not a single defendant was white.<sup>91</sup> The disparity in crack-cocaine use by ethnicity persisted: in 2006 only 8.8% of crack-cocaine users were white.<sup>92</sup>

In the United Kingdom, the Misuse of Drugs Act of 1971 was the first comprehensive drug-crimes legislation,<sup>93</sup> restricting the importation and exportation,<sup>94</sup> manufacture,<sup>95</sup> supply,<sup>96</sup> and possession<sup>97</sup> of illicit substances. These substances were classified into one of three groups according to perceived harmfulness.<sup>98</sup> And while the U.S. legal system’s penalties were

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (“Senator Edward M. Kennedy of Massachusetts noted that almost two-thirds of high school seniors had tried an illicit drug and almost twenty-six percent of high school seniors had used cocaine.”).

<sup>88</sup> Lipp, *supra* note 71, at 994-95 (citing 21 U.S.C. § 844(a) (1988)).

<sup>89</sup> 21 U.S.C. § 841(b)(1)(A), (b)(1)(B) (1988). For example, with the 100-to-1 ratio created by the Act, a defendant convicted of possessing five kilograms of powder cocaine received a mandatory sentence of ten years to life, whereas a defendant convicted of possessing fifty grams of crack cocaine received the same mandatory sentence. *Id.*

<sup>90</sup> Beaver, *supra* note 72, at 2549.

<sup>91</sup> *Id.* (citing Dan Weikel, *War on Crack Targets Minorities over Whites*, L.A. TIMES, May 21, 1995, at A1).

<sup>92</sup> U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 16 tbl.2-1 (2007), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200705\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf).

<sup>93</sup> Misuse of Drugs Act, 1971, c. 38 (U.K.).

<sup>94</sup> *Id.* § 3 (listing certain exceptions under which import and export were sanctioned by law).

<sup>95</sup> *Id.* § 4(1)(a).

<sup>96</sup> *Id.* § 4(1)(b).

<sup>97</sup> *Id.* § 5(1).

<sup>98</sup> SENTENCING COUNCIL, DRUGS OFFENCES RESEARCH BULLETIN 2 (2011) [hereinafter DRUGS OFFENCES RESEARCH BULLETIN 2011], available at <http://sentencingcouncil.judiciary>

based upon the quantity of the drug involved in the offense, British penalties were based on the danger of the drug combined with the offense committed – that is, “possession, production, importation, exportation, supply, or sale.”<sup>99</sup> Finally, defendants in the United Kingdom faced maximum sentences rather than the mandatory minimum sentences found in the U.S. system.<sup>100</sup>

In 1985 Parliament chose to increase penalties in the Controlled Drugs (Penalties) Act.<sup>101</sup> The United Kingdom again focused on drug crimes in 2010 when the Home Office announced its version of the American “War on Drugs.”<sup>102</sup> According to the Sentencing Council, this new policy “sets out a plan to crack down on drug supply, devolve power to local communities for tackling drug problems, and take a new approach to drug treatment which focuses on addressing all issues connected to an individual’s dependency problem.”<sup>103</sup> By 2011 Class A drugs, which include powder cocaine, crack cocaine, ecstasy, and heroin, constituted forty percent of sentenced offenses.<sup>104</sup> Moreover, approximately forty percent of offenders were punished with fines, while only eighteen percent were incarcerated for any length of time.<sup>105</sup>

As of 2011 the United Kingdom’s sentencing framework included guidelines for the five drug-related offenses – importation and exportation offenses, supply (sale) offenses, production (cultivation) offenses, permitting-use-of-premises offenses, and possession offenses.<sup>106</sup> These guidelines were only applicable in Magistrate Courts, however, and the 1971 Misuse of Drugs Act remained the governing sentencing structure in Crown Courts.<sup>107</sup> Under the Misuse of Drugs Act, for example, the maximum sentence for a defendant convicted of possession was three to six months in a summary trial,<sup>108</sup> and two

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.gov.uk/docs/Analysis\_and\_Research\_Bulletins\_-\_Drugs\_Offences.pdf (“These classes carry different levels of penalty, with Class A drugs attracting the most severe penalty as they are considered likely to cause the most serious harm to users and society.”); Lipp, *supra* note 71, at 1009 n.128 (citing P.W.H. LYDIATE, THE LAW RELATING TO THE MISUSE OF DRUGS 9 (1977)). For example, crack cocaine is listed as a Class A drug. *Id.*

<sup>99</sup> Lipp, *supra* note 71, at 1009-10.

<sup>100</sup> *Id.* at 1010.

<sup>101</sup> DRUGS OFFENCES RESEARCH BULLETIN 2011, *supra* note 98, at 3.

<sup>102</sup> See HOME OFFICE, DRUG STRATEGY 2010: REDUCING DEMAND, RESTRICTING SUPPLY, BUILDING RECOVERY: SUPPORTING PEOPLE TO LIVE A DRUG FREE LIFE (2010), available at <http://www.homeoffice.gov.uk/publications/alcohol-drugs/drugs/drug-strategy/drug-strategy-2010?view=Binary>.

<sup>103</sup> DRUGS OFFENCES RESEARCH BULLETIN 2011, *supra* note 98, at 3.

<sup>104</sup> *Id.* at 2.

<sup>105</sup> *Id.* at 4.

<sup>106</sup> SENTENCING COUNCIL, DRUGS OFFENCES GUIDELINE PUBLIC CONSULTATION PART I, at 5-6 (2011) [hereinafter PUBLIC CONSULTATION PART I], available at [http://sentencingcouncil.judiciary.gov.uk/docs/Sentencing\\_Council\\_Drugs\\_Offences\\_EasyRead\\_PART\\_1.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Sentencing_Council_Drugs_Offences_EasyRead_PART_1.pdf).

<sup>107</sup> *Id.* at 4.

<sup>108</sup> Lipp, *supra* note 71, at 1014. In a summary trial, the defendant is tried without a jury in front of a magistrate in a Magistrates’ Court. *Id.* at 1010. Summary trials generally “take

to seven years in a jury trial.<sup>109</sup> Judges would also have the discretion to impose a £2000 fine in lieu of or in conjunction with any incarceration ordered.<sup>110</sup>

B. *Calls for Reform*

Once the public took up the call for reform in the United States and United Kingdom, these original sentencing schemes did not last. Recognizing the inherent unfairness of the sentencing scheme for crack cocaine in the United States, many groups, including Congress and the Sentencing Commission, responded accordingly. In the United Kingdom the public was similarly displeased by the comparatively lenient treatment of many non-crack-cocaine drug offenses. In both countries, government actors responded in an attempt to reform what were seen as offensive drug policies.

For two decades Congress resisted attempts by the Sentencing Commission to revise sentencing scheme to mitigate its racially and ethnically disparate effects. For example, as early as 1995 Congress ignored the Commission's "unanimous[] recommend[ation] that changes be made to the current cocaine sentencing scheme, including a reduction in the 100-to-1 drug quantity ratio between powder cocaine and crack cocaine."<sup>111</sup> A 2002 report to Congress detailed the Commission's findings regarding the unfairness inherent in crack-cocaine sentencing, stating emphatically that "the Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act."<sup>112</sup>

Congress first acknowledged these negative effects in 2007 by failing to reject the Sentencing Commission's proposed amendment to reduce the crack-cocaine sentencing range. Section 2D.1.1 of the U.S. Sentencing Guidelines, which provides for the calculation of crack-cocaine offenses, reflected the Commission's amendment by reducing the base offense level by two levels.<sup>113</sup> Later that year the Commission resolved that the amendment should apply

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place quickly, informally, and often on guilty pleas." *Id.*

<sup>109</sup> *Id.* at 1014. A jury trial constitutes a more formal proceeding which takes place in the Crown Court. *Id.* at 1010.

<sup>110</sup> *Id.* at 1011-12.

<sup>111</sup> U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 12 (2002).

<sup>112</sup> *Id.* at 91. Social justice groups echoed the thoughts of the Sentencing Commission. Beaver, *supra* note 72, at 2549. Examples of such groups include the Sentencing Project, the ACLU, the American Bar Association, and Families Against Mandatory Minimums. All have published articles, reports, and research, and have testified before Congress concerning the toll the crack-cocaine sentencing disparity has taken on American minorities. *Id.*

<sup>113</sup> Maxwell Arlie Halpern Kosman, Note, *Falling Through the Crack: How Courts Have Struggled to Apply the Crack Amendment to "Nominal Career" and "Plea Bargain" Defendants*, 109 MICH. L. REV. 785, 797 (2011); see also Acosta, *supra* note 81, at 835.

retroactively, so defendants could petition courts for a sentence modification pursuant to 18 U.S.C. § 3582(c)(2).<sup>114</sup> Congress again took no action to modify or reject the amendment, and for several years courts began working with the new, slightly improved crack-cocaine sentencing regime.<sup>115</sup>

Although media coverage was scarce in the United Kingdom, as early as 2007 there was some indication that Britons were concerned with the current sentencing scheme for drug offenses.<sup>116</sup> This discontent with the then-current sentencing framework, coupled with the lack of drug offenses guidelines in the Crown Court, contributed to the Sentencing Council's decision to propose new guidelines and implement a public consultation regarding a new set of drug offenses guidelines.<sup>117</sup> The guidelines would cabin the discretion of the Crown Court by basing sentences upon an "assessment of the offender's role in the offence and the quantity of drugs involved or scale of the operation."<sup>118</sup> The Council also projected that punishments would increase for those with more serious responsibility for drug offenses.<sup>119</sup>

### C. *Implementing Drug Sentencing Reform*

Congress's most recent reform action has drastically – and properly, given this Note's analysis – reduced the sentencing disparity between powder and crack cocaine. The Fair Sentencing Act of 2010<sup>120</sup> has several prominent components.<sup>121</sup> First, the Fair Sentencing Act reduced the disparity between powder cocaine and crack cocaine to an eighteen-to-one ratio.<sup>122</sup> Although Congress debated either creating a one-to-one ratio or increasing the penalties for powder cocaine in lieu of reducing the penalties for crack cocaine, the compromise on an eighteen-to-one ratio "facilitated [the Act's] enactment into law."<sup>123</sup> The Fair Sentencing Act also abolished the five-year mandatory

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<sup>114</sup> 18 U.S.C. § 3582(c)(2) (2006); Acosta, *supra* note 81, at 835.

<sup>115</sup> Kosman, *supra* note 113, at 797-98.

<sup>116</sup> See Rebecca Lefort, *Crack Cocaine Fines Fall Below Cost of a Parking Ticket*, TELEGRAPH (Nov. 1, 2009), <http://www.telegraph.co.uk/news/uknews/crime/6475674/Crack-cocaine-fines-fall-below-cost-of-a-parking-ticket.html>; *Drug Offences up as Crime Falls*, BBC (Oct. 18, 2007), [http://news.bbc.co.uk/2/hi/uk\\_news/7050409.stm](http://news.bbc.co.uk/2/hi/uk_news/7050409.stm).

<sup>117</sup> Press Release, The Sentencing Council, Sentencing for Drugs Offences – Public Consultation Launched on New Guideline for Judges (Mar. 28, 2011), *available at* <http://sentencingcouncil.judiciary.gov.uk/media/571.htm>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified in scattered sections of 21 U.S.C. and 28 U.S.C.).

<sup>121</sup> See Kyle Graham, *Sorry Seems to Be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 792-93 (2011).

<sup>122</sup> Fair Sentencing Act of 2010 § 2 (codified at 21 U.S.C. §§ 841(b)(1), 960(b) (2006)).

<sup>123</sup> Graham, *supra* note 121, at 793 (discussing several congressmen's concerns with maintaining the difference between powder cocaine and crack cocaine); *see also* 156 CONG.

minimum sentences for mere possession offenses.<sup>124</sup> Finally, the Act increased penalties for “drug crimes involving violence, threats of violence, or other aggravating circumstances.”<sup>125</sup> Although the sentences have been reduced substantially, significant work remains to be done in resolving the question of retroactivity, and allowing those who qualify to initiate the process of reducing their sentences.<sup>126</sup>

The Sentencing Commission also attempted to implement sentencing reform in the Sentencing Guidelines. As an independent agency within the Judiciary, the Sentencing Commission engages in the public notice-and-comment period for its proposed amendments and updates to the Sentencing Guidelines.<sup>127</sup> This notice-and-comment period is intended to serve three purposes: (1) allowing for a more developed record of the rulemaking process, which will in turn

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REC. S1680-83 (daily ed. Mar. 17, 2010) (statement of Sen. Dick Durbin) (“I wish this bill went further. My initial bill established a 1-to-1 ratio, but this is a good bipartisan compromise.”); *id.* (statement of Sen. Patrick Leahy) (“Despite my belief that parity was the better policy, I have joined with Senator Durbin and support the progress represented by his compromise with Senator Sessions.”); Beaver, *supra* note 72, at 2556 (explaining that Congress, “concerned that eradicating jail time would have the adverse effect of spurring resurgence in crack dealing,” briefly deliberated the merits of increasing powder cocaine sentences).

<sup>124</sup> Fair Sentencing Act of 2010 § 3 (codified as amended at 21 U.S.C. § 844(a)).

<sup>125</sup> Graham, *supra* note 121, at 793; *see also* Fair Sentencing Act of 2010 § 5 (codified at 28 U.S.C. § 994 (2006)).

<sup>126</sup> In its 2011 Term the Supreme Court resolved the question of whether the new, lower mandatory minimum applied for defendants who committed their crimes prior to passage of the Fair Sentencing Act but who were sentenced after its passage. *Dorsey v. United States*, 132 S. Ct. 2321 (2012). The Court held that because Congress expressed clear intent that the Fair Sentencing Act apply retroactively, “the new, more lenient mandatory minimum provisions do apply to those pre-Act offenders.” *Id.* at 2326 (“We rest our conclusion primarily upon the fact that a contrary determination would seriously undermine basic Federal Sentencing Guidelines objectives such as uniformity and proportionality in sentencing. Indeed, seen from that perspective, a contrary determination would (in respect to relevant groups of drug offenders) produce sentences less uniform and more disproportionate than if Congress had not enacted the Fair Sentencing Act at all.”).

<sup>127</sup> *See* RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 383 (6th ed. 2011) (explaining the statutory constraints on rulemaking from the Administrative Procedure Act). Under section 553 of the Administrative Procedure Act, informal rulemaking requires notice, which includes (1) the “time, place, and nature of public rule making proceedings”; (2) the controlling “legal authority under which the rule is proposed”; and (3) “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(1)-(3) (2006). Once notice is given, the agency must give interested parties an opportunity to participate in the rulemaking process. *Id.* § 553(c). This participation can take the form of “submission of written data, views, or arguments,” and can be accompanied by oral presentation. *Id.* Once comments are submitted, “the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.” *Id.* Finally, the rule generally must be published within thirty days. *Id.* § 553(d).

allow “more effective judicial review of the final rule,” (2) “improving the quality of rulemaking” by testing the proposed rules in the public domain, and (3) giving interested and affected parties an opportunity to express their views, and therefore increasing the perceived fairness of the rulemaking process.<sup>128</sup> To amend the Sentencing Guidelines in accordance with proposed legislation and the Fair Sentencing Act, the Sentencing Commission held five meetings on the topic between 2009 and 2011.<sup>129</sup> At these meetings, members of the federal judiciary, the Obama Administration, and other interested parties – including nonprofit organizations, law professors, and the defense bar – spoke on the impact, prudence, or pitfalls of the Fair Sentencing Act both before and after its passage.<sup>130</sup>

The Sentencing Commission also collected public comments on the proposed amendments to the powder-crack cocaine disparity, the emergency amendment to implement the Fair Sentencing Act, and the merits of making the statute retroactive.<sup>131</sup> With respect to the necessity of the Fair Sentencing Act and its implementation, the prevailing view among public commentators was that the disparity needed to be brought in line with state treatment and either severely reduced or eliminated entirely.<sup>132</sup> With these comments in mind, the Sentencing Commission worked with Congress to create a workable

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<sup>128</sup> CASS ET AL., *supra* note 127, at 427 (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)).

<sup>129</sup> *Notices of Public Hearings and Meetings*, U.S. SENTENCING COMMISSION, [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/notices.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/notices.cfm) (last visited June 17, 2013).

<sup>130</sup> See Larry M. Fehr, Senior Vice President, Pioneer Human Services, Statement Before the United States Sentencing Commission, Northwest Regional Hearing: The Sentencing Reform Act of 1984: 25 Years Later (May 28, 2009), *available at* [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20090527-28/Fehr\\_testimony.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090527-28/Fehr_testimony.pdf) (commending the work of the Sentencing Commission to date on its work to reduce the disparity); Karin J. Immergut, U.S. Att’y, Dist. Or., Statement Before the U.S. Sentencing Commission in the Regional Hearing on the State of Federal Sentencing 5 (May 27, 2009), *available at* [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20090527-28/Immergut\\_testimony.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090527-28/Immergut_testimony.pdf) (“We think this change must be addressed now, in this Congress, and we will be working with you and Members of Congress over the coming months to address the sentencing disparity between crack and powder cocaine.”); Michael M. O’Hear, Marquette University Law School Professor and Associate Dean for Research, Statement Before the U.S. Sentencing Commission Public Hearing on Retroactivity (June 1, 2011), *available at* [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20110601/Testimony\\_Michael\\_OHear.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_Michael_OHear.pdf).

<sup>131</sup> See *supra* note 130 (compiling commentary during public consultations calling for the decrease of the crack-powder cocaine disparity); see also *Public Comment*, U.S. SENTENCING COMMISSION, [http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Public\\_Comment/index.cfm](http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/index.cfm) (last visited June 17, 2013) (providing a resource for public hearings regarding the Fair Sentencing Act).

<sup>132</sup> *Public Comment*, *supra* note 131.

solution for both sides. The resulting eighteen-to-one ratio is a step in that direction. This ratio is, however, still a far cry from the sentencing parity advocated by a number of commentators.

In the United Kingdom, the Sentencing Council spearheaded public outreach in many ways. First, the Sentencing Council conducted a formal public consultation consisting of three parts and twelve questions.<sup>133</sup> The first part explained why the Sentencing Council was reviewing and creating new drug offenses guidelines, in large part to reduce disparity among sentences in the Crown Courts.<sup>134</sup> It separated several drugs into three different classes, and explained the five types of drug offenses.<sup>135</sup>

The second part asked the public to assist in deciding what sentence an offender should receive, by explaining how each offender might be sentenced based upon the circumstances of the crime.<sup>136</sup> First, the Sentencing Council classified the quantities which constitute “very large,” “large,” “medium,” “small,” and “very small” for the purposes of supply and importation offenses.<sup>137</sup> The Council then described the different roles of offenders in possession, production, importation, exportation, supply, and sale crimes – leading role, significant role, or subordinate role.<sup>138</sup> Under the proposed guidelines, offenders with leading roles would face higher sentences than those in subordinate roles, and first-time offenders would face “starting point” sentences, rather than higher sentences for repeat offenders.<sup>139</sup> The second part included a table that showed how a defendant, charged with supplying a Class A drug, would be treated depending on the defendant’s role in the drug operation.<sup>140</sup> For example, a defendant in a leading role supplying a very large amount of a Class A drug would face a starting sentence of fourteen years in prison, with a range of sentences from twelve to sixteen years.<sup>141</sup> On the other

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<sup>133</sup> See PUBLIC CONSULTATION PART I, *supra* note 106, at 8-23; SENTENCING COUNCIL, DRUG OFFENCES GUIDELINE PUBLIC CONSULTATION PART II, at 5-25 (2011) [hereinafter PUBLIC CONSULTATION PART II], available at [http://sentencingcouncil.judiciary.gov.uk/docs/Sentencing\\_Council\\_Drugs\\_Offences\\_EasyRead\\_PART\\_2.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Sentencing_Council_Drugs_Offences_EasyRead_PART_2.pdf); SENTENCING COUNCIL, DRUG OFFENCES GUIDELINE PUBLIC CONSULTATION PART III, at 16-20 (2011) [hereinafter PUBLIC CONSULTATION PART III], available at [http://sentencingcouncil.judiciary.gov.uk/docs/Sentencing\\_Council\\_Drugs\\_Offences\\_EasyRead\\_PART\\_3.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Sentencing_Council_Drugs_Offences_EasyRead_PART_3.pdf).

<sup>134</sup> PUBLIC CONSULTATION PART I, *supra* note 106, at 4.

<sup>135</sup> *Id.* at 7.

<sup>136</sup> PUBLIC CONSULTATION PART II, *supra* note 133, at 1-2.

<sup>137</sup> *Id.* at 3-5. For example, a “very large” supply of heroin or cocaine is 2.5 kilograms to 10 kilograms, and a “very large” importation constitutes 100 kilograms to 400 kilograms. *Id.* at 3, 5.

<sup>138</sup> *Id.* at 6.

<sup>139</sup> *Id.* at 7.

<sup>140</sup> *Id.* at 8-9.

<sup>141</sup> *Id.* at 8. For comparison, a defendant in the United States with no criminal history who supplies 2.5 kilograms of crack cocaine (the low end of a “very large” quantity in the United Kingdom) faces a recommended sentencing range from 151 to 188 months in prison,

end of the spectrum, a defendant in a subordinate role supplying a very small amount of a Class A drug would face a starting sentence of twenty-six months in prison, with a range in sentences from high-level community order to two years in prison.<sup>142</sup> The second part went on to explain reasons for increasing a particular defendant's sentence, such as "putting others in greater danger than usual, for example by mixing drugs with harmful substances" and "trying to hide or get rid of evidence."<sup>143</sup> It also listed reasons for decreasing a defendant's sentence, including addiction to a drug he is caught supplying, misunderstanding the particular drug she is handling, or attempts to stop offending or stop using.<sup>144</sup>

Additionally, in recognition of the United Kingdom's 2010 Drug Strategy, the second part set forth the increased penalties planned for those charged with possessing drugs in prison.<sup>145</sup> The Sentencing Council proposed that while determining the seriousness of an offense, courts must not look to the drug's purity.<sup>146</sup> Purity would only become a factor when courts are determining the sentence for an offense.<sup>147</sup> The Sentencing Council disclosed that it was considering whether to decrease the sentences of those found in possession of marijuana to improve a medical condition.<sup>148</sup>

The third part discussed how the proposed guidelines would operate in the courts.<sup>149</sup> After a brief discussion of how the guidelines would affect each type of offense, the Sentencing Council then addressed how it would take into

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or up to approximately fourteen years. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, § 5A (2011). If that same defendant was charged with supplying ten kilograms of crack cocaine (the high end of a "very large" quantity in the United Kingdom), he faces a recommended sentencing range from 235 to 293 months in prison, or up to approximately twenty-four years. *Id.* § 2D1.1, § 5A. Moreover, these sentences do not take into consideration any of the upward departures that likely would apply to a defendant with a leading role in a drug operation. *Id.*

<sup>142</sup> PUBLIC CONSULTATION PART II, *supra* note 133, at 9. Again, for comparison, a defendant in the United States with no criminal history who supplies between 2.8 grams and 5.6 grams of crack cocaine (within the range of "very small" quantities in the United Kingdom) faces a recommended sentencing range from twenty-one to twenty-seven months, or approximately two years. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 141, § 2D1.1, § 5A. Thus, the proposed guidelines in the United Kingdom align most closely with the U.S. Sentencing Guidelines at the lower end of the quantity scale.

<sup>143</sup> PUBLIC CONSULTATION PART II, *supra* note 133, at 11.

<sup>144</sup> *Id.* at 12.

<sup>145</sup> *Id.* at 18 (listing several reasons for increasing punishment for possession of drugs in prison, including "drugs are a big problem in prisons," "drugs in prison make it harder for prisoners who are trying to give up taking drugs," and drugs "lead to other crime and are often used instead of money in prison").

<sup>146</sup> *Id.* at 22.

<sup>147</sup> *Id.* at 23.

<sup>148</sup> *Id.* at 25.

<sup>149</sup> PUBLIC CONSULTATION PART III, *supra* note 133.

account the views of victims,<sup>150</sup> and asked for ideas from the public on other ways to incorporate the victims into the sentencing process.<sup>151</sup> Perhaps recognizing the potential racial ramifications of increasing penalties for certain drugs, the Sentencing Council produced an “equality impact assessment” and spoke with interest groups.<sup>152</sup> Finally, the consultation requested any additional feedback.<sup>153</sup>

The Sentencing Council published new drug offenses guidelines for both the Crown Court and the Magistrates’ Courts in January 2012, based in large part upon the public consultation.<sup>154</sup> These guidelines, effective as of February 2012, are the product of the twelve-week consultation discussed above. As compared with the proposed guidelines made available during the consultation, the definitive guidelines are alike in many respects. For example, if a court determines the offender played only a lesser role and was in possession of at least one kilogram of cocaine, the court would sentence the offender to a starting sentence of five years.<sup>155</sup> Similarly, in the proposed guidelines, a subordinate offender found in possession of 783 grams would be sentenced to a starting sentence of six years and six months.<sup>156</sup>

The consultation results highlighted both the areas of agreement and disagreement with respect to each question asked in the public consultation. Most important for purposes of this Note, the largest area of disagreement concerned the quantities set out for each drug’s guideline. For example, many polled members of the judiciary expressed concern that the five categories of

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<sup>150</sup> *Id.* The published response to the consultation addressed the difficulties in determining just who constitutes the class of victims in drug crimes. SENTENCING COUNCIL, DRUG OFFENCES: RESPONSE TO CONSULTATION 23 (2012), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Drug\\_Offences\\_Response-\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Response-(web).pdf).

<sup>151</sup> SENTENCING COUNCIL, *supra* note 150, at 23.

<sup>152</sup> *Id.* at 24.

<sup>153</sup> *Id.*

<sup>154</sup> *Supra* note 10. Prior to the distribution of these guidelines, the Sentencing Commission issued different guidelines for the Crown Court and the Magistrates’ Courts. These guidelines, however, contain the exact same specifications, and are only divided between the Crown Court and Magistrates’ Courts to fit within the existing framework of each court system’s larger sentencing guidelines.

<sup>155</sup> SENTENCING COUNCIL, *supra* note 3, at 19. The sentence would then be adjusted to a range between three years and six months to seven years based on the presence of either aggravating or mitigating factors. *Id.* at 20. For a full list of factors, see *id.* at 21. A defendant in the United States would receive a sentence between five to seven years for the same quantity of cocaine with no criminal history. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 141, § 5A. Applicable upward departures could, however, produce a sentence far greater than the seven years maximum a British offender could receive. *Id.* Moreover, for the same quantity of crack cocaine, an American defendant could face between thirteen and sixteen years, notwithstanding any additional upward departures. *Id.*

<sup>156</sup> PUBLIC CONSULTATION PART III, *supra* note 133, at 5. The corresponding sentencing range is between six years and seven years, six months. *Id.*

quantity ranges too narrowly circumscribed judges' discretion in sentencing.<sup>157</sup> Taking this concern into consideration, the Sentencing Council lowered the number of quantity ranges in the definitive guideline to four, thus "allow[ing] for a more appropriate exercise of judicial discretion."<sup>158</sup> The consultation raised additional concerns with respect to the quantities of drugs corresponding to each quantity range.<sup>159</sup> Both academics and members of criminal justice organizations argued that because "the drugs market is in constant flux," certain quantity ranges would either become too harsh or too lenient in any given period.<sup>160</sup> Moreover, several consultees took issue with the thresholds, maintaining that "a tiny amount could result in an offence moving up or down into the next offence category."<sup>161</sup> Finally, others disagreed with the quantities on a more basic level, asserting that oftentimes quantity has no correlation to harm.<sup>162</sup> In response to these concerns, the Sentencing Council restyled the quantity ranges, moving away from the system currently used in American sentencing. The definitive guidelines now list "single indicative quantities," rather than set ranges, upon which the base offense will be classified.<sup>163</sup>

### III. LESSONS LEARNED: APPLYING PROCEDURAL JUSTICE THEORY TO RECENT DRUG SENTENCING REFORMS

A comparative analysis of sentencing law in the United Kingdom and United States highlights the problems inherent in responding to public opinion quickly and without the proper theoretical underpinnings. The comparison is particularly useful because of the important similarities between the two countries' legal systems.<sup>164</sup> There are several lessons to be learned from the United States' path toward sentencing equality for crack and powder cocaine offenses. First, process matters. Hasty legislation often mutes dissent. This is best illustrated by the clear racial disparity that resulted from the 100-to-1 ratio

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<sup>157</sup> SENTENCING COUNCIL, *supra* note 150, at 14.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 15 (describing the labels on quantity ranges as "misleading").

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* This practice is slightly modified for offenders classified as "street dealers" or prison officials who supply prisoners. *Id.* Those offenders will be charged with a base offense of category three, irrespective of the quantity involved. *Id.*

<sup>164</sup> Lipp points to several examples illustrating the commonalities between the United Kingdom and the United States which make the two ripe for comparison. Lipp, *supra* note 71, at 1003. For example, both countries' legal systems derive from the common law of England, the two share ideas on the construction of proper drug policy, and they are also joint actors in international endeavors. *Id.* at 1003-04. For further explanation of these similarities, see J. DAVID HIRSCHER & WILLIAM WAKEFIELD, CRIMINAL JUSTICE IN ENGLAND AND THE UNITED STATES 3 (1995).

enshrined in legislation that took only one month to draft, debate, and pass.<sup>165</sup> Second, the actor matters. Congressional oversight of the Sentencing Commission's proposed reforms impedes the Commission's ability to implement public commentary. Third, using procedural justice theory as the lens through which to critically analyze the process and the actor responsible for overseeing that process, we are better positioned to evaluate whether the ultimate reforms comply with underlying sentencing principles.<sup>166</sup>

A. *Process Matters*

According to procedural justice theory, perceptions of fairness in the decisionmaking process lead to perceptions of legitimacy and, ultimately, acceptance of those decisions.<sup>167</sup> Tom Tyler writes that perceptions of fairness are in turn influenced by the quality of the decisionmaking, including "even-handedness and objectivity," open communication, and the quality of the interpersonal treatment the public receives from authorities.<sup>168</sup> Public participation also has "an important indirect influence over procedural justice judgments, because people are more likely to rate the quality of decision making and the quality of interpersonal treatment to be high when the procedure includes opportunities for them to participate."<sup>169</sup> Thus, increasing citizens' participation in the decisionmaking process creates a public perception of fairness, and ultimately a public perception of legitimacy.<sup>170</sup> In the context of sentencing reform, this perception of fairness becomes

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<sup>165</sup> See *supra* notes 71-92 and accompanying text.

<sup>166</sup> See, e.g., Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 83 (2007) ("The expressive value of a sentence – its legitimacy and authority – depends on the extent to which it both embodies the moral and legal norms of the authorizing community and fits the circumstances of the offender in light of those norms.").

<sup>167</sup> See RALPH HENHAM, SENTENCING AND THE LEGITIMACY OF TRIAL JUSTICE 129 (2012) (asserting that the state has a responsibility "to ensure that the sentencing system commands public confidence. . . . [T]his should mean that sentencing outcomes are perceived as legitimate by citizens and that this legitimacy can only be measured by understanding the extent to which sentencing outcomes reflect shared values about punishment and sentencing."). Henham contends that issues of legitimacy and fairness in sentencing outcomes "has become increasingly critical for governance due to the fragmented and diverse nature of value systems in liberal western democracies." *Id.*

<sup>168</sup> Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 298 (2003).

<sup>169</sup> *Id.* at 300 (arguing that allowing opportunities for public participation "is also important in creating fair procedures").

<sup>170</sup> See *id.* at 286 ("Cooperation and consent – 'buy in' – are important because they facilitate immediate acceptance and long-term compliance. People are more likely to adhere to agreements and follow rules over time when they 'buy into' the decisions and directives of legal authorities.").

increasingly important, because almost every segment of society is subject to punishment for drug crimes.<sup>171</sup>

The United Kingdom, in its public consultation, used several methods to gather public opinion. One way the Sentencing Council engaged public opinion was to reach out to and work with several interest groups to “consider equality and diversity as part of th[e] consultation.”<sup>172</sup> Additionally, in preparation for a March 2011 research report, the Sentencing Council collected data from focus groups across the United Kingdom “explor[ing] public attitudes to the sentencing of a variety of drug offences.”<sup>173</sup> The results of these focus groups revealed a nuanced range of opinion: Britons did not simply desire more severe penalties for drug offenses. Although participants “tended to favour sentences that were more punitive than current practice,” this was not the case for certain offenses.<sup>174</sup> Rather, while participants desired longer prison sentences for larger supply and importation offenses, they also expressed a wish that those convicted of drug possession not receive prison sentences. Similarly, participants felt that smaller-scale supply and importation offenses did not warrant lengthy prison terms.<sup>175</sup>

The most extensive effort to collect public consultation occurred through the public and professional questionnaires circulated nationwide. The public consultation lasted twelve weeks, and the Sentencing Council published the responses received.<sup>176</sup> And, perhaps most important, the official guidelines were modified in part due to those responses.<sup>177</sup> According to the procedural justice theory, this type of public commentary and willingness to engage with special interest groups to craft the most appropriate guidelines makes it more likely that these new drug offenses guidelines will promote public confidence in the criminal justice system.<sup>178</sup> Further, the modifications based on such

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<sup>171</sup> See 156 CONG. REC. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Dick Durbin).

<sup>172</sup> See PUBLIC CONSULTATION PART III, *supra* note 133, at 20.

<sup>173</sup> JESSICA JACOBSON ET AL., SENTENCING COUNCIL, PUBLIC ATTITUDES TO THE SENTENCING OF DRUG OFFENCES, at i (2011), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Drugs\\_research\\_report.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drugs_research_report.pdf). This exploration is particularly important in any procedural justice analysis, because “procedures and reforms that promote impartiality and consideration of all points of view and that make manifest the standing of the citizen before the institution are likely to be well-received.” E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities* 23 (Am. Bar Found., Working Paper No. 9403, 1994) (arguing that procedures “that focus attention on the cost-efficient resolution of disputes by behind-the-scenes negotiation[] are likely to be poorly received”).

<sup>174</sup> JACOBSON ET AL., *supra* note 173, at i.

<sup>175</sup> *Id.*

<sup>176</sup> Lord Justice Brian Henry Leveson, *Foreword* to SENTENCING COUNCIL, *supra* note 150, at 2.

<sup>177</sup> See generally SENTENCING COUNCIL, *supra* note 150.

<sup>178</sup> This assertion is made more probable in light of the fact that the revision stemmed partially from a growing public concern with insufficient punishment of offenders for such serious drugs as heroin and crack cocaine. *Supra* notes 111-117 and accompanying text.

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public consultation also promoted proportionality in sentencing. By choosing to impose sentences based upon single indicative quantities, rather than quantity ranges, the guidelines give greater discretion to judges to sentence an individual offender for the specific characteristics of the offense.<sup>179</sup>

In the United States, however, the process for collecting public opinion was less robust. As discussed above, the Sentencing Commission only held five public hearings. Further, in contrast to the nationwide focus-group meetings conducted by the Sentencing Council, four of the five public hearings occurred in Washington, D.C. The Sentencing Commission also collected public commentary during its notice-and-comment period. Those who attended hearings or submitted commentary expressed a desire to eliminate the sentence disparity between crack and powder cocaine.<sup>180</sup> The ultimate result, however, was tightly constrained by the Fair Sentencing Act's seemingly arbitrary eighteen-to-one ratio. Thus, the Sentencing Commission failed to properly acknowledge public commentary (or was simply prevented from doing so), a necessary step to producing perceptions of fairness for the amended Sentencing Guidelines. Without implementing public commentary, the Sentencing Commission was unable to create perceptions of fairness and, following this argument to its logical conclusion, was also unable to create perceptions of legitimacy. With these results, it seems difficult to conclude that the process was successful in adhering to underlying sentencing principles.

#### B. *Actors Matter*

This leads to a second lesson: actors matter. One reason for a failure of process is the involvement of an ill-suited actor. If a process depends upon the collection, acknowledgement, and implementation of public commentary, then any actor who impedes any step in that process is impeding the process as a whole. By looking carefully at the process used in the United Kingdom and the United States, the difference in actors quickly becomes clear.

In the United Kingdom, the Sentencing Council is largely responsible for sentencing guidelines. While it takes its underlying principles, and thus its underlying direction, from Parliament, the ultimate guidelines are the work of the Council. This allows the Council the flexibility to consider a larger segment of public opinion, to consider it for a longer period of time, and to modify its own proposed guidelines accordingly. By possessing this flexibility to maintain fidelity to public opinion, the Sentencing Council is in a better position to implement the better process – the process that creates the strongest perception of fairness and legitimacy.

The United States, however, relies more heavily on Congress to guide sentencing reform. Importantly, the Sentencing Commission was barred from acting to decrease the powder-crack cocaine sentencing disparity until Congress passed the Fair Sentencing Act in 2010. Prior to the passage of the

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<sup>179</sup> See SENTENCING COUNCIL, *supra* note 150, at 15.

<sup>180</sup> See *supra* notes 127-132 and accompanying text.

Act, the Sentencing Commission relied upon congressional silence to implement any independent reforms. Additionally, as discussed above, a large segment of the public believes that the powder-crack cocaine disparity should no longer exist.<sup>181</sup> But this result is unlikely to obtain for many years, as Congress considered and rejected a policy of parity.<sup>182</sup> In these ways congressional participation in sentencing reforms interrupts the process by which the Sentencing Commission can implement such commentary. Further, the rules and regulations of the Sentencing Commission, comprised of criminal justice experts, are subject to review by Congress.<sup>183</sup> Therefore, Congress at times acts as an obstacle to producing sentencing reforms that the Sentencing Commission, in consultation with members of the public, believes are necessary for a more appropriate and thus more legitimate sentencing scheme.<sup>184</sup> This idea is illustrated by the events surrounding the Sentencing Commission's amendment to crack-cocaine sentencing ranges in 2007. When Congress failed to act on this amendment, the Sentencing Commission was able to begin the process of reducing the disparate punishment crack-cocaine offenders would receive.<sup>185</sup>

Moreover, there are two additional reasons why Congressional oversight of the Sentencing Commission need not be so burdensome. First, the Supreme Court's decision in *United States v. Booker* strips the Sentencing Guidelines of some of their force.<sup>186</sup> At the time *Booker* was decided, federal Sentencing Guidelines were mandatory for all judges.<sup>187</sup> Congressional policing of the Sentencing Commission's guidelines was more important to ensure that judges were not mandated to do something which the people's representatives had no hand in deciding. The Court struck down this mandatory framework, however, announcing that to pass constitutional muster the federal Sentencing Guidelines could only be advisory.<sup>188</sup> Therefore, the argument that Congress is necessary to police the activity of the Sentencing Commission now holds less

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<sup>181</sup> See *supra* notes 127-132.

<sup>182</sup> See 156 CONG. REC. S1682, *supra* note 171 (statement of Sen. Patrick Leahy).

<sup>183</sup> See 5 U.S.C. § 801 (2006) (providing for congressional review of all rules and regulations promulgated by federal agencies).

<sup>184</sup> Henham argues that "greater 'legitimacy' can be achieved by ensuring that decision makers are made aware of community views and expectations regarding punishment and its cost effectiveness." HENHAM, *supra* note 167, at 305. Congress, though aware of community views and expectations regarding punishment of crack-cocaine offenses, refuses to or is unable to implement these views. Accordingly, Congress should play a lesser role in sentencing reform. See *id.* at 183 (arguing that "there is a point where the dialectic between community values and the rule of law becomes so acute that the latter is no longer able to respond to changing community values, or the ruling elite prevents this for hegemonic reasons").

<sup>185</sup> See *supra* notes 113-115 and accompanying text.

<sup>186</sup> 543 U.S. 220 (2005).

<sup>187</sup> *Id.* at 233.

<sup>188</sup> *Id.* at 245.

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weight. If the Sentencing Guidelines are merely advisory, there is less concern that the Sentencing Commission will wield undue power over judicial sentencing discretion. Second, agencies must pass regulations that are not “arbitrary and capricious.”<sup>189</sup> This judicial review provides the Sentencing Commission with greater incentive to create sentencing guidelines that do not depart from the public commentary it receives.

C. *Evaluating Drug Sentencing Reforms Through the Lens of Procedural Justice*

Both the Fair Sentencing Act in the United States and the new drug offenses guidelines in the United Kingdom were meant to reform what were seen as less-than-optimal sentencing regimes for drug offenses. To compare the reforms of each country, they must be weighed against the principles articulated by their respective legislatures. These reforms must also be viewed critically against the prevalent underlying theory of punishment in each country: retribution. In so doing, the picture becomes clear with respect to which set of reforms most closely adheres to the underlying principles of sentencing, and which is therefore most effectively aligned with the desired goals of criminal punishment. This highlights areas in which either reform mechanism can be improved in the future.<sup>190</sup>

1. Procedural Justice Theory and the Fair Sentencing Act

The Fair Sentencing Act has a mixed record with respect to implementing the major aims of sentencing in the United States. These goals were laid out in the Sentencing Reform Act of 1984: comprehensiveness and consistency, fairness in sentences and patterns of sentences to both the individual offenders and the community at large, certainty with respect to sentences, a broad range of applicable sentences for each offender, uniformity from sentencing through corrections, and embodiment of advancements in human knowledge.<sup>191</sup> The Fair Sentencing Act must be viewed in light of these purposes to determine whether it properly adheres to the framework set forth.

The Act promotes several fundamental goals of American sentencing. First, it does nothing to unseat other aspects of the current sentencing regime, and

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<sup>189</sup> See 5 U.S.C. § 706 (2006).

<sup>190</sup> This Note argues that more principled sentencing reforms – those that adhere more closely to foundational principles of punishment – lead to greater legitimacy. But that does not automatically indicate which reforms are “better” than others. Two other arguably important aspects of the legitimacy of sentencing reforms are crime prevention and crime reduction. Without addressing crime-prevention or crime-reduction data, this Note does not and cannot address which set of reforms is empirically “better.” It also does not aim to label one set of reforms as “good” and the other as “bad.” Rather, it merely seeks to compare the processes for reform in the United States and the United Kingdom to determine which leads to a more principled outcome.

<sup>191</sup> 18 U.S.C. § 991(a) (2006).

therefore does not negatively affect the consistency and comprehensiveness of that regime. Rather, by addressing a more specific area of sentencing law in need of reform, the Fair Sentencing Act further bolstered the sentencing scheme's consistency and comprehensiveness. Moreover, there is no disturbance of the current uniformity of purpose between sentencing and corrections. Finally, with the removal of the mandatory minimum for simple possession, the Act creates a broader range of appropriate sentences for defendants convicted of possession of crack cocaine.<sup>192</sup>

There are still substantial gaps, however, in the Act's full compliance with several underlying aims set forth above. To be sure, by announcing clear guidance for crack-cocaine sentencing, the Fair Sentencing Act creates certainty with respect to future crack-cocaine sentences. It does, however, leave unanswered the questions of those sentenced after passage of the Fair Sentencing Act but prior to publication of the revised guidelines.<sup>193</sup> Furthermore, this confusion inhibits fairness in sentences and sentencing policy, both for defendants and the community.<sup>194</sup> The Fair Sentencing Act does attempt to increase the fairness to defendants and the community in sentences and patterns of sentencing – a goal evident from the title of the Act itself. And while an 18-to-1 ratio is certainly more equal than a 100-to-1 ratio, the existence of any disparity continues to negatively impact certain demographics more than others.<sup>195</sup>

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<sup>192</sup> See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended at 21 U.S.C. § 844(a) (2006)).

<sup>193</sup> See *supra* note 126 and accompanying text; see also *Peugh v. United States*, No. 12-62, slip op. at 13 (U.S. June 10, 2013) (holding that a defendant cannot be sentenced based upon “[a] retrospective increase in the Guidelines range applicable,” and calling it an *ex post facto* violation).

<sup>194</sup> See generally Brief for ACLU et al. as Amici Curiae Supporting Petitioners, *Dorsey v. United States*, 132 S. Ct. 2321 (2012) (No. 11-5683). The Sentencing Project, in cooperation with the ACLU, argues that Congress's recognition of the “unfair and discriminatory 100-to-1 sentencing disparity” signals to the Supreme Court that sentences after the Fair Sentencing Act was passed which do not adhere to the new eighteen-to-one ratio are unfair. See *The Sentencing Project Again Argues for Fairness in Crack Cocaine Sentencing*, SENTENCING PROJECT (Jan. 31, 2012), [http://www.sentencingproject.org/detail/news.cfm?news\\_id=1233&id=164](http://www.sentencingproject.org/detail/news.cfm?news_id=1233&id=164).

<sup>195</sup> The continued disparity is all the more curious in light of congressional recognition that “the assumptions about the more severe effects of crack cocaine compared to powder cocaine have been proven unfounded.” H.R. REP. NO. 111-670, pt. 1, at 3 (2010). The House of Representatives found that “[s]cientific and medical research has also found that crack and powder cocaine have essentially the same pharmacological and physiological effects on a person.” *Id.* In light of these findings, the House bill, the Fairness in Cocaine Sentencing Act of 2009, recommended “remov[ing] references to ‘cocaine base’ from the U.S. Code, effectively treating all cocaine, including crack, the same for sentencing purposes.” *Id.* at 14. The eighteen-to-one ratio was arguably the lowest ratio that would receive bipartisan support. See Press Release, Leadership Conference on Civil and Human Rights, Statement by Wade Henderson, President of The Leadership Conference on Civil and Human Rights,

Additionally, the Fair Sentencing Act fails to further the goals of retribution, the primary punishment theory in the United States. As discussed above, retribution focuses on the idea of an offender receiving her “just deserts.”<sup>196</sup> In other words, sentences based upon retribution are society’s mechanism for expressing disapproval for an offender’s action, and calibrating the level of punishment to the level of disapproval. The Fair Sentencing Act aimed to recalibrate the 100-to-1 ratio, in recognition of the fact that the level of punishment for crack-cocaine offenses far outweighed the level of societal disapproval. Looking at the Fair Sentencing Act in this light, the process by which the Fair Sentencing Act was implemented, and the actors who participated in that process, attempted to adhere to underlying sentencing principle of retribution.

Yet the Fair Sentencing Act is also notable for neglecting to embody the voices of many who felt that the level of punishment it imposed was still too severe.<sup>197</sup> In other words, the re-calibration did not fully account for the public voice. One reason for this is that the process for implementing sentencing reform that Congress and the Sentencing Commission followed did not include a significant amount of public consultation. Another reason is that Congress, as one of the actors in this process, was unable to come to a politically feasible compromise on behalf of sentencing parity. Thus, both the process and the actor impeded the Fair Sentencing Act’s adherence to underlying sentencing principles. Accordingly, under a procedural justice lens, the faulty process led to a less-principled result.

Additionally, the Fair Sentencing Act is troublesome for its arbitrariness. One way lawmakers lose sight of retribution is by losing sight of the goal of proportionality, due in part to retribution’s emotional underpinnings that “sweep aside scientific inquiry into the true nature of crime [in] the law of sentencing.”<sup>198</sup> To some extent, this critique applies here. While Senator Dick Durbin acknowledged that the original 100-to-1 ratio was based in large part upon Congress’s fear and lack of knowledge, there is no mention of any

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on the Senate Judiciary Committee’s Vote to Amend and Pass the Fair Sentencing Act (S. 1789) (Mar. 17, 2010), available at <http://www.civilrights.org/press/2010/fair-sentencing-act.html> (expressing disappointment that any disparity remains, but “consider[ing] the Senate Judiciary Committee’s unanimous passage of the amended version of S. 1789, which reduces the disparity from a ratio of 100-to-1 to 18-to-1, to be a step forward”). Several senators also voiced their frustration with the continued disparity. See 156 CONG. REC. S1680-83, *supra* note 171 (statements of Sen. Dick Durbin & Sen. Patrick Leahy).

<sup>196</sup> CAMPBELL, *supra* note 12, § 2:5, at 51-52.

<sup>197</sup> For statements by citizens regarding the negative effect of crack-cocaine sentencing, their views on the Fair Sentencing Act, and their encouragement to make the Fair Sentencing Act retroactive, see *Sample Citizen Letters*, U.S. SENTENCING COMMISSION (June 2, 2011), [http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Public\\_Comment/20110602/Sample\\_Citizen\\_Letters.pdf](http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110602/Sample_Citizen_Letters.pdf).

<sup>198</sup> CAMPBELL, *supra* note 12, § 2:5, at 54.

scientific data supporting a reduced 18-to-1 ratio as opposed to parity.<sup>199</sup> Moreover, why eighteen was a better number than ten, for example, is unclear. This lack of explanation exposes why the Fair Sentencing Act does not adhere to the proportionality principle inherent in retribution: Congress failed to limit the arbitrariness of sentencing law.<sup>200</sup> In this way, the process by which Congress implemented the Fair Sentencing Act failed to conform to U.S. sentencing principles. Here again we see that under procedural justice theory, the faulty process led to a less-principled result. Thus, while the Fair Sentencing Act promotes several of the goals for sentencing, it does not adhere to many underlying principles, especially retribution, proportionality, and uniformity.

## 2. Procedural Justice Theory and the New United Kingdom Drugs Offenses Guidelines

By contrast, the new drug offenses sentencing guidelines in the United Kingdom adhere more closely to the country's underlying principles of sentencing. In the Coroners and Justice Act of 2009,<sup>201</sup> Parliament articulated several punishment principles, including consistency in sentencing, recognition of the impact of sentencing on victims, promotion of public confidence in the criminal justice system, and deterrence.<sup>202</sup> The new drug offenses guidelines must be compared to these purposes to determine how closely the guidelines conform.

First, the guidelines represent an improvement in consistency of sentencing, because they apply both to the Magistrate Courts and the Crown Courts.<sup>203</sup> Further, the guidelines remain exactly the same in both courts, notwithstanding any procedural differences inherent in the two court systems.<sup>204</sup> Second, the Sentencing Council expressly considered the impact of the proposed guidelines on victims of these offenses.<sup>205</sup> While recognizing that it is difficult to determine specific victims for drug offenses in particular, the Sentencing Council asked the public whether it thought the proposed victim-involvement policy was appropriate, should be increased or decreased, or should be modified in some other way.<sup>206</sup>

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<sup>199</sup> 156 CONG. REC. S1680, *supra* note 171.

<sup>200</sup> *See supra* notes 33-34, 52-58 and accompanying text.

<sup>201</sup> Coroners and Justice Act, 2009, c. 25, §§ 118-136 (U.K.); *supra* notes 47-66 and accompanying text.

<sup>202</sup> Coroners and Justice Act, 2009, c. 25, §§ 118-136 (U.K.).

<sup>203</sup> *Sentencing Council Launches New Definitive Guideline for Drug Offences*, SENTENCING COUNCIL (Jan. 24, 2012), <http://sentencingcouncil.judiciary.gov.uk/news-stories.htm>.

<sup>204</sup> *Id.*

<sup>205</sup> PUBLIC CONSULTATION PART III, *supra* note 133; SENTENCING COUNCIL, *supra* note 150, at 23.

<sup>206</sup> Sentencing Council, *supra* note 150, at 23.

Third, the new guidelines for drug offenses have promoted public confidence in the criminal justice system. As discussed above, public participation is an important part of any legal reform process that the public, especially those most affected by the reform, deem legitimate.<sup>207</sup> By engaging the public in multiple ways, the Sentencing Council thus furthered its goal of promoting public confidence.

This goal is tied closely to the aim of furthering the principles of retribution. As discussed above, retribution is the major theory of punishment underlying sentencing in the United Kingdom.<sup>208</sup> Retribution focuses on setting punishment levels proportionate to societal disapproval levels. The process by which the Sentencing Council gathered public opinion highlights its attempt to calibrate the level of punishment society believed necessary for drug offenders to receive their just deserts. For example, the Sentencing Council not only requested commentary both from laypersons and criminal justice professionals, but it also conducted public hearings and adjusted its proposed guidelines based upon the responses it received.<sup>209</sup> According to procedural justice theory, because this process was based in large part upon public consultation, it is likely to be granted more legitimacy in the public's perception.<sup>210</sup> To be sure, there is currently no data showing the effectiveness of the new sentencing guidelines, either in terms of reducing or preventing drug crimes. But unlike the United States, the United Kingdom engaged in multiple avenues for collecting public commentary, and adjusted its guidelines according to that commentary. Under procedural justice theory, this public participation and inclusion leads to more principled and legitimate results.

The new guidelines in the United Kingdom adhere more closely to underlying sentencing principles in large part because of the public consultation itself, which forced the Council to draft the guidelines at a slower pace. Yet perhaps these principled reforms were also in part a result of the relative lack of political posturing that plagued the months leading up to the Anti-Drug Abuse Act of 1986. And perhaps they were also the result of the Council's recognition of the pitfalls that the United States faced in reacting too strongly and quickly to public opinion. Whatever the reason, the United Kingdom continued its cautious route to new drug offenses guidelines both in a more principled process and with a more principled result than did the United States.

#### CONCLUSION

The foregoing comparison illustrates that the Fair Sentencing Act leaves much to be desired in its continued imposition of disparate sentences for powder- and crack-cocaine offenders. In spite of Congress's recognition that

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<sup>207</sup> See *supra* notes 167-171 and accompanying text.

<sup>208</sup> See *supra* notes 65-68 and accompanying text.

<sup>209</sup> See *supra* notes 172-179 and accompanying text.

<sup>210</sup> See *supra* note 170.

scientific evidence points to the needlessness of such a distinction, it was unable to bring a majority of its members around to the idea of parity. As discussed in Part III.C.1, this disparity points to the unprincipled nature of current drug sentencing law. In accordance with procedural justice theory, the absence of a meaningful, public-opinion-driven reform process in the face of the continued call for sentencing uniformity for powder- and crack-cocaine offenses, decreases respect for the law.<sup>211</sup> This resistance may surface in particular among those groups adversely affected by the continued unequal treatment of the two drugs.<sup>212</sup> Therefore, Congress cannot yet rest on its laurels.

This Note also illustrates the United Kingdom's successful adherence to its sentencing principles when crafting revised drug offenses guidelines. This adherence signals a drug sentencing reform engendering the respect of the majority of the public. By consulting the public, incorporating several concerns into the definitive guidelines, and maintaining transparency throughout the process, the United Kingdom crafted guidelines that were legitimately the product of public opinion. Moreover, the guidelines were modified in important ways which otherwise may have left the guidelines lacking. Overall, the United Kingdom has found a principled method for reforming drug sentencing guidelines that still conform to popular public opinion. Consistent with procedural justice theory, this principled process is what led to the principled result.

Unfortunately for those convicted of crack-cocaine offenses in the United States, Congress seems to have spoken its last word on the issue for the time being. The Sentencing Commission, however, continues to gather information through its public-comment periods. Its most recent public-comment period regarding the Fair Sentencing Act occurred in June 2011,<sup>213</sup> and the majority of comments have centered on the disproportionate nature of mandatory minimum sentences generally, rather than as specifically applied to crack-cocaine offenders.<sup>214</sup> Thus, there is hope that the Sentencing Commission will maintain its role as an advocate for eradicating the powder-crack cocaine disparity.

One way the Sentencing Commission could gather more public comments is through a tiered consultation process. The Sentencing Council bifurcated its public consultation period into two reports – one for the general public, and one for professionals.<sup>215</sup> This would allow professionals (such as the staff at

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<sup>211</sup> Cong Rec. 1681 (statement of Sen. Dick Durbin) (“Law enforcement experts say that the crack-powder disparity undermines trust in the criminal justice system . . .”).

<sup>212</sup> *See id.*

<sup>213</sup> *Public Comment*, U.S. SENTENCING COMM’N, [http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Public\\_Comment/20110602/index.cfm](http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110602/index.cfm) (last visited June 17, 2013).

<sup>214</sup> *Id.*

<sup>215</sup> SENTENCING COUNCIL, DRUGS OFFENCES GUIDELINE: PROFESSIONAL CONSULTATION (2011), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Drug\\_Offences\\_Guideli](http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Guideli)

various non-profits and NGOs) who receive the professional consultation to re-distribute it to those affected by the proposed changes.

Another way the Sentencing Commission could increase responses during its consultation period is through increased community meetings. Here again, the United Kingdom provides a good example – it offered a series of meetings with interested parties during its twelve-week consultation period.<sup>216</sup> Similarly, the U.S. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States holds hearings regarding its most recent proposed amendments.<sup>217</sup> These hearings provide those who wish to testify or attend with several months to read, digest, and research the proposed amendments.<sup>218</sup> Although the Sentencing Commission engaged in several public meetings,<sup>219</sup> allowing the Sentencing Commission to increase the level of public discourse regarding the powder-crack cocaine disparity would open up the public-comment period to a greater number of people, thus ensuring greater respect for the ultimate outcome and hopefully, greater proportionality and consistency with underlying sentencing principles. According to procedural justice theory, developing a process for sentencing reform based in larger part upon public consultation and allowing that public consultation to effect meaningful change, would lead to more principled and more legitimate reforms. This can be seen in the United Kingdom's recent experience.

The Sentencing Commission has, through continued dedication to eradicate the powder-crack cocaine disparity, attempted to realign sentencing in this area.<sup>220</sup> The greatest obstacle to the Sentencing Commission's quest for

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ne\_Professional\_Consultation.pdf; SENTENCING COUNCIL, DRUGS OFFENCES GUIDELINE: PUBLIC CONSULTATION (2011), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Drug\\_Offences\\_Guideline\\_Public\\_Consultation\\_.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Guideline_Public_Consultation_.pdf).

<sup>216</sup> SENTENCING COUNCIL, DRUGS OFFENCES GUIDELINE: PUBLIC CONSULTATION, *supra* note 215.

<sup>217</sup> Memorandum from Mark R. Kravitz, Chair of the Committee on Rules of Practice and Procedure, Request for Comments on Proposed Rules and Forms Amendments (Aug. 15, 2012), available at <http://www.uscourts.gov/uscourts/rules/rules-published-comment.pdf>. This public consultation will last six months, and responses will come up for review by the Advisory Committee. *Id.* at 2-3. If the Advisory Committee submits the proposed amendments to the U.S. Committee on Rules of Practice and Procedure, the latter body must decide whether to then submit the proposed amendments to the Judicial Conference at large, and to the Supreme Court. *Id.* at 3. Finally, if approved by the foregoing bodies, and if Congress does not modify, reject, or defer the proposed amendments, they will become effective on December 1, 2014. *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> The Commission held only five meetings on the Fair Sentencing Act or the powder-crack cocaine disparity in three years. See notes 129-132 and accompanying text.

<sup>220</sup> See Eric H. Holder, Att'y Gen. of the United States, Statement Before the United States Sentencing Commission, Hearing on Retroactive Application of the Proposed Amendment to the Federal Sentencing Guidelines Implementing the Fair Sentencing Act of 2010 (June 1, 2011) ("Because of the Fair Sentencing Act, our nation is now closer to

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sentencing parity, strangely enough, is Congress itself. Its most recent addition to the sentencing framework, the Fair Sentencing Act, was implemented through a process that did not fully gauge or engage public opinion. As a result of this flawed process, the Fair Sentencing Act failed to adhere to the foundational principles of American sentencing.

As long as Congress controls the actions of the Sentencing Commission, either through active rejection of the its suggestions or through passive reluctance to engage with the Commission in this area, the Commission will be unable to fully implement its vision for sentencing parity. It remains to be seen whether Congress will one day fully align itself with those who advocate for parity. With, perhaps, the right leadership or the right public pressure, both the Sentencing Commission and Congress can act together to engage in a public-opinion-driven process to produce principled, legitimate reforms in the area of crack-cocaine sentencing.